



Limuru Hills Limited (In Receivership) v Muriithi & another (Jointly sued as the legal representative of the Estate of Martha Wangui Muriithi) (Environment & Land Case E223 of 2023) [2024] KEELC 133 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEELC 133 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E223 OF 2023
AA OMOLLO, J
JANUARY 24, 2024**

BETWEEN

LIMURU HILLS LIMITED (IN RECEIVERSHIP) PLAINTIFF

AND

GRACE NYAGURA MURIITHI 1ST DEFENDANT

ANNE WANGECI MURIITHI 2ND DEFENDANT

**JOINTLY SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF
MARTHA WANGUI MURIITHI**

RULING

1. The Plaintiff/Applicant filed a Notice of Motion Application dated 20th June, 2023 seeking for orders that:
 - i. Spent.
 - ii. There be a temporary prohibitory injunction pending the hearing and determination of the suit, restraining the estate of Martha Wangui Muriithi (deceased) through the Defendants, the deceased's family members, servants, agents or employees from entering onto, remaining on and in any way trespassing into LR No. 2951/37 - Nairobi in Lower Kabete.
 - iii. There be an interlocutory mandatory injunction pending the hearing and determination of the suit, compelling the estate of Martha Wangui Muriithi (deceased) through the Defendants, the deceased's family members, servant, agents or employees to, within fourteen (14) days of this order, give vacant possession of, and to remove at their cost, all structures erected by any and all of them on LR No. 2951/37 - Nairobi in Lower Kabete.



- iv. In default of compliance with order 3 above, the Plaintiff be at liberty, through the Court Bailiff, to evict the estate of Martha Wangui Muriithi (deceased) through the Defendants, the deceased's family members, servant, agents or employees from LR No. 2951/37 - Nairobi in Lower Kabete, and the OCS Spring Valley Police Station to maintain law and order during the eviction.
 - v. The costs of this application be awarded to the Plaintiff.
2. The application is based on the grounds set out on the face of it and on the supporting affidavit sworn on 20th June, 2023 by Mandhav Bhandari who swore that he is the Plaintiff's Receiver and Manager. He deposed that the Plaintiff is the registered owner of LR No. 2952/37 - Nairobi measuring 5 acres (the suit property) and had the title thereto, which it charged to Equity Bank Kenya Limited on 2nd July, 2015 to secure a loan of KShs. 451,000,000/- resulting into a floating debenture. That the Plaintiff defaulted in repaying the loan causing his appointment as the receiver & manager over its undertakings including the suit property.
 3. Mr Bhandari deposed further that he has been unable to access the suit property because of denial of access by a security guard appointed to man the entrance by the estate of Martha Wangu Muriithi (deceased), or her heirs or agents including the Defendants. He averred that he issued a notice pursuant to Section 152E of the Land Act, 2012 requiring the estate of the deceased including the Defendants to give vacant possession of the suit property, to no avail. He further stated that after the registration of the Charge, the deceased unlawfully registered a caveat over the suit property on 24th August, 2017. That the deceased's unregistered interest, if any, cannot be grounds for denying the Plaintiff access to its property.
 4. In response, the Defendants filed grounds of opposition and preliminary objection dated 6th July, 2023 in opposition to the application. They contended that the suit as filed does not comply with the mandatory statutory provisions of Order 3 Rule 2, Order 4 Rules 1(4) & (6) of the Civil Procedure Rules and Section 19 of the Civil Procedure Act. That the suit contravenes the provisions of the Companies Act and the Civil Procedure Act and Rules. Further, that the suit relates to LR No. 2951/37 - Nairobi yet the documents annexed to the supporting affidavit of Mandhav Bandari relate to LR No. 4967/37 - Limuru and LR 4967/38 - Nairobi that have nothing to do with the Defendants or the suit property.
 5. In addition, the Defendants averred that the two demand letters dated 7th November, 2022 and 21st February, 2023 were both written after the demise of Wangui Murithi, and it is only the initial letter related to the suit property, which is not among the charged properties. They averred that there was no prima facie case to warrant the issuance of the orders sought or establish trespass as alleged. It is their case that the Plaintiff had not exhibited title to the suit property to establish ownership. Hence, the application did not meet the threshold for grant of an injunction under *Giella v Cassman Brown* principle, is incompetent and should be dismissed with costs.
 6. The Plaintiff filed a Supplementary Affidavit sworn on 7th August, 2023 admitting to erroneously annexing the wrong title in his supporting Affidavit. He thus annexed the correct copy of title to LR No. 2951/37 - Limuru. The Defendants also filed a Further Affidavit sworn on 21st September, 2023 by Anne Wangechi Muriithi, who is a co-administrator of the Deceased's estate. She deposed that LR Number 2951/37 - Nairobi was registered on 24th June, 2015 to the late Ishmael Elijah Muriithi and is their family home. Under the Law of succession Act, Martha Wangui Muriithi, their late mother and a co-administrator of his estate, only held life in the property and had no legal authority to transfer the family property without consent of the beneficiaries or an order of the court hence the transfer was a



nullity. Further that the transfer of the family property was done way after the registration of the said Charge and Debenture and it did not form part thereof.

