



Chanda & another v Consolidated Bank Ltd & 3 others (Environmental and Land Originating Summons E025 of 2025) [2025] KEELC 4212 (KLR) (4 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4212 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E025 OF 2025
SM KIBUNJA, J
JUNE 4, 2025**

BETWEEN

ESTHER NGUNIA CHANDA 1ST APPLICANT

PAUL MWENDWA CHANDA 2ND APPLICANT

AND

THE CONSOLIDATED BANK LTD 1ST RESPONDENT

COLT PETROLEUM LIMITED 2ND RESPONDENT

THE LAND REGSITRAR 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

RULING

[Notice Of Motion Dated 20th December 2024]

1. The applicants filed the notice of motion dated 20th December 2024 seeking for the following orders:
 - a. “Spent.
 - b. That pending interparte hearing of this application, this Honourable Court be pleased to restrain the 1st and 2nd respondents either by themselves, their servants, agents and or otherwise from disposing, selling, transferring, charging, leasing or in any other manner disposing land in Plot Title Number Mombasa Block XVII/771/A.
 - c. That pending the hearing of this suit, this Honourable Court be pleased to restrain the 1st and 2nd Respondents either by themselves, their servants, agents and or otherwise form disposing, selling, transferring, charging, leasing or in any other manner disposing land in Plot Title Number Mombasa Block XVII/771/A.



- d. That the cost of this application be provided for.”

The application is based on the twelve (12) grounds on its face and supported by the affidavit of Paul Mwendwa Chanda, 2nd applicant, sworn on 20th December 2024, inter alia deposing that on the suit property that is registered in the name of Solomon Chanda Musili, who is his father, who died on 13th June 1986, stands an old building; that the said Solomon Chanda Musili, is survived by the 1st applicant and several children including himself, and some of them are deceased; that the 1st applicant is his mother, and together they were issued with a full grant of letters of administration in HC SUCCESSION CAUSE NO. 207 of 1986 as joint administrators; that they are in the middle of the transmission process of transferring the properties of the estate from the deceased to the beneficiaries; that all the beneficiaries have agreed that the suit property be sold and proceeds thereof shared amongst them and have instructed their advocate to coordinate the sale; that their advocates informed them that he had found a potential buyer but on conducting a search, he found the suit property was encumbered with a charge dated 1st February 2024; that the charge shows the deceased is the chargor and the 1st respondent is the chargee; that the 2nd respondent was the borrower of Kshs. 24,000,000/- (principal amount) which was secured by the charge; that the dead cannot execute a charge; that the certificate of title annexed had the last entry in encumbrance as a discharge of charge dated 19th May 1989 and no other charge was created using the deceased’s name; that the signatory of the said charge used ID NO. 9653189 which is a new generation ID card number that could not have belonged to the deceased; that the 2nd respondent used a fake certificate of lease to deposit as security; that the administrators instructed their advocate to demand cancellation from the respondents through a demand letter dated 6th May 2024, but their demand was not complied with; that they met with 1st and 2nd respondents on 7th May 2024 and the said respondents agreed take steps to have the charge cancelled unconditionally; that further correspondence followed between the parties’ counsel but the cancellation did not occur; that they got rumours that the suit property was going to be auctioned to recover the principal amount plus interests, and they lodged a complaint with the DCI; that the said charge has intermeddled with the estate of the deceased; that the 1st and 2nd respondents may proceed to auction the suit property prior to hearing and determination of the suit, and hence this application.

2. The application is opposed by the 1st respondent through the replying affidavit of Fredrick Musyoka Savonge, their employee, sworn on 31st January 2025, inter alia deposing that the Salim Abdullah Farah, a director to the 2nd respondent sought a loan facility from 1st respondent of Kshs.24,000,000 in January 2024; that the 1st respondent instructed Mulando & Company Advocates to represent it in the transaction and on 1st February 2024 the charge was executed by the chargor, Solomon Chanda Musili over the suit property in favour of 1st respondent for the loan facility to be made available to the 2nd respondent, plus interest, charges and other expenses as covenanted; that the charge was registered on 2nd February 2024 as entry No. 8 in the encumbrance section; the 1st respondent disbursed the funds to the 2nd respondent in two instalments of Kshs.14,000,000 and Kshs.10,000,000 on 27th February 2024 and 13th September 2024 respectively; that the 1st respondent trusted the title was void of any defects after confirming the same from the land’s office, through its advocates carrying out due diligence; that the applicants have not met the required threshold for an injunction to issue as the said charge was duly executed and registered; the applicants have not demonstrated irreparable injury which cannot be adequately compensated by damages, and are relying on rumours or speculation; that the balance of convenience tilts in favour of the 1st respondent as it is in constructive possession, and no



demonstration has been made to show that the inconvenience to the applicants would be greater than the inconvenience to the 1st respondent.

