



**Alavi (Suing as the Administrator & Legal Administrator of the Estate of Mohamed Farouk Alavi, (Deceased) v Kofa & 4 others (Environment & Land Case E081 of 2022) [2023] KEELC 20530 (KLR) (11 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20530 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E081 OF 2022  
SM KIBUNJA, J  
OCTOBER 11, 2023**

**BETWEEN**

**MOHAMED ZAHIR ALAVI (SUING AS THE ADMINISTRATOR & LEGAL ADMINISTRATOR OF THE ESTATE OF MOHAMED FAROUK ALAVI, (DECEASED) ..... PLAINTIFF**

**AND**

**ZAINAB HADULA KOFA ..... 1<sup>ST</sup> DEFENDANT  
SALIM YUSUF MWACHIUNDE ..... 2<sup>ND</sup> DEFENDANT  
MADIA ALWY KHALIFA ..... 3<sup>RD</sup> DEFENDANT  
THE LAND REGISTRAR, MOMBASA ..... 4<sup>TH</sup> DEFENDANT  
THE ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiff the Notice of Motion dated 23<sup>rd</sup> August 2022 premised under Order 40 of the Civil Procedure Rules 2010 and sections 1A, 1B, and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya in which they sought for the following orders:
  - a. This application be certified as urgent and be heard as a matter of priority.
  - b. That pending the hearing and determination of this application inter partes, the Defendants by themselves, their servants, employees, and or agents be restrained by a temporary injunction from charging, leasing, selling, transferring, alienating, carrying out any construction and/or in Mombasa/Block XI/271 hereinafter referred to as the suit property.



- c) That pending the hearing and determination of the suit herein, the Defendants by themselves, their servants, employees, and/or agents be restrained by a temporary injunction from charging, leasing, selling, transferring, alienating, carrying out any construction and or in any manner whatsoever else deal with the suit property.
- d) That this honorable court be pleased to grant a mandatory injunction compelling the 1<sup>st</sup> Defendant to vacate the suit property pending the hearing and determination of the suit.
- e) That this Honorable Court be pleased to make any further orders as it may deem just and expedient.
- f) That application dated 25<sup>th</sup> July 2022 for similar orders in relation to Mombasa/Block X1/272 be deemed as withdrawn with no order as to costs.
- g) That costs of this application be provided for.

The application is premised on the sixteen (16) grounds on its face, and supported by the affidavit of Mohamed Zahir Alavi, the plaintiff, in which he inter alia deposed that he was the administrator and legal representative of his late father, Mohamed Farouk Alavi's estate. He had been obtained a grant Ad Litem, allowing him to institute the suit on the deceased's estate behalf; that the late Mr. Alavi had been the registered proprietor and beneficial owner of the suit property, with a freehold title granted by the Land Registrar at Mombasa on 31<sup>st</sup> October 1972; that Mr. Alavi, passed away on 5<sup>th</sup> August 2018, leaving the suit property as part of his estate and with the plaintiff in physical possession running a medical practice on the premises; that on 6<sup>th</sup> May 2022, both the plaintiff and patients were forcefully evicted by the 1<sup>st</sup> Defendant, who claimed to have acquired the suit property from an auction sale emanating from a judgment reportedly issued in the Mombasa Chief Magistrates Court Civil Suit No. 710 of 2017; Salim Yusuf Mwachiunde V Maidha Alwy Khalifa, that had been initiated by the 2<sup>nd</sup> Defendant against the 3<sup>rd</sup> Defendant; that in a bid to safeguard the deceased's estate interests, and with the approval of siblings, the plaintiff's Advocate on record was instructed to delve into the aforementioned court file and to conduct an official search at the Mombasa District land registry; that it was discovered upon investigation, that the 2<sup>nd</sup> Defendant had secured a judgment against the 3<sup>rd</sup> Defendant for KSH 10,831,200, and a decree was issued; that further, it was revealed through the search that the 4<sup>th</sup> Defendant had unlawfully transferred the suit property to the 1<sup>st</sup> Defendant on 15<sup>th</sup> December 2021; that though neither the deceased, nor his estate, were parties to the suit, the 2<sup>nd</sup> Defendant had proceeded with the property transfer to the 1<sup>st</sup> Defendant, based on a deceitfully acquired court order by the 2<sup>nd</sup> Defendant, in a judgement passed against the 3<sup>rd</sup> Defendant; that subsequently, a petition concerning the deceased's written will was crafted, and the grant ad litem was secured, setting the stage for this suit; that the earlier application presented by their Advocates, under certificate for consideration, with interim injunctive orders was granted pending a hearing set for 25<sup>th</sup> July 2022 but upon perusal the Advocates noted it contained a typographical error in describing the suit property mistakenly as Mombasa/block XI/272, instead of Mombasa/block XI/271 that was on all attached documents; that the orders sought are essential as the deceased's estate is at significant risk and looming danger if the Defendants continue with their illicit property transfers unabated, that could result in significant injustice to the estate; that therefore, it's imperative for the Honorable Court to consider the notice of motion and ensure the orders sought are granted.