7. The Application was canvassed by way of written submissions. The Plaintiff's submissions are dated 5th September, 2023 whereas the Defendants' submissions are dated 21st September 2023.

Plaintiff's Submissions

8. To the allegation that the suit did not comply with Order 3 Rule 2, the Plaintiff submitted that the only document that was not filed with the Plaintiff was a witness statement but the omission was not fatal as per the proviso to the said rule. For compliance with Order 4 Rule 1(4), it was submitted that the Plaintiff had an authority to plead filed in court together with the Plaintiff. The Plaintiff also submitted that the alleged violations to the Civil Procedure Act and the Companies Act were not established. In addition, that in Multi Options Limited v Kalpana S. jai & 2 Others (2009) eKLR and in Nita Ganatra v Shimmers Plaza Limited & Another (2001) eKLR, the courts found the contention that a receiver requires the authority of the Company's Directors to be wrong.
9. Counsel acknowledged that an interlocutory mandatory injunction is granted only in special cases (Shariff Abdi Hassan v Nadbif Jama Adan (2006) eKLR). He submitted that in the instant case, the Plaintiff is the registered owner as shown by the title annexed to the supplementary affidavit and an official search also filed in court, which under Section 35 of the Land Registration Act is *prima facie* evidence that the Plaintiff is the registered owner of the suit property. Further that the Defendants' only interest is the caveat, which was registered after the charge, thus under Section 36(5) is inferior to the Chargee's interest (Monica Waruguru Kamau & Another v Innerscity Properties Limited & 2 Others (2020) eKLR and Rahans Investments Limited v Amaranth Enterprises Limited (2009) eKLR).
10. Counsel further submitted that it is enough that the late Martha Wangui Kariuki's grant was confirmed on 3rd October, 1986 thus the disposal of the land was valid, and that was why she only claimed interests over some houses. That the Plaintiff has established special circumstances to warrant grant of the orders sought. Counsel also cited Lochab Brothers v Kenya Furfural Co. Ltd (1983) eKLR on the authority of a receiver to plead and urged the court to find merit in the application and allow it.

Defendant's Submissions

11. In response, the Defendants submitted that the Plaintiff's suit is fatally defective for failure to comply with the mandatory provisions of Order 3 Rule 1 & 2 and Order 4 Rule 1(2) of the Civil Procedure Rules. Counsel explained that the gist of their Preliminary Objection is that the entire suit offends Section 19 of the Civil Procedure Act and provisions of the Companies Act in relation to a company in receivership, which require a resolution be made before a suit is instituted yet none has been attached to the application. Further that a Debenture must specifically identify the Company and Assets except in the case of a Floating Debenture over the trading assets of a Company. However, the charged assets in respect of the Debenture herein do not include LR No. 2951/37 - Nairobi. They added that under Section 35 and 37 of the Law of Succession Act, the late Martha Wangui only held a life interest over the suit property thus had no legal capacity to transfer the suit property to the Company.
12. The Defendants submitted further that for mandatory injunctions, a court must go beyond the establishment of a *prima facie* case and averred that there were serious doubts of the existence of the alleged Charge dated 2nd July, 2015. Reiterating the averments in the Grounds of Opposition, Counsel submitted that the Court cannot grant the injunctions sought over the suit property which has been their home for over 50 years. Counsel challenged the transactions between the late Martha Wangui Muriithi and the Plaintiff and pointed to an alleged non-disclosure and concealment of material facts



by the Plaintiff. It is the Defendants' submissions that the Plaintiff had failed to establish the threshold for grant of a prohibitory injunction or the higher threshold for a mandatory injunction. They urged the court to dismiss the application for violation of technical legal requirements and strike out the Plaintiff for lacking merit.