3. The learned counsel for the applicants and 1st respondent filed their submissions dated 3rd March 2025 and 28th March 2025 respectively, which the court has considered.

4. The issues for the court's determination are as follows:

a. Whether the applicants have met the threshold for the injunctive order sought to be issued at this interlocutory stage.

b. Who bears the costs?

5. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the two learned counsel, superior courts decisions cited and come to the following conclusions:

a. The application has invoked Order 40 of the Civil Procedure Rules, and it would appear the applicants seeks for temporary injunction, even though they have not expressly stated so. In the case of *Giella versus Cassman Brown* (1973) EA 358, which has been reiterated in numerous decisions in Kenya, such as *Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012* (2014) eKLR where 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”.

b. On the first pillar of prima facie case, the Court of Appeal in the case of *Mrao Ltd versus First American Bank of Kenya Ltd* (2003) eKLR 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.”

Both parties here agree that the suit property is registered to Solomon Chanda Musili. It is abundantly clear that the suit property is encumbered with a charge registered on 2nd February 2024. The certificate of death annexed as “PMC 1” confirms that one Solomon Syanda Musili died on 13th June 1986. It is not clear whether the individual named Solomon Syanda Musili, whose death is evinced by the said death certificate, is the same as Solomon Chanda Musili, registered with the suit property. The certificate of confirmation marked “PMC-2” dated 24th January 2020 issued in Mombasa HC Succession Cause No. 207 of 1986 relates to the estate of Solomon Chanda Musili, the registered proprietor of the suit property. For the purposes of this ruling, and pending the production of any evidence to the contrary, the court will take the names Solomon Chanda Musili and Solomon Syanda Musili to refer to the same person, the deceased. Hence, if the registered owner of the suit property passed away in 1986, it would not have been possible for him to execute



a charge in 2024. On that consideration, the court finds that the applicants have established a prima facie case.

- c. Secondly, the applicant has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. In the case of *Pius Kipchirchir Kogo versus Frank Kimeli Tenai* (2018) eKLR the court provided an explanation for what is meant by irreparable injury as follows:

“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.”

Although it is apparent the applicants were prompted to file this application due to the rumours or speculation of an intended auction, the 1st respondent has neither denied nor confirmed that they are auctioning the suit property. The 2nd applicant has deposed that they intended to sell the suit property and share the proceeds amongst the estate’s beneficiaries, and that they were in the process of transmission when they discovered the encumbrance of the charge over the suit property’s title. The applicants would not have found themselves in the situation they are had they instructed their counsel to register the death of Mr. Solomon Chanda Musili against the title in 1986, when they initiated the succession cause. Be that as it may, if the auction feared by the applicants is realised, then the applicants will definitely lose the suit property to third party(ies). This will definitely mean they have to start another litigation against the 1st & 2nd respondents, and the third party(ies). Litigations over land claims are usually expensive due to the long period they take, and that would translate to irreparable injury.

- d. On the third principle of balance of convenience, the court in the case of *Pius Kipchirchir Kogo* case supra held that:

“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”.

Similarly, in the case of *Paul Gitonga Wanjau versus Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, the court in dealing with the issue of balance of convenience expressed itself and stated that:

“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.”

Further, in the case of *Amir Suleiman versus Amboseli Resort Limited* [2004] eKLR the court offered elaboration 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.”

The lower risk of injustice or inconvenience in the instant situation would be to grant an injunction as sought by the applicants to prevent a scenario of subjecting the parties to a lengthy litigation with third parties.

- e. The provision of law under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya is that costs always follow the event unless where there is good reason to order otherwise. The court definitely has the discretion on the matter of costs, and in this case, I am of the view that due to the contestations between the parties that will be determined after the merit hearing, the costs should abide the outcome of the suit.
6. From the foregoing determinations, the court finds merit in the Applicants notice of motion and orders as follows:
- a. That the application is allowed in terms of prayer (c) that pending the hearing of this suit, the 1st and 2nd Respondents are hereby restrained either by themselves, their servants, agents and or otherwise from disposing, selling, transferring, charging, leasing or in any other manner disposing Plot Title Number Mombasa Block XVII/771/A.
 - b. The costs to abide the outcome of the suit.

It is so ordered.

DATED, SIGNED AND VIRTUALL DELIVERED ON THIS 4TH DAY OF JUNE 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Applicants : M/s Musyoki For Munyithya

Respondents : M/s Kinuva For Kibaara For 1st Respondent And Mr Koech For Kagoi For 3th And 4th Respondent.

Shitemi-court Assistant.