2. The 2<sup>nd</sup> Defendant opposed the application through the replying affidavit of Salim Yusuf Mwachiunde, sworn on the 30<sup>th</sup> November 2022 among others deposing that the plaintiff was abusing the court process, as he had failed to disclose the existence of ELC Case No. E059 of 2022, in which he was pursuing claims as an interested party, both in his behalf and on behalf of the Estate of Mohamed



Farouk Alavi; that the subject matter in ELC Case No. E059 of 2022 and this suit is the same; that there exists interlocutory orders in ELC Case No. E059 of 2022 and a notice of motion dated 31<sup>st</sup> May 2022 is pending ruling before He provided a copy of the plaint and the verifying affidavit, Naikuni J; that the plaintiff has in ELC Case No. E059 of 2022 exhibited grant Ad Litem issued to him on the 10<sup>th</sup> May 2022 and in this matter one issued on the 3<sup>rd</sup> June 2022- for the same estate; that the plaintiff has also exhibited a copy of a land certificate in respect of the suit land indicating the deceased as absolute proprietor and a certificate of lease and certificate of search showing deceased was a leasehold owner over the same land; that the plaintiff has been peddling false documents while he was always aware of Mombasa CMCC No. 710 of 2017 and the orders therein; that the auction sale of the suit land to 1<sup>st</sup> defendant was lawful and legal and this suit should be struck out in view of the existence of ELC case No. E059 of 2022 that was filed before this one and in which the plaintiff is a party; that the Plaintiff was undeserving of the equitable remedies sought in the motion and urged the court to strike out the entire suit.

3. In his supplementary affidavit sworn on the 9<sup>th</sup> December 2022, the plaintiff deposed among others that the 2<sup>nd</sup> Defendant was deceptively trying to mislead the Court, attempting to shift its focus away from the real issues; that he became aware of ELC Case No. E059 of 2022 during the court proceedings in this matter of 3<sup>rd</sup> November 2023 after the filing of the 2<sup>nd</sup> defendant's replying affidavit; that ELC Case No. E059 of 2022 was pending ruling on the 2<sup>nd</sup> defendant's preliminary objection on the grounds that the plaintiffs had no locus and not on an application as alleged; that he and his siblings had filed Succession Cause No. E046 of 2022 and obtained limited grant Ad Litem; that he denounced knowledge or involvement in Misc. Succession Cause No. E074 of 2022 before the lower court; that being sued as an interested party in ELC Case No. E059 OF 2022 does not bar him from instituting this suit in his capacity as administrator; that the judgement issued in Mombasa CMCC No. 710 of 2017 was against the 3<sup>rd</sup> defendant and could not have been executed against the deceased's estate; that the defendants dealing and or handling of the suit property amounts to a criminal act and infringement of the deceased's constitutional right to property and sanctity of the title; that the defendants should be restrained from further illegally transferring the suit property as that would put the deceased's estate at great risk.
4. The learned counsel for the plaintiff, and 2<sup>nd</sup> defendant filed their submissions dated the 20<sup>th</sup> March 2023, and 3<sup>rd</sup> July 2023 respectively.
5. The learned counsel for the plaintiff inter alia submitted that his client had met the conditions for the grant of an injunction. The established criteria for such a grant, is as set out in *Giella vs. Casman Brown & Company Limited* (1973) E.A 358 and *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others* (2003) eKLR. It was submitted that the Plaintiff had the legal authority to represent the estate of the late Mohammed Farouk Alavi. Evidence was provided that the late Mohammed Farouk Alavi had been the sole registered and beneficial owner of the land titled Mombasa/Block XI/271, as confirmed by a lease certificate from 31<sup>st</sup> October 1972. Additionally, the Plaintiff argued that the 2<sup>nd</sup> Defendant had improperly obtained a court order on a judgment against the 3<sup>rd</sup> Defendant, when the late Mohammed Farouk Alavi was not a party. This alleged misconduct reportedly led to the land's title being fraudulently transferred to the 1<sup>st</sup> Defendant through an auction. Counsel pointed out that the late Mohammed Farouk Alavi's died on 5<sup>th</sup> August 2018 while the 1<sup>st</sup> Defendant received a lease certificate on 15<sup>th</sup> December 2021, before succession proceedings could be initiated and deemed the transfer fraudulent. The counsel relied on the cases of *Re Estate of M'Mirithi [2007]* eKLR, *Morris Mwiti Mburungiuu vs. Dennis Kimathi M'Mburugu [2016]* eKLR, and *Jane Kagige Geoffrey & Another vs. Wallace Ireru Njeru & 2 others (2016)* eKLR. That the 2<sup>nd</sup> Defendant did not refute the Plaintiff's claims regarding the land's ownership, and that the Plaintiff's



