



**Waruingi & another v Allied Group for Business Investment Limited & 3 others
(Environment & Land Case 981 of 2015) [2024] KEELC 77 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 77 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 981 OF 2015
OA ANGOTE, J
JANUARY 18, 2024**

BETWEEN

SHIKU WARUINGI (SUING AS THE LEGAL ADMINISTRATOR OF THE LATE RICHARD WARUINGI MUNGAI) 1ST PLAINTIFF

GEORGE MACHEHO MUNGAI (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF STEPHEN MUNGAI KAMAU) 2ND PLAINTIFF

AND

ALLIED GROUP FOR BUSINESS INVESTMENT LIMITED 1ST DEFENDANT

THE CHIEF LAND REGISTRAR 2ND DEFENDANT

BEN NJAU KAYAI T/A NJAU KAYAI & CO ADVOCATES 3RD DEFENDANT

ROGER OTIENO SAGANA & ABDIWAHID AHMED BIRIQ T/A SAGANA, BIRIQ & CO ADVOCATES 4TH DEFENDANT

RULING

1. The 1st Defendant/Applicant has filed a Notice of Motion application dated 11th April 2023 seeking the following orders:
 - a. That the 2nd Plaintiff be restrained by an order of injunction from collecting the rent from the tenants in the suit property LR No. 36/III/13 and 36/III/96 pending the hearing and determination of the suit.
 - b. That the rent being collected from the suit property be collected by a reputable real estate agent and deposited in court pending the hearing and determination of the suit.



- c. hat the court gives directions for an expedited hearing as the 1st Defendant's directors are keen to take possession and develop the property.
2. The application is based on the grounds that the 2nd Plaintiff, as the administrator of the estate of Stephen Mungai (deceased), is collecting the rental income from the suit property to the detriment of the 1st Defendant/Applicant as the registered owner and delaying the prosecution of the claim.
3. According to the 1st Defendant/Applicant, the capacity of the 2nd Plaintiff as an administrator has been challenged in Succession Cause No. 434 of 2016 In the matter of the estate of Stephen Mungai Kamau (Deceased) and that the hearing of this suit has been delayed since inception to date, which delay is prejudicial to the 1st Defendant who does not have vacant possession of the property despite being the bona fide purchaser.
4. In the Supporting Affidavit sworn by Abdi Abdullahi Ahmed, a director of the 1st Defendant Company, he deposed that the Plaintiffs have not been keen to set the suit down for hearing to the 1st Defendant's detriment; that the suit property was conveyed to the 1st Defendant and the Indenture of conveyance registered in its favour and that the 2nd Plaintiff has been unlawfully collecting the rental income from the suit property, a sum of four hundred thousand shillings (Kshs 400,000/-) per month, for the last three years and delaying the prosecution of this claim.
5. The 2nd Plaintiff, George Macheho Mungai, responded to the application vide a Replying Affidavit sworn on 24th April 2023. He deposed that the application is premature, misconceived and an abuse of the court process, which will only serve to delay the expeditious hearing and determination of this suit.
6. The 2nd Plaintiff deposed that the suit is set for pretrial conference on 13th June 2023, and the instant application will derail the scheduled conference as it will have to be postponed to dispose of the application and that the 1st Defendant's alleged conveyance is disputed and it is only after hearing of the suit that it will be possible to determine where the truth lies.
7. Mr. Mungai admitted that he has been collecting rent from the suit premises even prior to the alleged conveyance in favour of the 1st Defendant and that the mere fact that the 1st Plaintiff has filed an application to revoke the grant in the Family Division of the High Court does not mean that he should not continue to do so.
8. The 2nd Plaintiff argued that the proceedings in Succession Cause No. 434 of 2016- Estate of Stephen Mungai Kamau fall within the remit of the Family Division of the High Court and that the dispute before this court is the determination of whether the 1st Defendant acquired ownership of the suit premises lawfully, which falls squarely within its jurisdiction.
9. Mr. Mungai further deposed that the 1st Defendant's prayer to have rental income collected by a reputable estate agent and deposited in court pending the hearing and determination of this application is mischievous as this court on 9th May 2019 and 3rd December 2019 declined to grant similar orders as there was no basis for the grant of the same.

Submissions

10. Counsel for the 1st Defendant/ Applicant submitted that the Plaintiffs and the 1st Defendant entered into a sale agreement for the properties LR No. 36/III/13 and LR No. 36/III/96, (the suit properties) and that by an Indenture of Conveyance dated 11th May 2015, the suit properties were registered in the 1st Defendant's favor and a Certificate of Title was issued to the 1st Defendant.