Analysis and Determination

13. I have carefully read and critically put into account all the filed pleadings, the well written submissions, cited authorities relied on and the relevant provisions of the appropriate and enabling laws and have framed the following issues for determination: -
- a. Whether the Preliminary Objection has merit?
 - b. Whether the Plaintiff is entitled to injunctive reliefs sought?
 - c. Costs of the Application.

Whether the Preliminary Objection is merited?

14. A Preliminary objections must be purely on points of law as was held in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors* (1969) E.A 696 in which it was held thus:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

15. The Defendants have alleged a lack of Compliance with Section 19 thereof which provides that “every suit shall be instituted in such manner as may be prescribed by rules”, as well as other mandatory provision of the *Civil Procedure Rules*. The first point on contention is that the suit does not comply with Order 3 Rule (1) which requires that every suit filed must indicate the track of the case, as well as Order 3 Rule 2 which lists the documents to accompany suit and provides that:-

“All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by-

- (a) the affidavit referred to under Order 4 rule1(2);
- (b) a list of witnesses to be called at the trial;
- (c) written statements signed by the witnesses excluding expert witnesses; and
- (d) copies of documents to be relied on at the trial including a demand letter before action:

Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.”

16. With regards to failure to indicate the case track as required under Order 3 Rule 1, Courts have held that this violation is not fatal to a suit. In *Puffins Investment Limited v Kishoro Leponyo Ntiapuyok & 2 Others* (2013) eKLR, the court held that failure to indicate the “case track” on the heading of the plaint is a matter of want of form and is curable under Order 2 Rule 4 of the *Civil Procedure Rules*. Secondly, failure to comply with Order 3 Rule 2 is also not fatal. It is cured by the proviso to Order 3 Rule 2 as read with Order 11 of the *Civil Procedure Rules*. The intention of a pre-trial conference under Order



- 11 is to find out whether the suit is ready for hearing and to sort out all preliminaries including the filing of a List of Witnesses, List of Documents as well as Witness Statements.
17. Order 4 Rule 1(2) on the other hand provides that “the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above”. For purposes of clarity, Order 1 Rule 1(f) provides that the Plaint should contain an averment that:-
- “...an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.”
18. Dealing with a similar objection, the court in *Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited* (2016) eKLR had this to say:-
- “9. Order 4 Rule (2) on the other hand, requires that the verifying affidavit shall verify the correctness of the averment in respect to pending and previous proceedings. To my mind, it is sufficient that the verifying affidavit simply verified the averments in the Plaint to be correct, including the aforementioned averment. The purpose of such an averment is to guard against the Plaintiff pleading a falsehood. I have seen the verifying affidavit filed in herein and note that, though the same does not contain the clause with respect to pending and previous proceedings, the averments in the Plaint are confirmed to be correct and true by the accompanying verifying affidavit at paragraph 2. As such, it is my view that the contents of the Plaint herein having been verified as correct, nothing much turns on the objection that Order 4 Rule 2 was flouted.”
19. In any event, the Plaintiff could not have sworn that there have been no previous proceedings between the parties as the Defendants themselves have admitted that there was Nairobi ELC No. 120 of 2023. This fact is also explained at paragraph 21 of the Plaint. However, since the Plaint does contain the averment in respect to previous proceedings, and the Verifying Affidavit verifies that the contents of the Plaint are correct and true, then this court finds that the Plaint as filed is sufficiently verified.
20. In addition to the foregoing discussions, the Defendants at Paragraph 10 of their submissions have called for the dismissal of the application for what they have termed as ‘technical legal grounds’ for violation of the provisions of the *Civil Procedure Act* and Rules. The Defendants are thus reminded that this court, in all its dealings is to be guided by Article 159 (2) (d) of *the Constitution* states that “justice shall be administered without undue regard to procedural technicalities”.
21. In determining the ground objection that the suit offends provisions of the *Companies Act*, I find that the Defendants did not clearly state the exact provisions of the *Companies Act* that the Plaintiff failed to comply with. However, at paragraph 4 of the Submissions, the Defendants submitted that the appointment of the receiver does not take away the requirement that a resolution must be made by the Members/Shareholders of the company before institution of a suit, and the resolution exhibited with the pleadings, which was not done here. In ordinary circumstances, where a company is not under receivership, it is mandatory that there should be a resolution passed by either the Shareholders of the company or Board of Directors authorizing the proceedings. The Plaintiff however is in receivership.
22. Therefore, once the receiver is appointed under a Debenture, the receiver/manager became an agent of the company and was entitled to institute a suit in the name of the company without first procuring a resolution. The court in *Multi Options Limited v Kalpana S. Jai & 2 Others* (2009) eKLR, dealt with



a similar situation, where upon appointment, a Receiver/Manager instituted proceedings in the name of the Company, and which action was opposed by the Directors. Lesiit J. (as she then was) held thus: -

