



**Eriya v Githeki (Succession Appeal 1 of 2021)
[2024] KEHC 149 (KLR) (18 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION APPEAL 1 OF 2021
CM KARIUKI, J
JANUARY 18, 2024**

BETWEEN

CHARLES EBEIYO ERIYA APPELLANT

AND

JACINTA WANGARI GITHEKI RESPONDENT

JUDGMENT

1. The Appellant by the memorandum of appeal dated 17th April 2023 appealed against the ruling delivered by Hon. C. Obulutsa, Chief Magistrate on 29th April 2021 in Nyahururu CMCC Succession Cause No. 20 of 2019. The grounds for appeal were as follows: -
 - i. That the learned trial magistrate erred in law and in fact in granting an injunction against the administrator of the estate of a deceased person in favour of a person who is entitled to the estate as a beneficiary or at all.
 - ii. That the learned trial magistrate erred in law and in fact in bestowing the estate of the deceased on Plot No. 533 EXT to the Respondent herein before the hearing and determination of the protest.
 - iii. That the learned trial magistrate erred in law and in fact in restraining the Appellant and his family members from utilizing the deceased's Plot No. 533 EXT pending the hearing and determination of the protest filed by the Respondent.
 - iv. The learned trial magistrate erred in law and in fact in allowing the application dated 21/5/2019 and applying the wrong principles and the law in granting an injunction.
 - v. Reasons wherefore the Appellant prays that the appeal be allowed as follows: -
 - vi. That the application dated 21/5/2019 be dismissed with costs.



- vii. That the orders issued on the 29/4/2021 be vacated forthwith.
 - viii. That Nyahururu Succ. Cause No. 20 of 2019 be heard before a different magistrate other than Hon. C. Obulutsa.
2. The appeal herein emanates from an application dated 21st May 2019 filed by the Respondent seeking inter alia temporary injunction orders restraining the Appellant from evicting and/or in any way interfering with the quiet use, occupation and accessibility to Plot No. 533 Extension No. 302 Marmanet Settlement Scheme measuring approximately 5 acres, the suit land hereinafter.
 3. The Appellant vide a replying affidavit sworn on 25th July 2019 by the Appellant herein opposed the said application and deponed that the Respondent had no locus to seek the orders of injunction and that she was not entitled to a share of the deceased's estate.
 4. Consequently, the learned trial magistrate through his ruling delivered on 29th April 2021 granting the injunction orders sought. Aggrieved by the ruling, the Appellant filed the instant appeal.

Appellant's Written Submissions

5. The Appellant submitted that the Respondent's case was that in or about the month of July 1977 she bought the suit land from Maria Aduka Loruma alias Hanuka Ruruma, the deceased hereinafter for the sum of Kshs. 150,000/-. No written agreement was produced in support of the alleged sale. She further claimed that she took over payment of the settlement fund trustee loan and has been living and residing on the suit land. The receipts marked as annexures in support of the payments are issued in the deceased's name.
6. The Appellant asserted that the Respondent cunningly filed a suit against the deceased after her demise at Nanyuki CMCC No. 41 of 2011 where she sought for orders of specific performance for transfer of the plot and the suit proceeded ex parte after the court was deceived to believe that the deceased was served with summons and an ex parte judgement was delivered in her favour on 12/2/2017. The ex parte judgement was later set aside after the Appellant discovered the suit.
7. It was stated that the trial court ought to have dismissed the application and directed the Respondent to file suit before the Environment and Land Court against the administrator for a determination of the validity of the sale if any and the right of occupation. The Appellant opposed the application and he maintained that the deceased did not sell the suit land and that the issues raised by the Respondent fell squarely on a claim on title on land and use and occupation of land which was a preserve of the Environment and Land Court.
8. Reliance was placed on *In re Estate Mucheru Githinji Ngogo (Deceased) [2020] eKLR*, *In re Estate of Atibu Oronje Asioma (Deceased) Succession Cause 312 of 2008 [2022] KEHC 11046 KLR*
9. The Appellant submitted that one may be tempted to argue that the Respondent herein is entitled to the estate as a creditor but it should not be lost to this court that per his replying affidavit, he did not acknowledge her as a creditor. Additionally, the Respondent did not annex a valid court order entitling her to the land. Reliance was placed on the case of *In re Estate of Atibu Oronje [supra]* in stating that the claim by the Respondent herein is yet to be proved or established against the estate of the deceased.
10. It was averred that the trial court by granting the injunction order restrained the administrator from discharging his duties under Sections 79 and 83 of the *Law Of Succession Act* in so far as the suit land is concerned.



11. Finally, the Appellant submitted that the Respondent did not satisfy the settled principles for a grant of temporary injunction and therefore urged this court to allow the appeal and vacate the orders issued on 29th April 2021 with costs to them.