11. It was submitted that the parties agreed that upon being given vacant possession, the balance of the purchase price in the sum of forty million shillings (Kshs 40,000,000/-) would be settled; that the 1st Defendant is ready and willing to pay the balance of the purchase price on vacant possession being given and that the original Plaintiffs failed to hand over the suit properties in vacant possession to the 1st Defendant.
12. Counsel submitted that the Plaintiffs' breach of their obligations under the sale agreement is an issue that can only be resolved after full hearing of the suit. They therefore argued that to safeguard the 1st Defendant's interests pending determination of this suit, interlocutory orders should issue so as to ensure that the suit properties are not interfered with to the 1st Defendant's detriment.
13. Counsel for the 2nd Plaintiff submitted that the 1st Defendant has not established a prima facie case and that the 1st Defendant's claim is by virtue of documents which the Plaintiffs contest in this suit and on which basis they have sought the cancellation of the registration of the 1st Defendant as the proprietor of the suit properties. They urge that these issues go to the very root of the claims by the Plaintiffs and the 1st Defendant.
14. With respect to the application pending before the High Court in Succession Cause No. 434 of 2016 filed by the 1st Plaintiff, the 2nd Plaintiff's Counsel submitted that the said application is in the court seized with the jurisdiction to determine issues relating to the estate of the deceased, and that this dispute should be determined by the evidence before it and nothing more.
15. It was the Plaintiffs' Counsel further submission that the deceased denied executing the sale agreement and the Indenture of Conveyance and additionally denied that he received the deposit of the purchase price as claimed by the 1st Defendant. Both parties relied on numerous authorities which I have considered.

Analysis and Determination

16. A brief background to this suit is that the Plaintiffs filed this suit on the basis that the suit properties were at all times registered in the name of the 1st Plaintiff and was held in trust for him by the 2nd Plaintiff, since 1969, through the execution of an Indenture of Conveyance.
17. The Plaintiffs aver that through an instrument dated 21st April 2015, purporting to be executed by the 1st Plaintiff, the 2nd Defendant unlawfully and fraudulently purported to sell the suit properties to the 1st Defendant. They consequently sought for an order of declaration that the 1st Defendant's purported acquisition of the suit properties was unlawful; and a mandatory injunction to issue compelling the Chief Land Registrar to cancel the purported proprietorship of the 1st Defendant.
18. The 3rd Defendant has filed a Statement of Defence and Counterclaim where it has denied the Plaintiffs' claims of fraud and averred that the 1st Defendant lawfully obtained title to the suit properties following conveyance from the Plaintiffs. The 3rd Defendant urges that the Plaintiffs no longer have interest in the suit properties and have trespassed on the same.
19. In its Counterclaim, the 1st Defendant has sought for specific performance of the agreement between themselves and the Plaintiffs and for the Plaintiffs to surrender vacant possession of the suit property.
20. The law on grant of interlocutory injunctions is found under Order 40 Rule 1 of the [Civil Procedure Rules](#), 2010 which provides as follows:

“Where in any suit it is proved by affidavit or otherwise–



- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution if any decree that may be passed against the defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

21. The locus classicus case of *Giella v Cassman Brown* (1973) EA 358 sets out the essential conditions to be satisfied for a court to issue injunctive orders:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

22. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would



arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

23. This court is guided by the above jurisprudence. In this application, the 1st Defendant is required to satisfy the following conditions: that they have a *prima facie* case with a likelihood of success; that if the application is not granted, they are likely to suffer irreparable damage which cannot be compensated by damages and that the balance of convenience tilts in their favour.
24. The 1st Defendant has averred that it has a *prima facie* case with a likelihood of success. It is their case that the Plaintiffs and the 1st Defendant entered into a sale agreement for the properties LR No. 36/III/13 and LR No. 36/III/96, and that by an Indenture of Conveyance dated 11th May 2015, the properties were registered in the 1st Defendant’s favor and a Certificate of Title was issued to the 1st Defendant.
25. According to the 1st Defendant, the parties agreed that upon being given vacant possession, the balance of the purchase price in the sum of forty million shillings (Kshs 40,000,000) would be settled; that the 1st Defendant is ready and willing to pay the balance of the purchase price on vacant possession being given; and that the original Plaintiffs failed to hand over the property in vacant possession to the 1st Defendant.
26. The 1st Defendant referred this court to Section 26 of the [Land Registration Act](#), which provides that a certificate of title is to be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner of that land. They further relied on the case of [Mohamed Ahmed Dabia & 3 Others v Abbey Hassan Maalim](#) [2020] eKLR, where Cheron J found that the certificate of title was *prima facie* evidence of ownership and granted the injunction sought, to maintain status quo in the interest of justice.
27. It is trite that where the legitimacy of a person’s title is questioned, such party should not just produce a copy of the disputed title. Rather, they must establish that they acquired the said title legally. This was succinctly articulated by the Court of Appeal in the case of [Munyu Maina v Hiram Gathiba Maina](#) [2013] eKLR, as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”
28. In this case, the Plaintiffs have challenged the 1st Defendant’s title on grounds of fraud. They assert that the signatures of the deceased were forged in the Sale Agreement and Indenture of Conveyance and that they never received the deposit of the consideration, as alleged.
29. The 1st Defendant, on its part, has filed a Counterclaim, where it claims that it met Stephen Mungai (deceased), whom they negotiated the sale and purchase of the suit property; that the 1st Defendant retained the services of the 3rd Defendant, while the deceased retained the services of the 2nd Defendant and that the 1st Defendant undertook the necessary due diligence and thereafter entered into a sale agreement with the Stephen Mungai with respect to the suit properties.



