



**Kimani v Kinyanjui (Civil Appeal E137 of 2023)  
[2024] KEHC 16761 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 16761 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E137 OF 2023**

**NIO ADAGI, J  
JULY 25, 2024**

**BETWEEN**

**LUCY WAITHERA KIMANI ..... APPELLANT**

**AND**

**GRACE NJOKI KINYANJUI ..... RESPONDENT**

**RULING**

**Introduction:**

1. The Appellant/Applicant (hereinafter referred to as “the Applicant”) filed a notice of motion application dated 12.7.2023 (hereinafter referred to as “the Application”) under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 Rule 1 and Order 51 Rule 1 of Civil Procedure Rules 2010 and with the main pending prayers for determination being that:-
  3. a temporary injunction order be issued restraining the Respondent whether by herself, her servants, agents, workmen and/or any other person acting on her authority from selling, subdividing, transferring, charging and/or in any other manner alienating/dealing in any manner that affects the ownership status and/or the registration status of land parcel Ndeiya/ Ndeiya A/1525 pending hearing of this appeal.
  4. the costs of the application be provided for.
2. The Applicant’s counsel filed written submissions dated 09.10.2023 and in expanding on the grounds on which the application is predicated, as well as the Applicant’s supporting affidavit sworn on 12.7.2023, urged the court to grant the sought injunction because the Applicant was a creditor to the Estate of the deceased Isaac Kinyanjui (husband to the Respondent) having purchased a 50 x 100 feet portion out of the suit property Ndeiya/Ndeiya A/1525 registered in the name of the deceased. That the Applicant paid Ksh.730,000/= out of the agreed Ksh.930,000/= and the balance was to be paid



- upon issuance of the agreed completion documents and transfer of the portion of land to the Applicant pursuant to a sale agreement dated 11.6.2020.
3. That the Respondent cancelled the said agreement and failed to take out letters of administration of the deceased's estate for purposes of completion of the transaction.
  4. It is on the foregoing that the Applicant instituted Citation proceedings in Limuru Principal Magistrate's Court in Misc. Succession Case No. 32 of 2021 citing the Respondent to take out letters of administration. The Citation was dismissed prompting the Applicant to lodge this Appeal and the instant application.
  5. The Applicant filed the instant application after she received information that the Respondent was in the process of selling off portions of the suit property to the detriment of the Applicant's interest in the suit property and without taking into consideration the pending appeal.
  6. The Applicant contends that since 2021 when she purchased the suit property to date, it has appreciated in value and is able to fetch more money. The Applicant believes that this is what is driving the Respondent to deny the Applicant the suit property in order that she can sell it to other persons at a higher price.
  7. The Applicant further contends that she stands to suffer more having paid nearly the whole amount of the purchase price which she did via a loan that she continues to service to date.
  8. The Applicant submits that it is in the interest of justice that the orders sought which are meant to preserve the status of the suit property be issued pending the hearing and determination of the appeal.
  9. The Respondent opposed the Applicant's application through the Replying affidavit sworn on 31.7.2023 and through her counsel's submissions dated 31.10.2023. Basically, the Respondent contests the application for being anomaly, premature and an abuse of the court's process and that this court lacks the jurisdiction to entertain the same and as such it should be dismissed with costs.
  10. In the view of this court what the Applicant brings up now is an application for a temporary injunction order to be issued restraining the Respondent whether by herself, her servants, agents, workmen and/or any other person acting on her authority from selling, subdividing, transferring, charging and/or in any other manner alienating/dealing in any manner that affects the ownership status and/or the registration status of land parcel Ndeiya/Ndeiya A/1525 pending hearing of this appeal.

