



Mwangi (Suing as the legal representative of the Estate of Mwangi Ngoriongo (Deceased) v Wanjiru & 4 others (Probate & Administration E004 of 2023) [2024] KEHC 4758 (KLR) (18 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4758 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
PROBATE & ADMINISTRATION E004 OF 2023
FN MUCHEMI, J
APRIL 18, 2024**

BETWEEN

STEPHEN MWANIKI MWANGI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MWANGI NGORIONGO (DECEASED) CITOR

AND

CECILIA WANJIRU 1ST CITEE
MARGARET NJOKI 2ND CITEE
AGNES WAMBUI 3RD CITEE
DANIEL MWANGI 4TH CITEE
JAMES NG'ANG'A 5TH CITEE

RULING

1. The applications coming up for determination are dated 8th November 2023 and 19th January 2024 respectively. The application dated 8th November 2023 seeks for orders of a temporary injunction restraining the 4th citee, his agents, servants or any other person acting under his instructions and on his behalf from entering, trespassing, cultivating on LR No. LOC 1 Kiunyu/Kiawaihiga Plot T7 pending the hearing and determination of the citation. The application dated 19th January 2024 seeks for orders of setting aside of the orders made by the court on 17th January 2024 restraining the applicant/citor, their agents, servants or any other person acting under their instructions and on their behalf from entering, trespassing, cultivating on the property LOC 1 Kiunyu/Kiawaihiga Plot T7.



2. For ease of reference, the applicant in the application dated 8th November 2023 is hereby referred as the “Applicant/Citor” while the applicant in the application dated 19th January 2024 and the respondents in the application dated 8th November 2023 are referred to as the “Respondents/Citees”.
3. In opposition to the application dated 8th November 2023, the 4th cite/respondent filed a Replying Affidavit sworn on 20th February 2024. The applicant/citor opposed the application dated 19th January 2024 and filed a Replying Affidavit sworn on 26th February 2024.

Citor/Applicant’s Case on the application dated 8th November 2023.

4. The applicant/citor states that he is the legal representative of the estate his father, Mwangi Ngoriongo, a brother to the deceased, who died on 19th August 2017. The applicant further states that his father was at all times in occupation and had been utilizing LR No. LOC 1 Kiunyu/Kiawaihiga Plot T7 which was acknowledged as part of his estate and been utilized by his dependents even after his death to date. However, the applicant contends that the suit property is still registered and was held in trust under the name of the deceased Kangethe Ngoriongo alias John Kangethe Ngoriongo who passed away on 5th September 2020.
5. The applicant states that the subject property was registered in trust under Kangethe Ngoriongo alias John Kangethe Ngoriongo for his brothers as he was the eldest son of the late Ngoriongo Gicheha and had two brothers namely Mwangi Ngoriongo (deceased) and Mburu Ngoriongo (deceased). Being the administrator of his father’s estate, John Kangethe Ngoriongo held all the property pending the distribution to his sibling brothers during the registration process.
6. The applicant states that in 1962-1963 during the land demarcation process in Muranga district, his father merged his inherited property with property he had separately acquired and together the land parcel was registered as LOC 1/Kiunyu/424.
7. The applicant further states that his father was allocated LOC 1 Kiunyu/Kiawaihiga Plot T6 whereas Kangethe Ngoriongo alias John Kangethe Ngoriongo, the deceased was allocated LOC 1 Kiunyu/Kiawaihiga Plot T7 following the demarcation committee rules and regulations that they would have owners of land apportioned a plot at the shopping center in Kiawaihiga for any property that had not attained 3 acres to encourage building of residential houses away from their parcels of land which were to be utilized for agricultural purposes.
8. Before the demarcation process, Kangethe Ngoriongo alias John Kangethe Ngoriongo while in charge of the inherited property sold off 1 acre and they agreed that LOC 1 Kiunyu/Kiawaihiga Plot T7 would belong to Mburu Ngoriongo. Mburu Ngoriongo sold the said property to one Mwangi Thuku aka Mwangi wa Magua who sold the property to Mwangi Ngoriongo. Thus, the applicant contends that the deceased has been in occupation of the suit property from 1963 until his death despite the property never have been registered in his name as the same was still under allotment letter and title processing never took place.
9. The applicant further states that during the lifetime of his father and the deceased there has never been a dispute on the subject property and the fact that it belonged to Mwangi Ngoriongo. Furthermore, on 26th February 2020, Kangethe Ngoriongo attended our family meeting and confirmed that the subject property belonged to the estate of Mwangi Ngoriongo and presided over the distribution of the estate after which he appended his signature in the succession agreement. Joseph Kangethe Mburu, the son of Mburu Ngoriongo and the 4th citee were also present in the meeting and never raised any objections. Further the 4th citee appended his approval signing the agreement.



