

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION APPEAL NO. E003 OF 2023
IN THE MATTER OF THE ESTATE OF GERALD MUSAU
KILILI (DECEASED)

JACQUELINE MWENDE KAMWANZA.....
APPELLANT

VERSUS

PHILLIP MULEI KILILI..... 1ST
RESPONDENT

ANDREW KILILI MULWA..... 2ND
RESPONDENT

BRENDA MASISTA MULINDI..... 3RD
RESPONDENT

(Being an appeal against the Ruling of Hon. Ole Keiwua delivered on 10th January 2023 in Kangundo Succession Cause No. E70 of 2022)

JUDGMENT

1. The Appellant being aggrieved by the Ruling of the trial court delivered on 10th January 2023 in Kangundo Succession Cause No. E70 of 2022 preferred this appeal. The ruling arose from a Chamber Summons Application dated 6th July 2022 filed by the Appellant seeking inter alia a preservative order directing the Respondents to deposit the rental income from rental house on the property LR No. 13767/118 Nairobi into the courts account or an account

held by both parties; an order to compel the Respondents to render an account of all the rental income that has been collected from the said property from the date of the deceased's death to date and a provision for school fees and other basic needs of Emmanuel Mulwa Musau (minor) son of the deceased.

2. The Appellant aggrieved by the Ruling dismissing the application dated 6th July 2022 filed a Memorandum of Appeal dated 20th January 2023 raising the following summarized grounds; that the Learned Magistrate erred in fact and law by delving into the substance of the suit and making final determinations of facts at an interlocutory stage, thereby undermining the purpose of a full hearing; holding that property LR No. 13767/118 Nairobi is not available for succession at the interlocutory stage; relying on the letter dated 18th May 2022 by Alexander M. Musembi, Chief Kangundo Location which contained a one sided conclusion and contravened the rules of natural justice; holding that Brenda Masita Mulindi was a wife to the deceased at the interlocutory stage without evidence; making a final determination on property LR No. 13767/118 Nairobi despite the matter being pending before the Nairobi Environment and Land Court, ELC Case No. 391 of 2018 Gerald Musau Kilili versus Brenda Masista Mulindi; awarding the Respondent orders not sought; relying on conjuncture, supposition and on extraneous matters.

3. The Appellant seeks orders that the Ruling of the subordinate court delivered on 10th January 2023, together with all consequential orders and decrees, be set aside and vacated; that a preservative order do issue directing the Respondents to deposit rental income from property LR No. 13767/118 Nairobi in court or in a joint account held by both advocates pending the hearing and determination of the succession cause and that the court grant any other relief it may deem fit.

Pursuant to the directions of this court, the appeal was canvassed by way of written submissions. **Appellant's submissions**

4. The Appellant began her submissions with a brief statement of facts asserting that she was a wife to the deceased and together, they had two children. She contends that the Respondent initiated succession proceedings without involving her and her children as beneficiaries. That upon learning of the succession proceedings, she filed an objection to the making of grant and an application dated 6th July 2022 seeking, inter alia, preservative orders over rental income from property L.R. No. 13767/118 Nairobi, registered in the names of the deceased and the 3rd Respondent.

5. The Appellant argued that the Respondents had been collecting and utilizing rental income to the exclusion of other beneficiaries, including a minor child of the deceased.

6. The Appellant raises five issues for determination that is, whether the trial Magistrate erred in fact and law by delving into the substance of the suit and making final determinations of facts at an interlocutory stage; whether the natural justice principle on the right to be heard and the constitutional right to a fair hearing were denied to the Appellant; whether the lower court erred by issuing orders not sought; whether the ruling as issued went against the doctrine of sub-judice and the issue of costs.
7. The Appellant submits that the trial magistrate erred in law and fact by making conclusive findings on contested issues at an interlocutory stage, thereby prematurely determining the substantive dispute. She argued that the application before the trial court merely sought preservatory orders pending determination of the succession cause, and the court ought to have confined itself to the principles governing interlocutory relief under Order 40 of the Civil Procedure Rules and the test established in the case of **Giella v Cassman Brown & Co. Ltd (1973) EA 358**. She further relies on **Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others [2016] eKLR**, where the court held that final orders should not ordinarily be granted at an interlocutory stage unless exceptional circumstances are demonstrated, which were absent in this case.

8. On the issue of the right to a fair hearing, the Appellant contends that the trial court violated Article 50(1) of the Constitution and principles of natural justice by determining contested matters of fact without affording parties an opportunity to adduce and test evidence through cross-examination. The court is said to have improperly relied on a letter dated 18th May 2022 from the Chief, Kangundo Location to conclude that the 3rd Respondent was a wife to the deceased and that the property was jointly owned. The Appellant disputes the existence of any marriage between the deceased and the 3rd Respondent, noting that the 3rd Respondent neither appeared in court nor produced evidence of marriage. She further, points out that Nairobi ELC Case No. 391 of 2018, *Gerald Musau Kilili v Brenda Masista Mulindi*, the deceased described the 3rd Respondent as an acquaintance and disputed joint ownership of the suit property.
9. The Appellant relies on ***Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR***, which referenced to ***M K v MWM & another [2015] eKLR***, ***Onyango v Attorney General (1986-1989) EA 456*** and ***Mbaki & others v Macharia & another (2005) 2 EA 206*** to underscore the centrality of the right to be heard and the principle that a decision made in breach of natural justice is invalid regardless of its merits.

