



Shah & another (Suing as Representatives of the Estate of Janendra Raichand Shah) v Awako Developers Ltd & 2 others (Environment & Land Case E022 of 2023) [2024] KEELC 943 (KLR) (27 February 2024) (Ruling)

Neutral citation: [2024] KEELC 943 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E022 OF 2023
NA MATHEKA, J
FEBRUARY 27, 2024**

BETWEEN

**KAMAL JANENDRA RAICHAND SHAH 1ST PLAINTIFF
VIKESH JANENDRA SHAH 2ND PLAINTIFF
SUING AS REPRESENTATIVES OF THE ESTATE OF JANENDRA RAICHAND
SHAH**

AND

**AWAKO DEVELOPERS LTD 1ST DEFENDANT
SHELKA INVESTMENTS LTD 2ND DEFENDANT
LAND REGISTRAR MOMBASA 3RD DEFENDANT**

RULING

1. The plaintiffs/applicants brought an application dated September 29, 2023 seeking an order against the defendants for the following;
 1. Spent.
 2. That pending the hearing and determination of this application, a temporary injunction does issue restraining the 1st and 2nd defendants/respondents by themselves, agents, servants, predecessors and successors in title, or anybody claiming through it from selling, charging and/or dealing with the property Mombasa/Block XXVI/203 in any way, including harassing and impeding the plaintiff's/applicant's possession and use of Mombasa/Block XXVI/203.



3. That the 3rd respondent be ordered to avail to the plaintiffs certified copies of the records in the parcel file and all the completion documents used to effect transfer from the late Janendra Raichand Shah to 2nd defendant's name.
 4. That pending the hearing and determination of this suit, a temporary injunction does issue restraining the 1st and 2nd defendants/respondents by themselves, agents, servants, predecessors and successors in title, or anybody claiming through it from selling, charging and/or dealing with the property Mombasa/Block XXVI/203 in any way, including harassing and impeding the plaintiff's/applicant's possession and use of Mombasa/Block XXVI/203.
 5. That costs of this application be provided.
2. The said application was immediately followed by a notice of preliminary objection by 1st and 2nd defendant dated 17/10/2023 for reasons that the plaintiffs had allegedly not obtained a grant of representation for the estate of the deceased and therefore had no locus standi. They also filed a grounds of opposition dated 17/12/2023 reiterating that the plaintiffs had no capacity to file a suit. The 2nd plaintiff filed a further affidavit and he averred that both plaintiffs obtained an ad litem grant on 28/9/2023 and filed the suit on 2/10/2023.
 3. Counsel for the 1st and 2nd defendant submitted that the plaintiffs had no locus standi and relied on *Julian Adoyo Onguga vs Francis Kiberenge Abano* Migori Civil Appeal No. 119 of 2015 as well as Order 3 rule 7 of *Civil Procedure Rules*. Counsel therefore argued that this suit was a nullity and needed to be struck out. Counsel for the plaintiffs reiterated their position that they had the ad litem grant before filing of the suit. Furthermore, counsel relied on *Giella vs Cassman Brown and Company* (1973) EA 358 on principles of interlocutory injunctions.
 4. I have considered the application, the replies thereto and submissions tendered in court and the issues arising:
 1. Whether the plaintiff had *locus standi* to file the instant suit?
 2. Whether the instant application can be granted or not?

Whether the Plaintiff had Locus Standi to File the Instant Suit?

5. The applicable law here is Order 3 rule 7 of the *Civil Procedure Rules* which state as follows:

“No claim by or against an executor or administrator, as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.”

Section 82 (a) of the *Law of Succession Act* states as follows;

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

- a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative.”



6. In the case of *Otieno vs Ougo & Another* (1986-1989) EARL 468; and in *Rajesh Pranjiran Chudasama vs Sailesh Pranjivan Chudasama* (2014) eKLR the Court addressed itself on the issue of Locus Standi in succession matters as follows: -

“... But in our view the position in law as regards locus standi in succession matter is well settled. A litigant is clothed with locus standi upon obtaining a limited grant or a full grant of Letters of Administration in cases of Intestate Succession.”