10. The applicant states that the next step was to have the deceased transfer the land to the rightful beneficiaries however covid 19 hit the country causing all major government offices to shut down and then shortly after on 5th September 2020, Kangethe Ngoriongo passed away.
11. Upon resumption of normalcy in 2021, the applicant states that he asked the 4th citee to provide him with his father's copy of death certificate to enable him initiate the succession process but the 4th citee became hostile and proceeded to make a claim on the subject property. Furthermore, upon the passing John Kangethe Ngoriongo, some of his surviving children were causing unwarranted turmoil and interfering with the quiet enjoyment of the occupation and rights of it to the extent of forcefully entering and destroying crops. The applicant states that they reported the matter at Kihumbuni Police Station Gatanga as OB No. 06/03/10/2022. Further, the applicant states that he sought the intervention of the court which stopped the 4th citee from interfering with the possession of the subject property.
12. The applicant contends that the respondent has since been provoking and inciting some of his siblings to lay a claim on the subject property to the extent of causing violence to frustrate their efforts. The applicant is apprehensive that if the orders sought are not granted, the 4th respondent may cause further harm and unnecessary damage on the subject property to the detriment of the estate of the deceased.

The 4th Citee/Respondent's Case

13. The 4th respondent states that Ngoriongo Gicheha was his grandfather and he had three sons namely John Kangethe Ngoriongo, Mwangi Ngoriongo and Samuel Mburu Ngoriongo. The 4th respondent further states that each of the sons inherited land as follows:- Mwangi Ngoriongo – LR No. LOC 1/Kiunyu/424; Mburu Ngoriongo – LR No. LOC 1/Kiunyu/423 and Kangethe Ngoriongo – LR No. LOC 1/Kiunyu/422. Furthermore, each of the sons got a plot from the said portions as follows:- Mburu Ngoriongo – Plot Number LOC 1/Kiunyu/T.5; Mwangi Ngoriongo – Plot Number LOC 1/Kiunyu/T.6 and Kangethe Ngoriongo – Plot Number LOC 1/Kiunyu-kiawaihiga/T.7.
14. The 4th respondent contends that everyone took possession of their respective portion and had them registered in their names. As such, the 4th respondent argues that the allegations made by the applicant that the deceased was holding LOC 1/Kiunyu-kiawahiga/T.7 in trust for the applicant's family are not true and cannot be substantiated. Furthermore the 4th respondent states that the said parcel of land does not form part of the estate of the applicant's father and the applicant cleverly inserted the said property into their succession agreement as part of their father's estate. The 4th respondent states that the allegations that his father approved the inclusion of the said parcel in the applicant's father's estate are fictitious, untrue, fabricated and far-fetched.
15. The 4th respondent confirms that he and his father were present in the said family meeting but he states that his father did not surrender the said parcel to the applicant's family as alleged. The 4th respondent contends that the suit property was not a subject of discussion during the said family meeting and thus he was shocked to see the property in the succession agreement attached to the applicant's supporting affidavit. Furthermore, the 4th respondent states that there is no signature appended on the page where the suit property was inserted as the same was cleverly inserted and it further does not specify to whom the property will be given to.
16. The 4th respondent states that there were no transfer forms signed by his father over the suit property to the applicant's family. Further there is no acknowledgement or undertaking by his father to transfer the same nor is there any written will by his father transmitting the suit property to the applicant's family.



As such, the 4th respondent states that the suit property ought to devolve to its rightful beneficiaries through intestate succession in accordance with the Law of Succession.

17. The 4th respondent states that he has been cultivating on the said land until the Kandara court erroneously disturbed the status quo. The 4th respondent further states that he was arrested in 2022 when he was harvesting nappier grass from the said plot which he had planted. Further, the 4th respondent states that James Mburu Mwangi had put a caution on the suit land on 10th May 2021 which he was ordered to remove after the 4th respondent escalated the matter to DCIO Kirwara.
18. The 4th respondent argues that the applicant has not produced any evidence to support that the land was held in trust by the applicant's father. The 4th respondent further argues that there is no way his father could have held the land in trust for a period of 57 years. The green card shows that the suit land has been the deceased's since 1963.
19. The applicant filed a Further Affidavit dated 26th February 2024 and states that the subject property has always been in possession and use by his father and the same was admitted by the 4th respondent in a letter dated 8/6/2022. Thus, the applicant contends that the 4th respondent is misleading the court by claiming that they attended the meeting on 26th February 2020 without knowing what was discussed and that the deceased placed his thumbprint in the agreement whereas the 4th respondent signed the said agreement.
20. The applicant states that the allegations by the 4th respondent that the three brothers inherited the land as indicated in his replying affidavit is totally misleading. Further the family of the late Mburu Ngoriongo only received their portion of inherited land from the deceased after subdivision around the year 2012.

The 4th Citee/Applicant's Case on the application dated 19th January 2024.

21. The applicant states that the instant court issued orders on 17th January 2024 restraining him and the other three citees from entering, trespassing, cultivating on property LOC 1 Kiunyu/Kiawaihiga Plot T7 without the court affording them a chance to be heard. The applicant further states that he was not served with any court documents by the citor and the matter only came to his attention on 22nd December 2023 when his brother showed him a court order dated 11th December 2023. The applicant further states that he learnt that the matter had a mention date of 17th January 2023, and when he attended the same physically nothing transpired.
22. The applicant avers that at around 2pm he visited the registry to make an inquiry on the status of the matter and he was informed that the matter had already been called, proceeded virtually and restraining orders issued against them. The applicant contends that he was never given an opportunity to defend himself against the citor.
23. The applicant states that he has been in active possession of the suit land and has been cultivating the same until the Kandara court erroneously disturbed the status quo. The applicant further states that the title deed and the official search both show that the suit land belongs to his father who holds a freehold interest on it. The applicant argues that the citor misled the court into thinking that the said land was being held by his father in trust for the citor's father.
24. The applicant states that he was unable to enter appearance since he was never served with the pleadings and therefore he did not abscond in any way the opportunity to defend himself before the court. Thus, it would be unjust and unfair to condemn him unheard. The applicant further argues that setting aside the orders and affording him an opportunity to be heard will not prejudice the citor.



The Citor/Respondent's Case

25. The respondent states that he served all the citees with the application dated 8th November 2023 and only one of them responded to the said application. The respondent contends that the application is totally mischievous, devoid of merit, vexatious and an abuse of the court process as the 4th citee confirms that he received the documents from his brother who live together in the same compound amongst the other citees herein. Furthermore, despite the 4th citee learning of the matter and date of the hearing, he failed to attend court and the allegations that he was in court are unsupported as he has legal representation. The respondent further argues that the 4th citee is a mischievous individual who has peddled falsehoods to hoodwink the court.
26. The respondent contends that the applicant has misled the court into believing that he has a right in court without any letters of administration against the other citees who despite being served have failed to enter appearance.
27. The respondent states that it is not in dispute that the subject property has always been in possession and use by his father and immediate family members, fact to which the applicant admitted in his letter dated 8/6/2022 and therefore it is false for the applicant to claim that he has been cultivating the land. The respondent contends that he has raised a *prima facie* case against the citees that indeed the property has been in possession of his father's estate since 1963 and a dispute arose after the death of the citees' father in 2021. Furthermore, ever since 1963, the respondent states that there has been no claim on the suit property by the citees or their late father. The respondent states that the citees have admitted that the suit property has been in his father's possession as captured in numerous communications which explains the reasons the 4th citee was arrested for violently entering the premises and cutting down crops planted by the respondent's late father's wife Josephine Wangui Mwangi on the suit property.
28. The respondent contends that if the court does not intervene to reinstate the orders of injunction issued against the 4th citee, who has shown his selfish character as opposed to the other citees who have made no claim on the suit property, the estate of his late father shall be prejudiced before the hearing of the full citation.
29. The respondent states that the matter in the lower court was dismissed precariously for touching on only one arm of the suit with regards to the subject property and not giving the 4th citee permission to the property.

