

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**SUCCESSION CAUSE 1136 OF 2013**

**(FORMERLY NAIROBI SUCCESSION CAUSE 3112 OF 2012)**

**MARGARET WAIRIMU KINUTHIA.....PETITIONER/  
RESPONDENT**

**VERSUS**

**MARY WANJIRU WAITHERA  
(being sued as a personal representative for ESTHER  
WAITHERA MWANGI) .....  
RESPONDENT**

**ALICE WANJA KARIUKI.....RESPONDENT/  
APPLICANT**

**RULING**

1. By an application dated 3<sup>rd</sup> April 2025, the Respondent/ Applicant has moved this honourable court seeking the lifting of the temporary injunction against parcel number No. LOC2/MARIIRA/2290 registered pursuant to order in Nairobi Succession Cause 3112 of 2012. The Applicant contended that the injunction continues to hinder her proprietary rights and the peaceful enjoyment of her property despite the suit relating to the agreement for sale between the Petitioner Respondent and Esther Waithera Mwangi having been dismissed for want of prosecution.
2. The Application was opposed by the Petitioner/ Respondent through Grounds of Opposition dated 16<sup>th</sup> May 2025 and a Replying affidavit dated 30<sup>th</sup> April 2025. It was the Respondent's contention that she is a creditor to the estate having purchased LOC.2/MARIIRA/2290 from one *Mwangi Gikonyo*, the deceased on 15<sup>th</sup> October 2002 for consideration of a sum of Kshs. 380,000. Since taking possession of the suit property in 2002, she has constructed a permanent house and developed it

extensively living peacefully and uninterruptedly. However, the deceased died in 2005 before obtaining neither the Land Control Board Consent nor transfer the property to her. Consequently, one Esther Waithera Mwangi (deceased) and a beneficiary of the estate of Mwangi Gikonyo secretly filed Kigumo Succession Cause no. 67 of 2009 despite knowing well that the Petitioner/Respondent was a creditor to the estate of Mwangi Gikonyo.

3. Following the confirmation of the grant, the said *Esther Waithera Mwangi* fraudulently sold the parcel to the Applicant/Respondent, Alice Wanja Kariuki. A fact she discovered upon conducting a search on the suit property. Consequently, she filed Nairobi Succession cause no. 3112 of 2012 seeking revocation of the grant. Nevertheless, despite pendency of the succession cause at Nairobi, the Applicant Respondent still harassed her and sent hooligans to destroy her property by cutting down tea bushes and other plantations. As a result, he moved the court and an injunction was issued on 31<sup>st</sup> December 2012 restraining the Applicant/Respondent from dealing howsoever with the suit property pending the determination of the suit.
4. When the suit was transferred to Murang'a High Court, Justice HPG Waweru determined that the succession cause lacked jurisdiction to deal with matters pertaining to contract law. The Petitioner Respondent thus instituted a Civil claim being Murang'a Civil case number 357 of 2017 Margaret Wairimu Kinuthia v Esther Waithira Mwangi and Alice Wanja Kariuki. However, Esther Waithira Mwangi, was deceased during the pendency of the suit and none of the beneficiaries was willing to take out a grant for administration of the estate of the deceased. Consequently, the Petitioner/Respondent took out letters of administration *ad litem* which were issued to one *Mary Wanjiru Waithira* limited to substituting the deceased in Murang'a Civil Suit No. 357 of 2017. Nevertheless, the suit was ultimately dismissed for want of prosecution and attempts to reinstate

it have been futile. The Petitioner/ Respondent contended that failure to attend and prosecute the suit was occasioned by circumstances beyond her reach, including illness and death of the deceased. She therefore contended that she will be prejudiced if the application is allowed.

5. The court directed that the application be canvassed through written submissions.
6. The applicant submitted that a temporary injunction is a temporary relief that is not meant to last forever or remain in force permanently. Especially when the main suit has been conclusively determined pursuant to **Order 40 rule 6**, temporary injunctions ought to lapse within a period of twelve months. The applicant contended that since the case upon which the injunction had been issued had been dismissed, the substratum of the injunction had also ceased to exist. Hence there remained no legal reason to have the injunction in force. Also, the suit seeking revocation of grant was dismissed and the land dispute tribunal also issued an eviction order against the Petitioner Respondent. Therefore, she was enjoying unregistered interest over a piece of land without any legal right or justification. The applicant therefore urged the court to exercise its discretion in favour of the Applicant and lift the temporary injunction on LOC. 2/MARIIRA/2290.
7. The Respondent on the other hand submitted that Murang'a Civil case number 357 of 2017 was never heard on its own merits, it was dismissed merely on technicalities for failure by the advocates to attend court. Therefore, the honest mistake of an advocate should not be visited upon the client to the detriment of the ends of justice. It is therefore in the interest of justice that the Application be dismissed to enable the Petitioner/ Respondent to successfully prosecute her case on its merits.
8. The main issue for determination is whether the application is merited.