statements stood uncontested, and hence is uncontroverted evidence that carries significant weight in court deliberations, as supported by the cases; Re Estate of M'Mirithi [2007] eKLR, *Morris Mwiti Mburungiuu vs. Dennis Kimathi M'Mburugu* [2016] eKLR, and *Jane Kagige Geoffrey & Another vs. Wallace Ireri Njeru & 2 others* (2016) eKLR. It was submitted that documentary evidence was also presented, indicating that the disputed land indeed belonged to the late Mohammed Farouk Alavi. Such evidence, the Plaintiff argued, sufficed to shift the burden of proof onto the Defendants. Reference was made to the cases *Peter Ngigi & Another vs. Thomas Ondiki Oduor & Another and Raila Amolo Odinga & Another vs. IEBC & 2 Others* (2017) eKLR. In conclusion, the Plaintiff emphasized that he had met the conditions for grant of injunction and on costs, the court should favor him, as set out under Section 27 of the *Civil Procedure Act of Laws of Kenya*.

6. The learned counsel for the 2<sup>nd</sup> defendant submitted inter alia that the injunctive orders are equitable reliefs that can to be considered and granted by the Court in exercise of its judicial equitable jurisdiction. The criteria for awarding an injunction are well-defined in cases like *E.A Industries Limited vs. Trufoods Limited* (1972) E.A 420, *Giella vs. Casman Brown & Company Limited* (1973) E.A 358, and *Nsubuga & Another vs. Mutawe* (1974) E.A 4876. The Plaintiff had allegedly failed to disclose to the court that there is another case filed and pending for hearing in the Court under ELC case No. E059 of 2022, wherein he is suing both on his behalf and on behalf of the estate of MOHAMED Farouk Alavi. That the subject matter in ELC CASE No. E059 OF 2022 is identical to the subject matter of this suit, that is the land titled Mombasa/Block XI/271. That interlocutory orders were issued in ELC No. E059 of 2022 and a Notice of Motion dated 31<sup>st</sup> May 2022 was pending for ruling before Justice LL Naikuni. It was argued that this secondary case cannot replace that case with a mere probability of success, given the identical subject matter where the Plaintiff is a substantial party. It was further submitted that the plaintiff had not provided full disclosure on matters pertaining to being granted an injunction, as required in *Keneih Cons Ltd vs. New Gatitu Services Station Ltd & another* (1990) K.L.R 557. The plaintiff had not approached the court with clean hands. That even if the ingredients of grant of injunction had been met, the orders should not issue as in light of the facts and reliefs sought in the suit, damages can sufficiently compensate the plaintiff. The 2<sup>nd</sup> Defendant emphasized the difference between prohibitory and mandatory injunctions and submitted that to obtain a mandatory injunction, the applicant must meet a higher evidentiary burden than that for a prohibitory injunction. The Plaintiff's in the 2<sup>nd</sup> Defendant's view, has failed to meet the threshold required for a mandatory injunction, as seen in cases like *Kenya Breweries LTD vs. Washington O. Okeyo* (2012) EKLR and *Nation Media Group vs. John Harun* (2014) eKLR. It was further submitted that the Plaintiff's conduct in this case was misleading and amounted to an abuse of the court process. The Plaintiff's failure to disclose the pending suit ELC case No. E059 of 2022 and contradictory statements, especially when viewed in light of the amended plaint and the verifying affidavit, were pointed out as indicative of dishonesty and potential perjury. On the Costs, it was submitted that, the Plaintiff should pay costs as they had misled the Court and abused the Courts process. In conclusion, the 2<sup>nd</sup> Defendant urged the court to dismiss the Plaintiff's application and strike out the suit, asserting that the Plaintiff's actions and omissions have violated principles of full disclosure, honesty, and the efficient administration of justice.
7. The following are the issues for the determination by the court:
  - a. Whether the Plaintiff has satisfied the essential criteria warranting the issuance of the injunction orders sought.
  - b. Which party ought to be tasked with defraying the costs associated with this application.