10. The Appellant further submits that the trial court erred by granting orders not sought by any of the parties contrary to the well-established principle that parties are bound by their pleadings. In this regard, reliance is placed on **Kenya Women Finance Trust v Squaredeal Kenya Limited (Civil Appeal No. 36 of 2021) [2023] KEHC 17234 (KLR)** where the court held that a court should not determine matters outside the pleadings.
11. Additionally, the Appellant argues that the trial court's determination offended the doctrine of *sub judice* under Section 6 of the Civil Procedure Act. It is submitted that the issue of ownership and nature of the tenancy in respect of the suit property was already pending determination before the Environment and Land Court in Nairobi ELC Case No. 391 of 2018. The trial court is faulted for conclusively determining the same issue, thereby risking conflicting decisions and multiplicity of proceedings.
12. In conclusion, the Appellant submits that the impugned ruling violated constitutional principles under Articles 25(c), 47, 48, 50(1) and (2), and 159 of the Constitution by denying her a fair hearing and prematurely determining substantive issues. The Appellant urges this court to set aside the ruling of the subordinate court and substitute it with orders allowing the application dated 6th July 2022, particularly by issuing preservative orders directing that rental income from L.R. No. 13767/118 Nairobi be

deposited in court or in a joint account pending determination of the succession cause.

13. The Appellant prays that the appeal be allowed, the ruling and consequential orders be set aside, preservatory orders be granted, and costs of the appeal be awarded.

Respondent's Submissions

14. The Respondent opposes the appeal and frames a single issue for determination, that is, whether the appeal is meritorious.

15. On this issue, the Respondents submit that the appeal lacks merit and ought to be dismissed. They contend that the 3rd Respondent was a wife to the deceased and that together they jointly owned the suit property L.R. No. 13767/118 Nairobi, as evidenced by the Certificate of Title contained in the Record of Appeal. They further rely on a letter from the Chief Kangundo Location dated 18th May 2022, which confirmed the existence of the marriage and argue that its contents were not controverted by the Appellant.

16. The Respondents submit that the ownership of the suit property remained unchanged until the death of the deceased on 6th October 2021. They argue that as the property was held under a joint tenancy, it is governed by the doctrine of survivorship, whereby the interest of a

deceased joint tenant automatically vests in the surviving joint tenant.

17. In support of this position, the Respondents rely on **In re Estate of Johnson Njogu Gichohi (Deceased), Succession Cause No. 112 of 2016 (2018) eKLR**, as cited with approval in **In re Estate of M’Kiunga M’Rinyiru (Deceased) (2021) eKLR**. In those cases, the courts interpreted Section 60 of the Land Registration Act to mean that upon the death of a joint tenant, the Registrar is required to delete the name of the deceased from the register upon proof of death and the property automatically vests in the surviving joint tenant. The courts further held that such property is excluded from the operation of the Law of Succession Act.
18. The Respondents also cite Section 49 of the Land Act regarding transmission upon death of a joint proprietor, arguing that upon proof of death, the Registrar is mandated to delete the name of the deceased and register the surviving proprietor.
19. It is therefore the Respondents’ position that the 3rd Respondent, as the surviving joint proprietor, automatically became entitled to the suit property upon the death of the deceased, and that the property does not form part of the estate subject to succession proceedings.
20. In conclusion, the Respondents submit that the trial court correctly applied the law in finding that L.R. No. 13767/118

Nairobi was not available for succession and in declining to grant the preservative orders sought. They urge this court to uphold the ruling of 10th January 2023 and dismiss the appeal with costs on the basis that it is unmeritorious.

Analysis and Determination

21. This court has considered the grounds of appeal, the proceedings of the lower court and the submissions by both the Appellant and the Respondent and the following issues arise for determination;

- (a) **Whether the learned trial magistrate erred in law and fact by determining substantive issues at an interlocutory stage and making findings not sought**
- (b) **Whether the learned magistrate violated the Appellant's right to a fair hearing**
- (c) **Whether the trial court's determination offended the doctrine of *sub judice***

Whether the learned trial magistrate erred in law and fact by determining substantive issues at an interlocutory stage and making findings that were not sought

22. The application before the trial court dated 6th July 2022 sought, in essence, preservative orders over rental income from L.R. No. 13767/118 Nairobi pending the hearing and determination of the succession cause. The central question

is whether the trial court confined itself to the parameters of an interlocutory application.

