



Ogola (Suing as the Administrator of the Estate of Cyrillus Christopher Ogola Osongo) v Ogola & 3 others (Environment & Land Case E024 of 2024) [2025] KEELC 18 (KLR) (16 January 2025) (Ruling)

Neutral citation: [2025] KEELC 18 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E024 OF 2024**

E ASATI, J

JANUARY 16, 2025

BETWEEN

MAURICE ONGURU OGOLA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF CYRILLUS CHRISTOPHER OGOLA OSONGO) PLAINTIFF

AND

AUGUSTINE OGOLA 1ST DEFENDANT

LAND REGISTRAR, KISUMU 2ND DEFENDANT

NCBA BANK KENYA PLC 3RD DEFENDANT

KEYSIAN AUCTIONEERS 4TH DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion application dated September 16, 2024 brought pursuant to the provisions of Order 40 Rules 1(a), 2 and 4 of the Civil Procedure Rules 2010, sections 1A, 1B, 3A and 63(e) of the [Civil Procedure Act](#) and Section 26(1)(a) and (b) of the [Land Registration Act](#), 2012.

The application seeks for orders that: -

- a. Pending the hearing and final determination of the suit, orders of temporary injunction do issue restraining the 3rd and 4th Respondents whether by themselves or through their agents, servants and/or employees from conducting any auction or transferring to any third party the property title No. Kisumu/municipality Block 8/105.
- b. Pending the hearing and determination of the suit, interim orders of temporary injunction do issue restraining the 1st and 2nd Respondents from transacting, transferring, dealing, alienating,



selling and/or interfering in any manner whatsoever with the property title number Kisumu Municipality/block 8/105.

- c. Costs of the application be provided for.
2. The application was supported by the averments in the Supporting Affidavit sworn by the applicant on 16th September 2024 and the annexures thereto.
3. The application was opposed by the 3rd Defendant vide the contents of the Replying Affidavit sworn by Christine Wahome on 25th October, 2024. The case of the 3rd Respondent is that its involvement in the present suit is as a result of the 1st Respondent approaching it for a financial facility. That the 3rd Respondent advanced to the 1st Respondent a financial facility cumulatively totalling to Kshs.30,000,000/=. That the facility was secured by the registration of an interest in Kisumu Municipality/block 8/105 in favour of the 3rd Respondent. That the 3rd Respondent intends to dispose of the said property due to the default in repayment of the loan by the 1st Respondent.
4. That the 1st Respondent moved to court and filed Kisumu Hccc No 14 Of 2023 in an attempt to stall the 3rd Respondent from exercising its remedies as a chargee. That the application was dismissed vide the court's ruling delivered on 19th June 2024. That the supposition by the applicant that the suit property belongs to Christopher Ogola Osongo is not verifiable as no document has been produced to show the alleged fraud and illegality by the 1st Respondent.
5. That the application is an abuse of the court process solely meant to deny the 3rd Respondent its right to realize the security. That the 3rd Respondent and its customers stand to be greatly prejudiced should the orders sought be granted as the 1st Respondent is still indebted to the 3rd Respondent.

The application was argued by way of written submissions.

6. It was submitted on behalf of the Applicant vide the written submissions dated 22nd October, 2024 filed by the firm of Mbeka & Associates that the applicable principles of law in determining whether or not to grant the order of temporary injunction were set out in the case of *Giella -vs- Casman Brown Ltd & Another* [1971] E.A.
7. Counsel relied on the case of *Mrao Limited -vs- First American Bank of Kenya Ltd & 2 Others* [2003]eKLR on the definition of prima facie case. Counsel submitted that the Applicant is the son and an administrator of the estate of the late Cyrillus Christopher Ogolla Osongo who died intestate on 3rd July, 1983. That prior to his death, the deceased acquired the suit property title Kisumu/municipality Block 8/105 from the Industrial and Commercial Development Corporation on or about 1st August, 1977.
8. That upon acquisition of the property, instead of the property being registered in his own name, on or about 6th September, 1979, the 2nd Respondent deliberately registered the suit property in the name of the late Cyrillus Christopher Aoko Ogolla and the 1st Respondent who was still a minor by then which actions were illegal and fraudulent.
9. That on 8th December, 2011 the suit property was transferred from the deceased's name to that of the 1st Respondent yet at that time, the suit property was still an asset up for distribution in the estate of the deceased in Kisumu High Court Succession Cause No.282 of 2000.
10. That the Applicant was registered as the sole owner of the property on 10th September, 2021. That the 1st Respondent on or about 10th September 2021 and 22nd February, 2022 secured loans of Kshs.30,000,000 and 6,000,000 respectively using the suit property as collateral. That the 1st



- Respondent has failed to settle the loan and the 3rd Respondent through the 4th Respondent has listed the property for sale by public auction.
11. That the 1st Respondent had no rights of using the said property to secure the loans in his own name to the detriment of the other beneficiaries.
 12. That the application raises a fundamental issue that touches on the right to property as enshrined in article 40 of *the Constitution* which the court can only determine after hearing all parties. That it is in the interest of justice that an interim order of injunction be granted pending the hearing and determination of the suit so as to preserve the substance of the suit.
 13. Counsel further submitted that the Applicant stands to suffer if the order of injunction is not granted as the sale by public auction will proceed before hearing of the suit herein and determination of the main issues in the suit. That the applicant who resides on the suit property will be evicted and rendered homeless.
 14. Counsel relied on the cases of Joseph Siro Mosioma -v-s Housing Finance Company Limited & 3 Others (2008)eKLR and Said Almed -vs- Manasseh Benga & Another [2019] eKLR – and the case of Robert Mugo Wa Karanja -vs- Eco Bank (Kenya) Limited & Another [2019]eKLR.
 15. Counsel submitted that the balance of convenience tilts in favour of granting the orders sought and that it is in the interest of justice that costs be awarded to the Applicant.
- No submissions were filed by the 1st & 4th Respondents.
16. The 2nd Respondent indicated that it was not participating in the application.
 17. It was submitted on behalf of the 3rd Respondent that a party seeking interim injunctive relief should satisfy the 3 conditions set down in the case of Giella -vs- Cassman Brown. That the present application ought to be interrogated against those conditions. That the Applicant has alleged that there was a fraudulent transfer of Kisumu Municipality Block 8/105.
 18. That it is not in question that the registration of the property in the joint names of the parties was done during the lifetime of Cyrillus C. Ogolla Osongo. That no evidence has been produced that the late Cyrillus did not intend the property to be registered jointly in his name and the name of his wife.
 19. That the allegation that the 1st Defendant in collusion with the 2nd Defendant caused registration of the title in the joint name of Cyrillus and his wife is unreasonable considering that the 1st Defendant was a minor at the time. That it is clear that the property was registered for the benefit of the three parties and clearly indicated as a joint proprietorship in the white card.
 20. Relying on the provisions of sections 101, 102 and 103 of the Registered *Land Act* Cap 300 Laws of Kenya (now repealed), Counsel submitted that after Cyrillus C. Ogolla Osongo and his wife died as shown in the certificates of death and that the 1st Defendant survived them. That accordingly by operation of law, after the death of Cyrillus C. Ogolla Osongo, the proprietorship of the suit land vested in the 1st Defendant and his mother Susan Aoko Ogola and subsequently upon the death of the 1st Defendant's mother the property vested in the 1st Defendant.
 21. That the Applicant has therefore failed to demonstrate a prima facie case. Counsel relied on the case of Nguruman Limited -vs- Jan Bonde Nielsen [2014] where the court held that if a prima facie case is not established, then irreparable injury and balance of convenience need no consideration.
 22. That the Applicant has failed to demonstrate the injury he will suffer, in the event that the order of injunction is not granted. That the injury the Applicant claims he will suffer is speculative because



the property clearly belongs to the 1st Defendant by dint of surviving the other joint owners. That the application does not meet the conditions for grant of the orders sought. Counsel urged the court to dismiss the application with costs.

23. I have carefully considered the application, the grounds raised in opposition thereof and the rival submissions.

24. The grounds for grant of an interlocutory injunction were set out in the case of *Giella vs Cassman Brown Co. Ltd* (1973) 358 that firstly, the Applicant must establish a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the Applicant would suffer irreparable injury which would not adequately be compensated in damages and thirdly, that when the court is in doubt, it will decide the application on a balance of convenience. A prima facie case was defined by the Court of Appeal in *Mrao Ltd vs First American Bank Kenya Ltd & 2 Others* [2003] eKLR as follows:

“a prima facie case in a civil Application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

25. The Applicant’s case is that in the first instance, the suit land was fraudulently registered by the 2nd Defendant in the joint names of the Cyrillus C. Ogola Osongo, Susan Aoko Ogola and the 1st Defendant instead of Cylillus C Ogola Osongo only. That secondly, the 1st Defendant obtained registration of the suit land fraudulently in his sole name and caused it to be charged to the 3rd Defendant.

26. The copy of register (white card) annexed to the Supporting Affidavit shows that on 6th September, 1979 the suit land was registered in the names of Cyrillus C. Ogola Osongo, Susan Aoko Ogola and Augustine Anyango Ogola (minor) as joint proprietors of P.O. BOX 182 Homa-Bay and that certificate of lease in respect of the land was issued to them on 10th November, 1979. It shows that on 8th December, 2011 the land became registered in the sole name of Ogola Augustine ID No.xxxxx and title issued to him on the same date.

27. As correctly submitted on behalf of the Applicant, joint registration under the provision of section 101 to 103 of the Registered *Land Act* (repealed) is subject to the doctrine of survivorship. Under the doctrine of survivorship, when a joint owner of a property dies his or her interest in the property automatically passes to the surviving joint owner(s). In the case of *Isabel Chelangat vs Samuel Tiro Rotich & 5 Others* (2012) eKLR it was held that

“a joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights as against everyone else, they are in a position of a single owner. Joint tenancy carries with it the right of survivorship and the four unities. The right of survivorship (*jus accrescendi*) means that when one owner dies his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under a Will or Intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. The four unities that must be present in a joint tenancy are:

- i. the unity of purpose
- ii. the unity of interest



- iii. the unity of title and
 - iv. the unity of time.
28. Similarly, in *Re Estate of Johnson Njogu Gichohi* (Deceased) 2018 eKLR the court stated that
- “By the principle of survivorship, land owned jointly passes automatically to the surviving owner when one dies without the need to file a Succession Cause.”
29. I have carefully considered the contents of the Supporting Affidavit, and the submissions made on behalf of the applicant. I find no proof of fraud or illegality in the registration, transfer and charging of the suit land, at least to the required degree for purposes of the application. The burden of proof rests with the applicant. The prima facie case I find is that the suit land was registered in the names of the deceased persons and the 1st Respondent as joint owners and therefore subject to the doctrine of survivorship. The information contained in the white card, exhibited by the applicant, that the property was jointly owned by the deceased and the 1st Respondent has not been challenged. There is no evidence that the joint ownership was ever terminated or severed.
30. The suit land is currently charged to the 3rd Defendant and nothing has been presented so far to show that the charging was unlawful. The balance of convenience tilts in favour of not interfering with the current status pending the hearing and determination of the suit.
31. The application dated September 16, 2024 is therefore hereby dismissed. Costs to the 3rd Respondent. Orders accordingly.

RULING DATED AND SIGNED AT KISUMU AND DELIVERED THIS 16TH DAY OF JANUARY, 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

**E. ASATI,
JUDGE.**

In the presence of:

Ajevi/Alex: Court Assistant.

Mbeka for the Plaintiff/Applicant

Odiyo for the 3rd Defendant/Respondent.

No appearance for the 1st, 2nd and 4th Defendants/Respondents.