8. That having considered the grounds on the application, affidavit evidence, submissions by the learned counsel, the superior courts decisions cited thereon, the court comes to the following findings:
- a. The Plaintiff has sought for a temporary injunction to prevent charging and leasing of the subject property, and additionally a mandatory injunction compelling the 1<sup>st</sup> Defendant to vacate the subject property pending the hearing of the suit and costs of suit. The plaintiff has attached a limited grant of letters of administration Ad Litem as prove that he had the right to institute the suit and application hereto on behalf of the estate. He has also attached the land title, under the name of Mohammed Farok Azam Alavi, dated 31<sup>st</sup> October 1972, to substantiate that the property was indeed part of the estate of the deceased. However, the 2<sup>nd</sup> Defendant has countered the plaintiff's position and accused him of abusing the court process, claiming that the plaintiff had failed to disclose to the court the existence of another pending matter, ELC Case No. E059 of 2022, where he is suing on his behalf and on behalf of the Estate of Mohammed Faraouk Alavi as an interested party. The 2<sup>nd</sup> Defendant pointed out that the subject matter of ELC Case No. E059 of 2022 mirrors the subject matter of the current suit. Furthermore, interlocutory orders have already been issued in ELC E059 of 2022.
  - b. That upon perusing the documents relating to ELC Case Number E059 of 2022, it is clear the plaintiffs are Tariq Mohammed Zahir, Haleena Zahir Alavi, and Hannan Zahir Alavi. They filed a suit against Salim Yusuf Mwachiunde, Zainabu Hadula Kofa, and Michael Mulwa trading as Swifway Auctioneers. In the said suit, the plaintiff in the instant suit was enjoined as an interested party, on his own behalf and on behalf of the estate of Mohamed Farouk Alavi. The crux of the aforementioned suit is to have the suit property transferred back to the Plaintiffs and a declaration that the sale of the aforementioned property, previously owned by Mohammed Faraouk Alavi (now deceased), to the 2<sup>nd</sup> Defendant was illegal, null, and void. There was also filed a Notice of Motion seeking for injunction to prevent the defendants from selling or otherwise interfering with the property identified as Mombasa/Block XI/271. In the supplementary affidavit, the plaintiff has deposed that he was unaware of ELC No. E059 of 2022. He claimed that he was granted the letters of administration only after the initiation of this suit. However, I find it hard to believe that he was unaware of suit E059 of 2022, especially since the suit was instituted by persons that appear to be his own siblings by their names over the same subject matter subject matter in the current suit. It is obvious that ELC No. E059 of 2022 and this suit arise from similar circumstances, albeit with some parties differences in the parties.

In *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, the court stated thus in respect of what amounts to a *prima facie* case:

“A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The granting of mandatory injunctions has been extensively deliberated upon by the courts. Specifically, in the case of [\*Joseph Kaloki t/a Royal Family Assembly Vs Nancy Atieno Ouma\*](#)



[2020] eKLR, the Court of Appeal reaffirmed its earlier decision in *Kenya Breweries Limited & another Vs Washington O. Okeyo [2002]* eKLR, stating that;

.....a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.

The Court, revisited its position on mandatory injunctions, in its previous decision in *Shariff Abdi Hassan Vs Nadhif Jama Adan [2006]* eKLR, and emphasized that while there is general reluctance to grant mandatory injunctions at an interlocutory stage, exceptions do arise. Specifically, when it is prima facie demonstrated, in accordance with the legal benchmarks, that the party against whom the injunction is sought is evidently in the wrong. Under such circumstances, the courts have shown a willingness to intervene, ensuring that justice is promptly delivered rather than deferring it until the comprehensive hearing of the case.

- c. After meticulously reviewing the pleadings and materials presented by both parties, it becomes evident, echoing the observations of the 2<sup>nd</sup> Defendant, that the plaintiff has not been transparent regarding his knowledge of and the status of ELC case No. E059 of 2022 that is reportedly before Justice Naikuni. This case revolves around the same subject and arises from analogous circumstances, albeit involving slightly varied parties. While the plaintiff herein is the interested party in that other case, it is indisputable on a cursory look that the interlocutory orders and or judgment rendered therein would bear considerable implications to the current case and its outcome. There is nothing that stopped the Plaintiff from making the appropriate application to participate in that other case in a different capacity and lodge his claim in that suit instead of filing a new suit.
- d. It is paramount that the Court's time is used judiciously. The court does not entertain Applicants potentially engaging in forum shopping and those seeking expedited or more favorable outcomes. However, recognizing the slight variance in parties involved between the two cases, and so as to guard the integrity of the court in case the two suits, that are over the same subject matter and almost similar parties were to be heard and determined separately, the court is of the view that it is prudent for this suit to be referred to the court handling ELC No. E059 of 2022 that was filed earlier for directions on how the two suits will be heard by that Court. This will definitely result in expeditious and efficient adjudication of the issues in a cost- effective way to the parties and court.
- e. It is the principle of awarding costs in legal proceedings is grounded in Section 27 of the *Civil Procedure Act* Chapter 21 of Laws of Kenya. It is well-established that the decision to award costs rests within the discretion of the court and is typically granted to the winning party. The precedent in the case of *Party of Independent Candidate of Kenya & another vs Mutula Kilonzo & 2 others (2013)* eKLR referenced the authoritative words of Murray C J in *Levben Products vs Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR)* at 227, which highlights the guiding principles for awarding costs. These principles are: the court possesses the discretion to award costs. However, this discretion is judicial in nature, meaning the court should exercise it based on sound reasoning that a rational individual would concur with. The prevailing rule is that costs are awarded to the party that prevails in the legal dispute. This general rule should remain undeviated unless where there are compelling reasons to order otherwise. Considering the ongoing nature of this case, the costs in the application should be in the cause.



10. The upshot of the foregoing leads the court to find and order as follows:

- a. That the plaintiff's application is without merit and is hereby dismissed in view of the interlocutory orders already issued in ELC No. E059 of 2022 that was filed before this instant suit and in which the plaintiff herein is a party. Needless to state, the interim order is hereby vacated.
- b. That so as to protect the integrity of the court and ensure efficient use of judicial resources this suit is hereby transferred before ELC 3 [Naikuni J] before which ELC Number E059 Of 2022; Tariq Mohammed Zahir & 2 Others Vs Salim Yusuf Mwachiunde & 4 others is pending, for further directions.
- c. That due to the unique circumstances and relationship between the parties herein and that other suit, each party will bear their own costs notwithstanding the provisions of section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED ON THIS 11<sup>th</sup> DAY OF OCTOBER 2023.**

**S. M. KIBUNJA, J.**

In the presence of;

Plaintiff : Mr Okongo

Defendants : Mr Asige for 2<sup>nd</sup> Defendant.

Wilson – Court Assistant.

**S. M. KIBUNJA, J.**