30. The 1st Defendant claims that it thereafter paid a sum of Kshs 20 million to the Plaintiffs, but they failed to deliver vacant possession. The 1st Defendant avers that it is a bona fide purchaser for value without notice and that the Plaintiffs ought to be made to honor the agreement they made.
31. In support of this case, the 1st Defendant has annexed various correspondences between the and 2nd and 3rd Defendants' advocates, copies of the 1914 and 1969 Indentures, copies of the national identification cards and PIN Certificates of the deceased, rates certificate, official search, RTGS for fourteen million shillings (Kshs 14,0000,000/-), valuation requirement for stamp duty, stamp duty declaration, assessment and pay-in-slip.
32. Until, the issue of whether the Plaintiffs (representing the vendors) signed the sale agreement is determined at trial, the documents before this court shows that there was a sale of the suit property to the 1st Defendant. On this basis, and without going into the merits of the suit, this court is satisfied that the 1st Defendant has established that it has a prima facie case with a likelihood of success.
33. The 1st Defendant has submitted that the 2nd Plaintiff is unlawfully collecting the rental income from the suit property, a sum of four hundred thousand shillings (Kshs 400,000/-) per month for the last three years.
34. The 2nd Plaintiff has rightly articulated that this court's jurisdiction is specialized and is limited to disputes relating to the environment and land, as set out under Article 162(2)(b) of *the Constitution* and the *Environment and Land Court Act*, 2011. It is trite that the estate of a deceased vests in their personal representatives, who have the capacity to file or defend a suit, as the case may be.
35. In this case, it is not disputed that the 2nd Plaintiff has a valid grant with respect to the deceased property. While such grant has been challenged, in the absence of a court order by the Family Court, revoking the grant issued to the 2nd Plaintiff, this court must find that the 2nd Plaintiff has a valid grant and is lawfully representing the deceased's estate and collecting rental income from the suit properties.
36. However, considering the contestation on the issue of ownership, the rental income from the suit property should be preserved pending the hearing of the suit. Indeed, the 1st Defendant is likely to suffer irreparable injury that may not be compensated by an award of damages unless the collectable rent is preserved, by having the same deposited in court.
37. Consequently, the 1st Defendant/Applicant has satisfied this court that the orders of injunction should issue preventing the 2nd Plaintiff from collecting rent from the suit properties pending hearing and determination of this suit.
38. For those reasons, the court makes the following orders:
 - a. The 2nd Plaintiff be and is hereby restrained by an order of injunction from collecting the rent from the tenants in the suit property LR No. 36/III/13 and 36/III/96 pending the hearing and determination of this suit.
 - b. The rent from the tenants in the suit property LR No. 36/III/13 and 36/III/96 shall be collected by a reputable and registered real estate agent, appointed by the parties' and such agent shall deposit the collected rent in court, less its statutory commission, every month pending the hearing and determination of the suit.
 - c. The said real estate agent to be appointed by the parties within 15 days of this Ruling, and if the parties do not agree on a real estate agent within the said 15 days, this court to make the said appointment.
 - d. Costs of the application to be in the cause.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF JANUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Kwamboka holding brief for Birig for 3rd Defendant

Mr. Issa for 1st Defendant/Applicant

Mr. Mulwa for 1st Plaintiff

Mr. Mbatha holding brief for Mr. Burungu for 2nd Plaintiff

Mr. Allan Kamau for Attorney General

Court Assistant - Tracy