The Applicant's Submissions

30. The applicant reiterates what he has deponed in his affidavits and submits that he has raised a *prima facie* case that warrants the orders sought.
31. The applicant submits that his father has been in occupation of the suit property since 1963 and the same is supported by the fact that there has never been a dispute over the property and its occupation until 2021 after the death of Kangethe Ngoriongo. Further the applicant contends that even after his father's death, which occurred on 19th August 2017, the 4th citee's father never made a claim over the suit property until upon his demise on 5th September 2020. The applicant argues that it is strange that the registered owner of the suit land never made a claim on the suit property even after the demise of the person who legally occupied it.
32. The applicant further contends that the 4th citee has interfered with the quiet enjoyment of his occupation on the property without a valid legal document or eviction orders. Thus, the applicant



relies on the case of *Joyce Mutindi Ndili v Mulu Ndili* [2022] eKLR and submits that he has established that he has a prima facie case with a probability of success.

33. The applicant further submits that they are entitled to compensation for the crops destroyed by the 4th cite on the suit property. The said crops belonged to Josephine Wangui, the wife of the deceased and the applicant reported the destruction at Kihumbuini Police Station Gatanga vide OB No. 06/03/10/2022.
34. The applicant relies on the case of *James Muniu Mucheru v National Bank of Kenya Ltd* [2019] eKLR and states that he has proved his case on a balance of probability as the green card for LR. LOC 1 Kiunyu/422 and 423 confirms that Kangethe Ngoriongo distributed his property in the year 2012/2013. Furthermore, the family of the late Mburu Ngoriongo only received their portion of inherited land from the deceased after sub division around the year 2012. Moreover, the applicant contends that the 4th respondent has not presented any documents to prove that he has obtained any legal documents to run the issues of the estate of the deceased such as to evict them from the property as is required by law. As such, the applicant submits that the 4th respondent's actions to interfere with the quiet possession of the suit property is illegal and an affront to the law.
35. The applicant further submits that the application dated 19th January 2023 is a desperate attempt to further delay the conclusion of the matter and fails to address the real issues at play in the suit as the 4th cite purports to seek entry to the suit property by using falsehoods and hoodwinking the court to believe that he has been in occupation while all documentary evidence proves otherwise. Further the respondent submits that the argument by the applicant that the application filed in the lower court at Kandara gave him legal status to enter the suit property is a fallacy. The lower court only declared that the suit was filed in the wrong forum because in one of the arms of the prayers it raised an aspect of transfer of the property.
36. The applicant states that in any event the lower court was convinced that he was entitled to have an injunction.

The Law

Whether the applicant has met the requisite conditions to warrant the granting of a temporary injunction.

37. The principles of interlocutory injunction are now well settled. Those principles were set out in *East African Industries v Trufoods* [1972]EA 420 and *Giella v Cassman Brown & Co. Ltd* [1973]EA 358. Restating the said principles, Ringera J, (as he then was) in *Airland Tours & Travel Limited v National Industrial Credit Bank Nairobi (Milimani)* HCCC No. 1234 of 2002 set them out as follows:-
 - a. A prima facie case with a probability of success at trial;
 - b. The applicant is likely to suffer an injury, which cannot be adequately compensated in damages;
 - c. If the court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of convenience;
 - d. The conduct of the applicant meets the approval of the court of equity.
38. Similarly in *Dr. Simon Waiharo Chege v Paramount Bank of Kenya Ltd Nairobi* (Milimani) HCCC No. 360 of 2001, Ringera J, (as he then was) held:-

“The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation, which have been, or



are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show that he has a prima facie case with a probability of success at the trial. If the court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as pertains to the subject matter of the suit does not meet the approval of the eye of equity.”

Prima facie case with a probability of success at trial

39. What then constitutes a prima facie case? In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125,

“The principles which guide the court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless an 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....A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by “prima facie case” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “prima facie” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a suitable cause of action, the words “*prima facie*” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of prima facie case, the former being the lesser standard of the two...In civil cases a *prima facie* case is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently being infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly, a standard, which is higher than an arguable case.”

40. It is the applicant’s case that his father has been in occupation of LR. No. LOC 1 Kiunyu/Kiawaihiga/PLOT T7 since 1963 and is part of his estate. The applicant argues that the suit property is registered in the name of the deceased as he held the suit property in trust for him and his three brothers. Upon the demise of the deceased on 5th September 2020, his surviving children started interfering with the quiet enjoyment of the suit property and declined to adhere to the succession agreement dated 26th February 2020.