Further in *Otieno vs Ougo* (*supra*) the court rendered itself thus;

“...an Administration is not entitled to bring any action as administration before he has taken out Letters of Administration. If he does, the action is incompetent as the date of inception To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus means he cannot be heard, even on whether or not he has a case worth listening to”

7. The 1st and 2nd defendants are opposing the capacity of the plaintiffs for reasons that they lacked an ad litem grant at the time of the filing suit hence it has no cause of action and ought to be dismissed. I disagree with the defendants’ arguments as the suit revolves around the suit property where the deceased was the registered owner and had entered into an agreement with the 1st defendant but somehow the suit property was transferred by the 3rd defendant to the 2nd defendant before consideration as fully paid up as alleged. That is a cause of action as held in the *Drummond Jackson vs Britain Medical Association* (1970) 2 WLR 688; an authority relied on by the 1st and 2nd defendant. With respect to locus standi, the plaintiffs attached an ad litem grant marked “Vjs 1A” obtained in CMCC Misc E142 of 2023 where authority was granted to the 1st and 2nd plaintiff on 28/9/2023. The suit was filed on 2/10/2023 which is four days later. The plaintiffs therefore have locus standi.
8. On the instant application for interlocutory injunctions, the 1st and 2nd defendant opposed it on grounds that the plaintiffs do not have locus standi which argument the court has dismissed. The court is therefore left with determining the application on the strength of the statements in the supporting affidavit sworn on 29/9/2023. The guiding principles in *Giella vs Cassman Brown* (1973) EA 358 has been used in temporary injunction cases such as *Nguruman Limited vs Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a *prima facie* level, b, demonstrates 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 rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

A *prima facie* case has been explained in *Mrao Ltd vs First American Bank of Kenya Ltd* (2003) eKLR where the Court of Appeal stated that;

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”



9. In his afore mentioned supporting affidavit, the 2nd plaintiff stated attached a copy of title of the suit property (Vjs 1A) which was bearing the name of the deceased. He also attached a sale agreement (Vjs 2) between the deceased and the 1st defendant for sale of the suit property for Kshs. 145,000,000. He also attached a copy of search dated 15/8/2023 showing that the 2nd defendant is the registered owner. The plaintiffs allege that the 1st defendant did not complete payment yet the suit property was transferred to the 2nd defendant. This is clearly a *prima facie case*.

10. Secondly, The Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of [Pius Kipchirchir Kogo vs Frank Kimeli Tenai](#) (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a *prima facie case* is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

11. The 2nd plaintiff deposed in his afore mentioned supporting affidavit that he is apprehensive that the 2nd defendant may take steps in disposing of the suit property or even charge the suit property and that his elderly grandmother resides on the same might be severely affected in case of an eviction. In my view, this is sufficient demonstration of irreparable loss being occasioned to the Plaintiff.

12. Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of [Pius Kipchirchir Kogo vs Frank Kimeli Tenai](#) (2018) eKLR which defined the concept of balance of convenience as:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

13. In the case of [Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 others](#) (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus;

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an



injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

14. The balance of convenience tilts in favour of the plaintiffs because the deceased was the registered owner and they intend to bring evidence to disprove the ownership of the 2nd defendant as required by section 26 of the *Land Registration Act*. In *Amir Sulaiman vs Amboseli Resort Limited* (2004) eKLR the learned judge offered further elaboration on what is meant by “balance of convenience” and stated that;

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

15. In the upshot, the said preliminary objection is dismissed with costs to the 1st and 2nd defendant. I find that the application has merit and I grant the following orders;

1. That the 3rd respondent be ordered to avail to the plaintiffs certified copies of the records in the parcel file and all the completion documents used to effect transfer from the late Janendra Raichand Shah to 2nd defendant’s name.
2. That pending the hearing and determination of this suit, a temporary injunction does issue restraining the 1st and 2nd defendants/respondents by themselves, agents, servants, predecessors and successors in title, or anybody claiming through it from selling, charging and/or dealing with the property Mombasa/Block XXVI/203 in any way, including harassing and impeding the plaintiff’s/applicant’s possession and use of Mombasa/Block XXVI/203.
3. That costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF FEBRUARY 2024.

N.A. MATHEKA

JUDGE