9. After an order of injunction has been issued, the party subject to the injunction can apply to the Court to vary, discharge or set it aside. Courts have power to discharge, vary or set aside any interlocutory order granted under Order 40. In particular, **Order 40 Rule 7** provides that:

***“7. Order for injunction may be discharged, varied, or set aside [Order 40, rule 7] Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”***

10. The above provision does not stipulate the conditions under which an order of injunction may be discharged, varied, or set aside. Courts have through caselaw developed and prescribed the conditions to be considered before an injunction is discharged, varied or set aside. In **Ochola Kamili Holding Limited vs Guardian Bank Limited (2018) eKLR** for instance, the court stated that:

***“The court is alive to the fact that interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person’s conduct with respect to matter pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting injunction orders sits on the matter and uses the orders to the prejudice of the opponent.”***

11. The Respondent has admitted that the civil suit she had instituted to enable her recover from the estate of the deceased was dismissed for want of prosecution. Therefore, her contention is that lifting the temporary injunction issued by this honourable court in 2012 should remain in force to enable her pursue her proprietary rights.

12. What then should the court consider when faced with an application for setting aside an injunction? In the case of **Atlas Copco Customer Finance AB v Polarize Enterprises (2016) eKLR**, the court distilled the factors that may be considered when faced with a question of discharge, varying or setting aside of an injunction. The court held as follows:

***“... it is now trite that some of the factors that guide the exercise of the courts' discretion in this area of law are, but not limited to: a. proof that the injunction was obtained by concealment of facts which if presented would have worked against the granting of the injunction;***

***b. a radical change in the circumstances of the suit, such that it is no longer necessary to have the injunction;***

***c. Proof that the general conduct of the holder of injunction is such that the court is impelled to discharge the injunction, for instance, where the injunction is being used to intimidate the Defendant or achieve an ulterior purpose;***

***d. proof that the sustenance of the injunction would cause an injustice.***

13. In the instant case, there is no material evidence to demonstrate that the injunction was obtained through misrepresentation or concealment of material facts. Nevertheless, **Order 40 rule 6 of the Civil Procedure Rules** states that:

***“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”***

14. It is evident that the injunction that the Respondent had been given in 2012 was temporary. Therefore, she was to ensure that expedited disposal of the case within 12 months otherwise the injunction would lapse. Unfortunately, the suit was never concluded within the prescribed time. Furthermore, there is no evidence that the Respondent ever moved the honourable court to extend the orders for sufficient cause. Instead, the court itself determined that the Respondent's claim could not be determined in a succession cause and therefore the Respondent was compelled to institute a civil claim.
15. Accordingly, at the lapse of the 12-month period, the injunction issued in the succession cause automatically lapsed as a new cause of action had been lodged in a separate claim which claim was dismissed for want of prosecution and any attempts to reinstate it also dismissed.
16. It is trite that injunctive reliefs are equitable remedies, therefore a person enjoying it must ensure equity. The Respondent has not sufficiently demonstrated the steps that she took to make good her claim on the impugned property.
17. While the Respondent took possession of the suit property in 2002, she did nothing to guarantee her title to the said property until 2012 when this honourable court granted her relief over the property. Also, upon getting the temporary injunction, she did not take any expedited steps to secure her title to the property. Only to wait for the filing of the instant application for her to give a litany of reasons why she ought to benefit for an equitable remedy.
18. It is trite that delay defeats equity, the temporary injunction that the applicant seeks to lift expired by effluxion of time. The matter upon which the injunction was based was already instituted in a civil claim.

19. As it stands, this honourable court has no material upon which the instant application is premised. ***There is no legal basis upon which this succession court can lift orders that have already expired, nor make any order regarding a claim that is best determined in a civil suit.***
20. ***The upshot of the matter is that the application dated 3<sup>rd</sup> April 2025 is dismissed.***
21. ***Each party to bear their costs.***

**Dated, Signed and Delivered Virtually on this 13<sup>th</sup> day of May 2026.**

**HON. T. W. OUYA, OGW  
JUDGE**

**In the presence of:**

**Ms. Mwangi for Mr. Muchoki for Respondent**

**No appearance by Petitioner**

**Hamza/Kevin - Court Assistants**