41. I have perused the pleadings by both parties and noted that the bone of contention is whether LR. No. LOC 1 Kiunyu/Kiawaihiga/Plot T7 was being held in trust by the deceased for his brothers. The applicant has filed a citation, citing the respondents as surviving children of the deceased to take up letters of administration in regards to their father's estate so that they can transfer the suit property to the family of the applicant as the rightful owners. According to the applicant, the suit property forms part of the estate of Mwangi Ngoriongo, his father, which fact was acknowledged and supported by the deceased and the 4th respondent in a family meeting held on 26th February 2020. The applicant further supports his contentions by producing a copy of the signed succession agreement dated 26/2/2020 signed by both the deceased and the 4th respondent. The applicant has further annexed copy of the green cards in respect of LR Nos. LOC 1 Kiunyu/422 and 423 to confirm that the deceased only distributed the said parcels of land after the sub division in 2012.
42. The applicant has argued that his father has been in occupation of the suit property since 1963 thus enjoying quiet possession and neither the deceased nor the 4th respondent made any claim over the said property. It is only after the deceased died that the 4th respondent went ahead to destroy the crops on the suit property to which the applicant made a report at Kihumbuni police station at Gatanga vide OB No. 06/03/10/2022.
43. The 4th respondent on the other hand has argued that the deceased is the registered owner of the suit property and therefore does not form part of the estate of the applicant's father and neither did he hold the said land in trust for the applicant's father. The 4th respondent admits to attending the family meeting on 26/2/2020 but contends that the discussion did not involve the suit property and neither did his father or him sign on the transfer of the suit property. The 4th respondent thus argues that the suit property can only devolve to the rightful beneficiaries through intestate succession according to the Law of Succession. He has further supported his allegations on the ownership of the suit property by annexing a copy of the official search of the suit property. It is therefore evident that these issues cannot be determined at this interlocutory stage and would need to proceed to trial. Evidently these issues can only be resolved during the citation. It is therefore my considered opinion that the applicant has established a *prima facie* case with a probability of success.

Irreparable Injury

44. In *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others* [2016]eKLR the court considered Halsbury's Laws of England on what irreparable loss is and stated that:-

“First, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”

45. The applicant contends that after the deceased passed away on 5th September 2020, the 4th cite acting without any legal authority went ahead and destroyed crops on the suit property. Following that incident, the applicant reported the incident at Kihumbuni police station at Gatanga vide OB No. 06/03/10/2022. I have perused the parties pleadings and noted that the 4th cite has not provided any evidence to prove that he is the legal administrator of the estate of the deceased Kangethe Ngoviongo to empower him to manage the deceased's estate. Without the legal documentation it is illegal for him to curtail the quiet possession of the applicant on the suit property. Thus it is my considered view that the



applicant has demonstrated that he will suffer irreparable loss unless the injunction is granted, which loss would not be compensated by an award of damages.

Balance of Convenience Test

46. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR, the court in dealing with the issue on balance of convenience held as follows:-

The meaning of balance of convenience in favour of the plaintiff is that if the injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience 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 would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

47. In light of the above, it is my considered opinion that the balance of convenience tilts in favour of the applicant because the inconvenience caused to him will be much greater than that caused to the 4th respondent if the court upon trial finds that deceased held the suit property in trust for the estate of the applicant's father.

48. It is therefore my considered view that the applicant has met the threshold as set out in *Giella v Cassman Brown* and therefore an injunction ought to issue in his favour.

49. Having found that the application dated 8th November 2023 has merit, I find no basis to delve into the issues in the application dated 19th January 2024 seeking to set aside the orders dated 17th January 2024. The applicant/citor having established a prima facie case in his application, the respondent/citee's application dated 19th January 2024 is in my view misconceived and ought to be struck out.

50. Consequently, the application dated 8/11/2023 is hereby allowed in the following terms:-

That pending hearing and determination of this citation, the respondents, their agents, servants or any other person acting on their behalf are hereby restrained from entering, cultivating, trespassing or dealing in any other way with LR NO. LOC. 1/Kiunyu/Kiawaihiga Plot No. T7.

51. The respondents/citees application dated 19th January 2024 is hereby dismissed. This matter being a family case, it is hereby ordered that each party meet their own costs.

52. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 18TH DAY OF APRIL 2024.

F. MUCHEMI

JUDGE