Respondent's Written Submissions

12. The Respondent stated that she pleaded before the lower court that she purchased the suit land from the deceased in or about July, 1977 and settled therein by building a semi-permanent house and has been cultivating the said land ever since. That after the said purchase the deceased introduced her to the then district settlement officer wherein she was allowed to continue paying and/or clearing the settlement fund trustee loan pending the discharge of charge in favour of the deceased and later the transfer of the said parcel of land to her.
13. She deponed that the deceased disappeared or so many years and when she completed payment of the said SFT loan she was nowhere to come and collect the discharge for the said parcel of land in order to transfer the same to her. She then decided to institute Nanyuki CMCC No. 41 of 2011 which suit proceeded ex parte and judgment entered in her favour as the said deceased could not be found however the Appellant moved the court and sought for the nullification of the said orders and the whole suit for the reason that the Respondent had sued a deceased person where he produced letters of administration as litem in respect of his deceased's mother estate and his prayers were granted.
14. The Respondent stated that she thereafter filed Nyahururu CMC ELC No. 11 of 2019 and which suit she withdrew after receiving a notice of preliminary objection on the ground that the limited grant held by the Appellant then was limited to the Nanyuki case and therefore the Appellant had no locus to be sued as such.
15. Further, she submitted that were it not for the interim orders granted, the Appellant would have evicted her from the suit land and had threatened to evict her from the only place she called home and had sent The area chief Ol'jabet location severally to come and tell her to vacate the subject parcel of land otherwise after her withdrawn suit she would face even worse consequences.
16. She stated that the Appellant has always wanted to take away the subject land from her simply because his mother is now deceased and cannot show up to tell the truth. She also deponed that if she moved in to stop the Appellant from evicting her from the suit land, hostility may occur as the parties herein remain bitterly pitted in this matter and that form the reason why she sought the assistance of the honourable court.
17. The Respondent stated that the Appellant did not adduce any evidence to controvert the averment and evidence of the Respondent that she actually has developed the subject parcel of land, cultivate the same and was actually living thereon.
18. The Respondent submitted that the issues that arise for determination in the instant appeal are as follows: -
 - i. Whether the learned magistrate erred in law and fact in granting the order for temporary injunction?
 - ii. Whether lack of a written sale agreement nullified the claim by the Respondent herein?
 - iii. Whether the Respondent had the requisite locus standi to bring the application dated 21st May 2019 before the lower court?



- iv. Dies the succession court have jurisdiction to entertain a claim of a purchase during the confirmation of grant?
 - v. Who should bear the costs of this appeal?
 - vi. On issue a, c and d: -
19. The Respondent stated that injunctive reliefs are available in succession matters. Reliance was placed on *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR
 20. It was contended that the Respondent has a right to approach the succession court and that the said court had jurisdiction to entertain her claim including to issue injunctive orders against her eviction from the deceased's property.
 21. *Mbula Muoki Ndolo & Another vs Kenya Power and Lighting Company Limited* [2017] eKLR, *Mpatinga Ole Kamuye vs. Meliyo Tipango & 2 Others* [2017] eKLR, *In re estate of Julius Ndubi Javan (deceased)* [2018] eKLR
 22. The Respondent asserted that she had met the conditions for grant of the injunctive orders as outlined in the case of *Giella vs Cassman Brown* [1973] EA 358.
 23. The Respondent asserted that she has established a prima facie case as she had an interest in the suit land that is capable of being protected having purchased the suit land from the deceased back in 1977 and that she had been in continuous occupation without any interruption and has been continuously tiling the land and that she was apprehensive that the Appellant would make good his threat of eviction.
 24. That the Appellant placed no material before the court to controvert this assertion apart from making general denials. It was stated that the Respondent demonstrated how she has been pursuing her claim since purchase of the land by making payments for the parcel of land's loan at the SFT though in the deceased's name as the allocation was to the deceased as well as filing numerous cases for the recovery of the said parcel of land. Reliance was place on *Mrao Ltd vs First American Bank of Kenya & 2 Others* [2003] KLR 125
 25. On balance of convenience, it was argued that if the order of injunction was never granted in the first instance and/or is vacated by this honourable court, the Appellant would quickly evict the Appellant from the suit land and demolish the Respondent's house and if the succession cause is finally concluded in her favour then she would have to reconstruct her house and start afresh on the said parcel of land after being there for about 46 years. She would also be homeless for the uncertain period of time that the said succession cause would take to be concluded.
 26. On the other hand, the Appellant doesn't live on the suit land and he has nowhere in the pleadings pleaded as much. In the circumstances, he would suffer no prejudice if the orders granted remained in force even if the succession cause is finally concluded in his favour as the estate would just be taking possession of the suit land at no costs per se. reliance was placed on *Chebii Kipkoech vs. Barnabas Tuitoek Bargoria & Another* [2019] eKLR
 27. On irreparable loss, the Respondent averred that the inconvenience that would come with eviction from a parcel of land that one has called home for the past 46 years is one that created psychological torture, homelessness and therefore one cannot be compensated by an award of damages hence irreparable loss.
 28. On issue b, the Respondent stated that the Appellant has impugned the agreement between the deceased and the Respondent for it not being in writing and that although this is an issue that ought



to dealt with in the substantive suit, the said agreement was entered into in the year 1977 which time the law of contract in force was the Indian Contract, 1872 which did not make it mandatory for such a contract to be in writing. The validity of the same however, they left for the determination in the substantive suit.

29. In conclusion, the Respondent humbly urged the court to find the appeal unmerited and dismiss the same with costs to the Respondent.

Analysis and Determination

30. This appeal is in respect to ruling delivered by the trial court on 29th April 2021 in respect to application dated 21st May 2019 that sought temporary injunctive orders against the Appellant pending the hearing and determination of summons for confirmation of grant. Having perused and considered the memorandum of appeal herein and the written submissions by the parties, I find that the main issues is whether the trial court erred in granting the aforementioned injunctive orders.

31. The Respondent based her application dated 21st May 2019 on the contention that she had bought the suit land from the deceased in July 1977 and cleared the SFT loan on the deceased's behalf. She averred that she settled on the land and put up a house. That thereafter the deceased disappeared and when she cleared the loan, the deceased was not available to collect the discharge to enable a transfer to be done in her name.

32. The Respondent submitted that she filed suit in Nanyuki CMCC No. 41 of 2011 in which judgement was entered in her favour but before transfer could be done, the Respondent had the orders nullified since the seller was deceased. That she filed another suit Nyahururu CMC ELC No. 11 of 2019 which she withdrew. She then sought the injunctive orders against the Appellant which were granted pending the hearing and determination of summons for confirmation of grant in respect to the deceased's estate.

33. I will limit my determination to that ruling only and in stating so, I agree with the Respondent that the question of the existence of the alleged impugned sale agreement between the deceased and the Respondent and validity of the same are issues that to be left for determination in the substantive suit and should not be tackled herein.

34. That being the case, the conditions to met for grant of interlocutory injunctions were outlined in the case of *Giella vs Cassman Brown* [1973] EA 358 where the court held thus: -

“The conditions for grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

35. Further, the Court of Appeal in the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 others* [2014] eKLR further opined that:-

“...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 stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be



irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."

36. Accordingly, in the trial court application, the Respondent needed to prove the principles that govern the grant of injunctive orders as follows: -
37. The she had a prima facie case with a probability of success;
38. That she would suffer Irreparable injury which would not be adequately compensated by an award of damages if the orders were not granted; and
39. That the balance of convenience was in her favour.
40. Having thoroughly gone perused the Respondent's case in the trial court and the learned trial magistrates ruling, it is my considered view that the aforestated principles were indeed established. The Appellant who is the administrator of the deceased's estate filed for grant of letters of administration on 7th December 2019 and the same was issued on 8th May 2019. Consequently, the Respondent filed her application on 21st May 2019. On 13th May 2020, the administrator filed an application seeking the confirmation of the grant issued and the applicant filed a protest against the confirmation based on similar grounds as the application.
41. It is my considered view that the Respondent has established that she has a prima facie case with a probability of success by contending that she purchased the suit land from the deceased and submitting evidence to support her allegations establishing that she therefore had grounds to protest against the confirmation of grant in respect to the deceased's estate as a purchaser.
42. Moreover, I agree with the Respondent's submissions on the issue of irreparable injury and balance of convenience. The Respondent proved that she is likely to suffer irreparable loss if she is uprooted from a place she has developed, settled in and called home for the past 46 years and it is my considered view that the same cannot be compensated by an award of damages. Further, although the court is tasked with balancing the interest of both the Appellant and the Respondent, it is my finding that the balance of convenience is in the Respondent's favour at this point in time for the reasons that she outlined in her submissions and that it is the interest of justice to grant the injunctive orders she sought. It is my considered view that the appellant did not establish any substantial loss that he or the estate would suffer if the injunctive orders were granted pending the hearing and determination of the summons for confirmation of grant.
43. Additionally, it is important to note that the application by the Respondent for temporary injunctive orders and the issue of the suit land's ownership arose as a consequence of the succession matter in respect to the deceased's matter ongoing in the in the trial court. Moreover, I disagree with the Appellant's contention that the trial magistrate had bestowed the estate of the deceased on Plot No. 533 EXT to the Respondent herein before the hearing and determination of the protest, as the purpose of the injunctive orders was merely to restrain the Appellant from evicting the respondent from the suit in the interim before the hearing and determination of the protest and the summons of confirmation of grant.



44. Consequently, I agree with the trial magistrate’s finding that the Respondent’s application dated 21st May 2019 met the threshold of the grant of injunctive orders as granted and with the above reasoning, the Appellant’s appeal on the same must fail, thus the court make the order;

i. The appeal is hereby dismissed with costs to the Respondent.

DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 18TH DAY OF JANUARY 2024

C KARIUKI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

