



**Ndolo (Suing as the Administrator of the Estate of David Mwau Ndolo - Deceased)  
v Nuni General Trading Company Limited; Ndolo & 4 others (Interested Parties)  
(Environment & Land Case E221 of 2022) [2024] KEELC 5584 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5584 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E221 OF 2022**

**LN MBUGUA, J  
JULY 25, 2024**

**BETWEEN**

**JOSEPH NGUI MWAU NDOLO (SUING AS THE ADMINISTRATOR OF THE  
ESTATE OF DAVID MWAU NDOLO - DECEASED) ..... PLAINTIFF**

**AND**

**NUNI GENERAL TRADING COMPANY LIMITED ..... DEFENDANT**

**AND**

**LUMUMBA MWAU NDOLO ..... INTERESTED PARTY  
PAULINE MWEONDO ..... INTERESTED PARTY  
BONIFACE KITUKU MWAU ..... INTERESTED PARTY  
PATRICK MUTINDA JAMHURI ..... INTERESTED PARTY  
HELLEN MUKUI NZOMO ..... INTERESTED PARTY**

**RULING**

1. The Interested Party’s application dated 28.2.2024 is for determination, whereby, her quest to be joined as an Interested Party (Prayer 2 in the said application) was allowed on 3.4.2024. In the other prayers, the interested party seeks a conservatory order directing that all rents and/or proceeds collected or deriving from the suit property known as LR No. 36/11/33 Eastleigh be deposited to this Court, or as the court may direct, pending hearing and determination of this suit. She also seeks a temporary injunction restraining the Defendants either by themselves, their directors, employees, agents, assigns or through whomsoever or howsoever from making any payments either as rent, deposit towards purchase or negotiation fees to any of the other beneficiaries pending the hearing and determination of the main suit.



2. The application is premised on grounds on its face and on the Interested Party's supporting affidavit sworn on 28.2.2024. She avers that together with the Plaintiff, they instructed the firm of Ochieng, Achach & Kaino Advocates to set aside a fraudulent grant in which one of their siblings had manipulated their elderly mother Teresia Ndolo to obtain a grant without involving all the children of David Mwau Ndolo (deceased). The contents in her affidavit are more or less similar to averments set forth by the plaintiff in his application dated 29.6.2022, where the court delivered a ruling on 20.12.2022.
3. She contends that the estate stands to be wasted and some beneficiaries disadvantaged if the Defendant continues distributing rent to some beneficiaries and not others.
4. The application is opposed by the Defendant vide the replying affidavit sworn on 2.4.2024 by its director, one Hussein Ibrahim Nuni. Similarly, the contents therein mirrors those in the deponent's replying affidavit dated 28.9.2022, filed in opposition to the application of the plaintiff dated 29.6.2022.
5. He contends that the applicant's main grievance is that she has not received her share of the rental income arising from the lease in issue. He points out that the 1<sup>st</sup> tranche of payments under the lease was made to the beneficiaries in the year 2022 but the 5<sup>th</sup> Interested Party's share could not be paid out immediately since she had not provided details of her bank account despite a request to do so but ksh. 200,000/= was collected on 2.2.2023 by the Plaintiff on her behalf. He has no problem in depositing the applicants share in court.
6. He avers that if orders sought are issued, they will disenfranchise and prejudice all other beneficiaries who are the majority and the defendant which has invested millions in developing the suit property and they will stand to suffer loss, thus it is in the interest of justice that the defendant be allowed to recoup its investments.
7. The 1<sup>st</sup> - 4<sup>th</sup> Interested Parties are also opposed to the application vide the 1<sup>st</sup> Interested Party's replying affidavit sworn on 2.4.2024. He avers that the lease agreement dated 18.10.2019 was lawfully concluded and duly signed by the estate of David Mwau Ndolo (deceased) and the Defendant herein.
8. That further, the terms of the lease agreement provided that the Defendant would develop a storey building which is already complete and occupied.
9. He avers that the Plaintiff being one of the administrators of the estate of David Mwau (deceased), agreed to the terms of the lease and even received the 1<sup>st</sup> payment of ksh. 200, 000/= and continues to receive his share and that of the 5<sup>th</sup> Interested party.
10. He also avers that the issues expressed by the 5<sup>th</sup> Interested Party have substantially been dealt with in the Business Rent Tribunal where the issues of rent collected from the suit property was handled to conclusion.
11. The Plaintiff did not file a response to the application.
12. In her submissions, the 5<sup>th</sup> Interested party relies on the case of *Invesco Assurance Co v MW (Minor Suing thro' next friend and mother (HW))* [2016] eKLR as well as the case of Board of management of *Uhuru Secondary school v City County Director of Education & 2 others* [2015] eKLR to argue that a conservatory order ought to be issued since it is unfair for rent to be collected and distributed from an illegally obtained lease, as the court is yet to determine the question of legality or otherwise of that lease.



13. It is also her submission that the test for grant of a temporary injunction as stated in *Giela v Cassman Brown* (1973) EA 358 has been met, and that she stands to lose her right to property as elucidated under Article 40 of the [Constitution](#) if the orders sought are not granted.
14. The Defendant's submissions are dated 19.4.2024 where it is argued that the 5<sup>th</sup> Interested Party has not established a prima facie case as defined in [Mrao Ltd v First American Bank of Kenta Ltd](#) [2003] eKLR. It is pointed out that she did not meet the cardinal principles of equity which is; "he who seeks equity must do so with clean hands" since she failed to disclose material facts being that she has already received ksh.200,000/= paid out of the lease.
15. The defendant also argues that the 5<sup>th</sup> Interested Party is abusing court process. It is pointed out that the present application is a recalibration of the Plaintiff's dated 29.6.2022 similarly filed by the firm of Liko & Anam Advocates who also represents the 5<sup>th</sup> Interested Party.
16. The Defendant relies on the case of [Satya Bhama Gandhi v Director of Public Prosecutions & 3 others](#) [2018] eKLR, [Peter George Antony D' Costa v Attorney General & Another](#) [2013] eKLR as well as the case of [Kivanga Estates Limited v National Bank of Kenya Limited](#) [2017] eKLR, as well as the case of [Pius Kipchirchir Kogo v Frank Kimelu Tenai](#) [2028] eKLR.
17. The 1<sup>st</sup> - 4<sup>th</sup> Interested Party's submissions are dated 17.5. 2024, where it is argued that the 5<sup>th</sup> Interested party has not met the threshold for grant of an injunction since she has no prima facie case based on the fact that all the beneficiaries of the estate had agreed on the terms of the lease herein.
18. That further, the loss that the 5<sup>th</sup> Interested Party stands to suffer is financial in nature which can easily be calculated, thus there is no irreparable loss.
19. To buttress their submissions, the 1<sup>st</sup> - 4<sup>th</sup> Interested Parties relied on the case of [George Muritu Gatheca v Family Bank Limited](#) [2017] eKLR as well as the case of [Amina Karama v Njagi Gachangua & 3 others](#) [2020] eKLR.

## Determination

20. I have considered all the issues raised herein including the rival submissions. On the prayer for issuance of conservatory orders, I find that the issue as to whether the lease subject of this case is fraudulent is a contested matter and the proper forum of ventilation, interrogation and determination of the said issue should and shall be at the hearing of the main suit. To this end, the court declines to issue a conservatory order that the rent arising from the lease be deposited in this court on the basis that the lease is fraudulent.
21. On the prayer for injunctive orders, the court finds that the orders sought are more or less similar to those sought by the plaintiff in his application dated 29.6.2022 in which the court rendered its verdict on 20.12.2022, where at paragraph 29 of the said ruling, this court stated as follows;
 

"It is instructive to note that the plaintiffs rights and interests over the suit property are intricately intertwined with such rights and interests of the other beneficiaries and he cannot therefore position himself as having a superior claim."
22. It is the finding of this court that the plaintiff and the 5<sup>th</sup> Interested Party are pushing to have a second bite of the cherry, seeing that the application of 29.6.2022 was not allowed. To this end, I am in agreement with defendant's submissions that the current application dated 28.2.2024 is a recalibration of the plaintiff's application dated 29.6.2022!



23. I also find that on 3.4.2024, this court directed the 5<sup>th</sup> Interested Party to liaise with the other parties for purposes of having ADR on issues pertaining to rental payments; the applicant was mute on this issue.
24. It is noted that the applicant sought to be joined as an Interested Party, which application was allowed. The parameters of such a party were set out in the case of *Francis Kariuki Muruatetu & Another v. Republic & 5 others*, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, where the Supreme Court held that;
- “The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as Interested Parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court.”
25. It follows that the applicant not being a primary litigant herein cannot present her case outside the parameters set out by the main protagonists, that is the plaintiff and the defendant.
26. All in all, the parties should desist from filing a plethora of applications which have the effect of derailing the resolution of the substantive issues; See *Lawrence Kinyua Mwai v Nyariginu Farmers Co Ltd & another* [2019] eKLR. In the end the application dated 28.2.2024 is dismissed with costs to the defendant and the 1<sup>st</sup> – 4<sup>th</sup> Interested Parties, save prayer 2 on joinder.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Muchoki for Defendant

M/s Kerubo holding brief for Anam for Applicants

M/s Nduva holding brief for Ondieki for 1<sup>st</sup> – 4<sup>th</sup> Interested Parties

Court assistant: Eddel