**Issues For Determination:**

11. I have read the application, affidavit in support of the application, replying affidavit, and their accompanying annexures.
12. I have also considered and weighed the rival submissions in this application as regards the application and the grant of orders of injunction sought by the Applicant and also taken into consideration the judicial decisions cited and attached.
13. Both the Applicant and the Respondent have in their respective submissions raised issues for determination which the court will summarize as follows:
  - (i) whether this court has jurisdiction to hear and determine the application;
  - (ii) whether the application is properly before this court
  - (iii) whether the application is merited



## Analysis And Determination.

### whether this court has jurisdiction to hear and determine the application;

14. I will, briefly reiterate what the Court of Appeal stated in Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another vs. Eric Cheruiyot & 15 Others (unreported) in a decision rendered on 8<sup>th</sup> February, 2022 on the doctrine of jurisdiction in general as follows:

Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

15. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S’ v. Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:

...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

16. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.

17. The Supreme Court in In the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya is regulated by [the Constitution](#), statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

18. In Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No. 2 of 2011, the Supreme Court reiterated its holding on a court’s jurisdiction.



In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.

19. Article 165(5) of *the Constitution* precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.
20. There is no doubt that the court before which the application and appeal are filed is the High Court under the family division. The family division court is guided by *the Constitution* and the *Law of Succession Act* Cap 160 of the Laws of Kenya with a rider to exceptional provisions as set out in this Act.
21. I agree with the Respondent’s counsel that this court is a family court sitting as such on this appeal arising out of Citation proceedings and therefore its jurisdiction is limited to the decision of the Trial Court regarding the Citation filed therein. The issue for injunction was not a subject before the trial court and the Appellant cannot ride on this appeal to introduce that which was not determined at the trial court. The Appellant seems to be introducing a new cause of action perceiving proprietary interests in land which need to be safeguarded by the grant of the injunction order she is seeking from this court.
22. In the case of *Floriculture International Ltd v Central Kenya Ltd & 3 Others (1995) eKRL*, the Court of Appeal held that:-

“the normal rule that a party could not raise for the first time on appeal a point he had failed to raise in the High Court, did not, and could not apply when the issue sought to be raised de novo on appeal went to jurisdiction”

“.....the Respondent conceded and, in our opinion properly, that the Superior Court , had no jurisdiction she contended that this issue not having been raised in the Superior Court, we do not have the benefit of the decision of the Superior Court”
23. Section 13 of the *Environment and Land Court Act* outlines the Environment and Land Court’s jurisdiction as follows: -
  1. The Court shall have original and appellate jurisdiction to hear and determine all dispute in accordance with Article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
  - (2) In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes—
    - (a) relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
    - (b) relating to compulsory acquisition of land;
    - (c) relating to land administration and management;
    - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and



(e) any other dispute relating to environment and land.

24. From the guidance of the Court of Appeal in the Kenya Commercial Bank Limited & 2 others (supra), Interim Independent Electoral Commission (supra) and the above analysis, there is no doubt that the application deals with the Applicant's proprietary interests in the suit land and its ownership. In that case, the jurisdiction of the High Court and more so the Family Court to hear and determine the application is expressly ousted under Article 162(5)(b) of *the Constitution*.
25. This is an issue that would have been properly ventilated by the Environment and Land Court.
26. Consequently, on this first issue alone, the application dated 12.7.2023 be and is hereby struck out with costs.
27. I will however not hesitate to consider the other issues for determination:

**whether the application is properly before this court:**

28. The application is brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 Rule 1 and Order 51 Rule 1 of Civil Procedure Rules 2010 and any other enabling provisions of the law.
29. The Respondent contends that the application is anomaly and has been brought under the wrong provisions of the law as such it should be dismissed.
30. The Oxford Dictionary defines "anomaly" as something that deviates from the common rule, arrangement, form, what is standard, normal or expected.
31. The Appellant's counsel has in the submissions gone ahead to cite Article 159(2) of *the Constitution*, Section 47 of the *Law of Succession Act* and Rule 73 of the Law of Succession Regulations. The Appellant has cited quite a number of decisions in support of the application with the argument that the application is properly presented before court.
32. I have had the opportunity of referring to the cited provisions of the law as well as the cited decisions by the Appellant in reference to the application. It is clear that the Applicant did not present the application under any of those provisions cited and only introduces them in the submissions and urges the court to consider them in determining whether the application is properly before it. It is to be noted that in all these decisions, the applications had been brought pursuant to Section 47 and 76 of the Law of Succession Act and Section 44(1), 49, 63(2) and 73 of the probate and Administration Rules unlike the Applicant's application.
33. In the case of *Jiwa Nadmudin Dhanji v Teborah Naliaka Wabwayi & another* [2006] eKLR the court found that:-

“Overall, therefore, the application before me has been brought under the wrong provisions of the law and although counsel for the applicant was notified about this in good time, he chose to ignore it. It would be too presumptuous on his part to expect the court to ignore all these flaws in his application. I find it extremely difficult to endorse such kind of application. I also note that although the Senior Principal Magistrate is said to have disqualified herself on account of want of pecuniary jurisdiction that order was not annexed to the applicant's affidavit and the court cannot therefore confirm whether the said magistrate has the pecuniary jurisdiction to deal with the matter in question or not. All in all therefore, I find that the applicant has failed to properly move the court and to base his application on the correct provisions of the law. He has failed to convince this court to



grant him the orders he is seeking. His application is accordingly dismissed with costs to the respondents”.

34. The Applicant urged the court to invoke the provisions of article 159(2)(d) of *the Constitution* which provides that justice should be administered without undue regard to technicalities. My view is that the defect herein goes beyond technicalities and cannot be cured by the said constitutional provision.

35. I find that the application is not properly before this court.

#### **whether the application is merited**

36. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Versus Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *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”.

37. Consequently, the Applicant ought to, first, establish a prima facie case. The Applicant submitted that she has established a prima facie case and relied on the judicial decision of *Mrao Ltd Versus First American Bank of Kenya Ltd* (2003) EKLK in which the Court of Appeal gave a determination on a prima facie case. The court 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.”

38. Secondly, the Applicant has to demonstrate that irreparable injury will be occasioned to him if an order of temporary injunction is not granted. The judicial decision of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

“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.

39. The Applicant has deposed that since 2021 when she purchased the suit property to date, it has appreciated in value and is able to fetch more money. The Applicant believes that this is what is driving the Respondent to deny the Applicant the suit property in order that she can sell it to other persons at a higher price.



40. From the facts of this matter, the value of the suit plot can be ascertained, the loss she is likely to if any are quantifiable and can thus be adequately compensated by damages.
41. The Appellant has not satisfied this second condition
42. Thirdly, the Appellant has to demonstrate that the balance of convenience tilts in her favour. In the case of Pius Kipchirchir Kogo (Supra) the concept of balance of convenience was defined as:

“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”.

43. In the case of Paul Gitonga Wanjau Vs Gathuthia Tea Factory Company Ltd & 2 others (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus:-

“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.”

44. The Applicant contends that the balance of convenience tilts in her favour because she is a Creditor over the Estate of the Respondent deceased’s husband with regard to the suit property which is registered in the name of the deceased. Adopting this court’s finding on issues (i) and (ii) above I also find that the Applicant has not satisfied the balance of convenience tilts in her favour.
45. In view of the foregoing, I find that the Applicant has not met the criteria for grant of orders of temporary injunction pending appeal.
46. I therefore decline to allow the application dated 12.7.2023.

#### **Who shall bear the costs of the application?**

47. On the issue on costs; section 27 of the [Civil Procedure Act](#) provides that costs shall follow the event. The successful party shall ordinarily have costs.
48. Consequently, I make the following order:



1. A temporary injunction order restraining the Respondent whether by herself, her servants, agents, workmen and/or any other person acting on her authority from selling, subdividing, transferring, charging and/or in any other manner alienating/dealing in any manner that affects the ownership status and/or the registration status of land parcel Ndeiya/Ndeiya A/1525 pending hearing of this appeal is declined.
2. That Respondent is awarded costs of Kenya Shillings Thirty Thousand (Ksh.30,000.00) only on the application.

It is so ordered.

**DATED SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 25<sup>TH</sup> DAY OF JULY 2024**

**NOEL I. ADAGI**

**JUDGE**