“I am satisfied that the Receiver was authorised to take the proceedings in the name of the company, being an agent of the company. Under the Debenture the receiver has power to take care of and receive the property of the Plaintiff Company under his charge. The Debenture, having crystallized, gave the Receiver Manager the necessary authority to bring these proceedings. The appointment of the Receiver Manager is governed by the Debenture and not the *Companies Act* per se. I am satisfied that the appointment of the Receiver Manager having been done by the Debenture are lawful and that therefore the Receiver Manager has the locus standi to bring these proceedings.

I can understand why the Defendants are challenging the locus of the Receiver Manager to institute these proceedings being directors of the Plaintiff Company. The suit has not been brought under the *Companies Act*. Secondly, the Receiver Manager is an agent of the Plaintiff company to take care of the assets of the company. It was not necessary for the directors of the company who include the Defendants in this suit to give permission to the Receiver to institute the proceedings, neither was their permission required in order to validate the proceedings. The action that has been brought by the Receiver Manager is in the Plaintiff's company interest.” (underline mine for emphasis).

23. The Deed of Debenture annexed to the Supporting Affidavit clearly states that the Bank appointed the Receiver/Manager in pursuance of the power given under the Debenture. Clause 2 of the Deed of Appointment of the Receiver is clear that the Receiver/Manager is an agent of the borrower, who is the Plaintiff herein. Consequently, and further going by the above decision, once appointed, a Receiver/Manager is governed by the terms of the Debenture and not the *Companies Act*. The allegations of violations of the provisions of the *Companies Act* cannot arise, which then divests the objection of any merit.

Whether the Plaintiff is entitled to the injunctive reliefs sought?

24. It is clear from the motion that although the applicant is seeking for mandatory orders i.e, an interlocutory order of prohibitive injunction and the grant of a mandatory injunction. Prayer (a) of the application wants the Defendants not to enter or remain on the suit property and at the same time in prayer (b) the Applicant wants them to surrender vacant possession. Both orders are intended to achieve vacant possession of the suit property and not to preserve the suit property pending determination of the suit which is the purpose of a temporary order of injunction.
25. Setting out the distinction between the two injunctions, Naikuni J in *Bandari Investments & Co. Ltd v Martin Chiponda & 139 others* (2022) eKLR cited the case of *Shepard Homes v Sandham* (1970) 3 WLR Pg. 356 in which Megarry J. as he then was stated follows:-

“Whereas a Prohibitory Injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials if it is ultimately established that the Defendant was entitled to retain the erection”.

26. The first issue for determination is whether or not the Plaintiff has laid out a case to be granted the interlocutory prohibitory injunction sought. The Plaintiff avers that it owns the suit property and has annexed to its supplementary affidavit a copy of a Conveyance dated 28th May, 2015. That the Plaintiff



- offered the property as security over a charge to Equity Bank Ltd to secure a loan advanced to it. Having failed to repay the monies owed by the Company, the Bank appointed a receiver/manager who filed the current suit, and has explained that the property is to be sold to repay the loan.
27. On the other hand, the Defendants aver that the suit property is their family home and has been so for over 50 years. It is their case that the suit property belonged to their late father, Ishmael Elijah Muriithi with their mother Martha Wangu Muriithi- deceased, as one of the co-administrators of their father's estate. They allege that as a spouse she only had a life interest over the suit property under Section 35 of the *Law of Succession Act*, which upon her death would have devolved to the children of the deceased equally. It turns out that the Late Martha Wangu Muriithi sold the property to the Plaintiff Company. Indeed, the Plaintiff has annexed the Conveyance showing that the property was transferred from the Estate of the late Ishmael Elijah Muriithi, and only one administrator, Martha Wangu Muriithi-deceased signed the conveyance.
28. It is not in doubt that the Defendants have possession of the suit property. Once the assets of the deceased are vested in the administrators, the said administrators would then be entitled to exercise the powers conferred upon them by section 82, and they are subject to the duties that are imposed by section 83. The said section 83 of the *Law of Succession Act* lists the duties of the personal representatives. The question whether or not the sale and transfer of the suit property was irregular or otherwise can only be determined at the hearing of this case. Consequently, if the orders sought by the Plaintiff are granted at this interlocutory stage, it will definitely put the Defendants to a disadvantage.
29. Even though the Plaintiff in its submissions have stated that the Grant was confirmed on 3rd October, 1986, this court has not seen a copy of the alleged Grant of representation or the Certificate of Confirmation thereto. The Plaintiff has also admitted in its submissions that although the late Martha Wangu did not challenge the disposition, she did claim interest over some houses, which is possibly why she placed a caveat on the property claiming a purchaser's interest. The conclusion to be drawn from the above analysis is that although the Plaintiff is the current registered owner, the Defendants have raised triable issues. It is inferred that this is not a simple and clear case.
30. Turning to the prayer for a mandatory injunction, the principles that govern the grant of mandatory injunctions were laid down in the case of *Locabail International Finance Limited v Agro-Export & Another* (1986) 1ALL ER 901 as follows:-
- “A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”
31. The Court of Appeal in the Case of *Malier Unissa Karim v Edward Oluoch Odumbe* (2015) eKLR articulated as follows:-
- “The threshold in mandatory injunctions is higher than the case of prohibitory injunction and the Court of Appeal in the case of Kenya Breweries Ltd-v- Washington Okeyo (2002) EA 109 had the occasion to discuss and consider the principles that govern the grant of a



mandatory injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-

A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application’.”

32. Although Courts have power to grant a temporary mandatory injunction on an interlocutory application but the power is to be exercised only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. The court must also consider whether the act done is a simple and summary one which can be easily remedied or whether the Defendant attempted to steal a march on the plaintiff. In most cases, a mandatory injunction is granted in an interlocutory application to restore status quo and not to establish a new state of things.
33. In this suit, the Defendants are the ones in possession of the suit property and the Plaintiff now wants them compelled to not only give vacant possession but also remove any structures they have built on the suit property pending the determination of the suit. This in essence means that granting the mandatory injunction would not be to restore the status quo, but establish a new state of things. In [*James Maina Kimemia v James Maina Kimemia & another*](#) [2019] eKLR, the court held that:-
- “The evidence as gleaned from the material before the Court in the lower Court and the suit is that the Appellant and the 2nd Respondent have been in occupation of the suit land for over 20 and 15 years respectively. They have annexed photographs to show the developments on the suit land. The 1st Respondent has not contested this. He has alluded to the same as well. It would therefore be misplaced to grant such orders which effectively would be eviction orders. I agree with the submissions of the Appellant in that regard. It will lead to unintended and or undesired outcome of evicting the Appellant and the 2nd Respondents before the suit is heard. It is tantamount to granting a permanent or mandatory injunction as well as determining the suit at the interlocutory stage.”(underline mine for emphasis).
34. Thus, the Defendants are the ones likely to suffer an immediate injury/damage in the event that the said orders are granted at this stage. There is no telling at this point how this suit will be determined. On the other hand, apart from the outstanding loan, the Plaintiff has not shown any injury so immediate as to result in grave hardship unless and until a mandatory injunction is granted at an interlocutory stage. If mandatory injunction is granted on this motion, it will have the drastic consequence of giving the Plaintiff the eviction and demolition which orders are being sought in the suit.
35. For the reasons stated in the preceding paragraphs, it is the court’s finding that no compelling factors have been established that would warrant the grant of a mandatory injunction at this stage. Notably also, the provisions of the [*Civil Procedure Rules*](#) are clear that an injunction is to be granted where the property is under threat of wasting, being disposed of or otherwise likely to be removed from the jurisdiction or reach of the court. That is not the case obtaining in the instant application as there is no evidence presented to prove that the Defendants were in the process of and or are likely to dispose of the suit property.
36. Despite the foregoing finding, the Court under section 3, 3A of the [*Civil Procedure Act*](#) and Order 40 Rule 1 of the [*Civil Procedure Rules*](#) has discretion to make any order for purposes of preserving



the suit property so that the ends of justice are met before the suit is heard and determined on merit. Consequently, I make following orders that:

- a. The Notice of Motion dated 20th June, 2023 is dismissed.
- b. The Preliminary Objection dated the 6th July, 2023 lacks merit and is dismissed.
- c. An order that the status quo prevailing as at the date of delivery of this ruling be maintained, which order, for the avoidance of doubt shall entail the following:

“ That there shall be no further constructions or development on the suit property or any portion thereof by the Defendants or anyone claiming under them or the estate of the late Martha Wangui Muriithi or the Estate of the late Ishmael Elijah Muriithi pending determination of this suit”

- d. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2024.

A. OMOLLO

JUDGE