23. From the ruling, it is evident that the learned magistrate proceeded to determine, inter alia, that the 3rd Respondent was a wife to the deceased; the appellant and 3rd Respondent were co-wives; that the suit property was held in joint tenancy; and the property did not form part of the estate and was not available for succession. These findings are particularly evident at paragraphs 15, 19 and 20 of the ruling, where the court made conclusive determinations on marital status, nature of co-tenancy and proprietary rights.
24. In this court's finding, these were not merely incidental findings but substantive pronouncements that went to the very core of the dispute. They effectively resolved contested questions of ownership and succession to the suit property, which ought to have been reserved for full hearing on evidence.
25. The law governing interlocutory applications, particularly those seeking preservatory or injunctive relief, requires the court to exercise judicial restraint. Courts are required to avoid making final determinations on contested issues at such a stage. The guiding principles are well settled in **Giella v Cassman Brown & Co. Ltd (1973) EA 358** and further reinforced in **Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others [2016] eKLR**, where it was held that final orders should not ordinarily be granted

at an interlocutory stage unless exceptional circumstances are demonstrated. No such exceptional circumstances were established in this case.

26. The trial court did not undertake any analysis of whether the Appellant had established a prima facie case, whether irreparable harm would be suffered, or where the balance of convenience lay. Instead, it conclusively determined ownership and excluded the property from the estate. While I note that the Respondents, in their Replying Affidavit sworn on 22nd July 2022, raised the issue of joint ownership and survivorship, the trial court's role at that interlocutory stage was limited to assessing whether those matters raise triable issues sufficient to displace the threshold for grant of preservatory orders. It was not called upon to make a definitive pronouncement on the nature of the co-tenancy or to determine whether the suit property formed part of the estate.

27. By proceeding to conclusively find that the property was held in joint tenancy and thereby excluded it from the estate, the learned magistrate exceeded the scope of an interlocutory determination and effectively resolved the substantive dispute without the benefit of a full hearing.

28. I therefore find that the trial magistrate erred in law by prematurely determining substantive issues in an interlocutory application.

29. On whether the findings made by the trial Magistrate were ones not sought, I note that the Appellant's application sought preservative and ancillary reliefs. There was no prayer seeking a determination that the property was held in joint tenancy or that it was excluded from the estate. Nevertheless, the trial court proceeded to hold that the property was not subject to succession and that the 3rd Respondent could proceed to effect transmission by survivorship. This amounted to granting reliefs and making determinations outside the scope of the pleadings. Courts are bound by the issues placed before them, and by venturing beyond those issues, the learned magistrate erred in law. **Whether the Appellant's right to a fair hearing and the rules of natural justice were violated**

30. The Appellant contends that the trial court made findings on contested issues of fact particularly the existence of a marriage and the nature of ownership without affording her an opportunity to test the evidence. The impugned ruling shows that the court relied heavily on a letter from the Chief Kangundo Location dated 18th May 2022 to conclude that the 3rd Respondent was a wife to the deceased and that the Appellant and the 3rd Respondent were co-wives. That letter was neither subjected to cross-examination nor supported by viva voce evidence. Further, the 3rd Respondent did not swear an affidavit asserting her marital status.

31. The existence of a marriage, particularly in a contested succession dispute, is a serious question of fact and law that ordinarily requires evidentiary proof. The right to a fair hearing under Article 50(1) of the Constitution encompasses the right to challenge and test adverse evidence. By making definitive findings on contested matters without a full hearing, the trial court denied the Appellant the opportunity to challenge the evidence and present her case fully.

32. I therefore find that the Appellant's right to a fair hearing and the principles of natural justice were violated.

Whether the doctrine of *sub judice* was violated

33. The material before the trial court disclosed the existence of Nairobi ELC Case No. 391 of 2018 between the deceased and the 3rd Respondent concerning the same property. The issues in that suit as acknowledged in the ruling concerned ownership and the nature of the co-tenancy. **Section 6 of the Civil Procedure Act** bars a court from proceeding with a matter in which the issues are directly and substantially in issue in a previously instituted suit between the same parties or those claiming under them.

34. Despite this, the trial court proceeded to conclusively determine the nature of ownership of the property. In doing so, the court risked rendering a decision inconsistent with that of a court of competent jurisdiction and undermined the purpose of sub judice rule.

35. Having found that the trial court erred in law and fact on multiple fronts, by prematurely determining substantive issues, by violating the appellant's right to a fair hearing, and by offending the doctrine of sub judice, this court is entitled to interfere with the exercise of discretion. The justice of the case demands preservation of the subject matter pending determination of the succession cause. I am satisfied that the Appellant had established sufficient grounds to warrant preservatory orders, particularly in light of the undisputed fact that rental income was being collected and the existence of a minor beneficiary whose welfare must be safeguarded.

36. Accordingly, I make the following orders that;

- a. The appeal is merited and is allowed
- b. The ruling of the subordinate court delivered on 10th January 2023 is hereby set aside. The matter is remitted back to the Kagundo Chief Magistrate Court for hearing before another magistrate other than Hon. Ole Keiwua (CM).
- c. The Respondents shall continue to deposit the rental income from L.R. No. 13767/118 Nairobi into a joint interest earning account in the names of the parties' advocates as directed by this court in a Ruling delivered on 17th January 2024 pending the rehearing and determination of the succession cause.
- d. The appellants shall be awarded the costs of this appeal.

Orders accordingly.

Dated, signed and delivered at Machakos this 8th day of
April, 2026

RHODA RUTTO
JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant