



REPUBLIC OF KENYA



**Ali v Ali (Environment & Land Case 58 of 2021)
[2023] KEELC 198 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 198 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 58 OF 2021
NA MATHEKA, J
JANUARY 24, 2023**

BETWEEN

ASLAM MOHAMED HAJI ALI APPLICANT

AND

AMINA AKBAR MOHAMED HAJI ALI RESPONDENT

RULING

1. The application is dated April 5, 2022 and is brought under article 40 of the [Constitution of Kenya](#) 2010, order 40 rule 1,2,3 & 4 and order 51 rule 1 of the [Civil Procedure Rules](#), 2010, section 1A, 1B, 3A and 63 of the [Civil Procedure Act](#) cap 21 Laws of Kenya seeking the following orders;
 1. That the honourable court be pleased to certify this application urgent and having so certified the application, to hear the same ex parte in the first instance.
 2. That the honourable court be pleased to issue an interim order restraining the respondent, her agents and or assigns from further collecting and or receiving rental income from MSA/ block XII/101 pending hearing and determination of this application.
 3. That the honourable court be pleased to issue an interim order restraining the Respondent, her agents and or assigns from further collecting and or receiving rental income from MSA/ block XII/101 pending hearing and determination of this suit.
 4. That the honourable court be pleased to issue orders directing that the Applicant herein be allowed to collect rental income of the said property MSA/ block XII/101 through his appointed agent and share 50% of the said rental income to the duly appointed Administrators of the Estate of Akbar Mohamed Haji Ali (Deceased).
 5. That the cost of this application be borne by the respondent herein.



2. It is based on the grounds that the applicant is the legal owner of Plot Number MSA/ blockXII/101 which is jointly owned by him and the Estate of Akbar Mohamed Haji Ali (Deceased). That the respondent, the widow to Akbar Mohamed Haji Ali (Deceased) has been collecting rental income from Plot Number MSA/ block XII/101 without the authority of the applicant who is the co-owner to the property. That the respondent has been collecting rental income from Plot Number MSA/ blockXII/101 and using the same for her own benefit to the exclusion of the applicant who is the co-owner and the other beneficiaries. The respondent is mischievous and is attempting to enjoy the fruits of the honorable court's ruling dated February 3, 2022 in Succession Cause No. 107 of 2020 In the Matter of the Estate of Akbar Mohamed Haji Ali (Deceased) solely at the exclusion of the Applicant herein who co-owns Plot Number MSA/blockXII/101 and the other beneficiaries. That the Applicant's Constitutional right enshrined under Article 40 has and continues to be violated by the Respondent as she has adamantly denied the Applicant to enjoy rental income from the suit property. In the premises and in the interest of justice, the Respondent hereby by herself, her agents and or servants be restrained from collecting rental income from Plot Number MSA/ blockXII/101. Alongside, an order should issue compelling the Respondent to bring forward accounts of all rental income collected for the period of approximately twenty-eight (28) months since Akbar Mohamed Haji Ali's demise.
3. The respondent states that all the rental income received, and expenditures incurred from the said properties have been accounted for. Annexed and marked "AAM-1" is a copy of the Income and Expenditure Account Sheet. That neither the Applicant, the other widow of the deceased nor her children from the marriage have been sidelined and/ or excluded in the distribution of the estate of the deceased. That the said grant was revoked, the honorable court proceeded to issue a new one where herself and her co-wife Hamida Banoo were made co-administrators to the estate. Annexed and marked "AAM-2" is a copy of the said grant. That all the rental income received from Mombasa/ Block have been accounted for and the Applicant has been receiving his share from the said property through his agent, Dina Komba via M-pesa on mobile number 0721 379 xxx, and the applicant's share of the income received after expenditure in respect of Mombasa/Block XII/101 has been remitted to the applicant through his agent, one Noormohamed Abdalla of mobile number 0722 830 xxx. Annexed and marked "AAM-3 and 4" is a copy of the M-pesa statements and petty cash vouchers.
4. That Further, the estate of Akbar Mohamed Haji Ali (deceased) is being preserved and shall be distributed as per the Kadhi's distribution once all the debts due are paid and sub divisions of all the properties has been done. That the Applicant for his own personal interest, has been interfering and/ or creating conflict and division among beneficiaries in the estate of Akbar Mohamed Haji Ali by using the other widow of the deceased to further his agenda. That this application is an afterthought, lacks merit and it is only aimed at stalling the administration of the testate of Akbar Mohamed Haji Ali (deceased) and the Applicant herein is therefore intermeddling with the estate.
5. This court has considered the application and submissions therein. The power of the court in an application for interlocutory injunction is discretionary, the discretion is judicial and is exercised on the basis of law and evidence. The principles which guide the court in deciding whether or not to grant an interlocutory injunction are well settled. *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358, set out the three requirements that has to be satisfied in an interlocutory injunction application. The applicant has to establish his case only at a prima facie level, demonstrate irreparable injury if a temporary injunction is not granted, and where the court has any doubts, it will be decided on a balance of convenience.



6. The court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* (2003) KLR 125 defined a prima facie case as. It held that;

"So what is a prima facie case? I would say 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 right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter." The court went further to hold that "A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant case upon trial. That is clearly a standard which is higher than an arguable case."

7. The respondent submitted that neither the applicant, the other widow of the deceased nor her children from the marriage have been sidelined and/ or excluded in the distribution of the estate of the deceased. That the said grant was revoked, the honorable court proceeded to issue a new one where herself and her co-wife Hamida Banoo were made co-administrators to the estate. Annexed and marked "AAM-2" is a copy of the said grant. That all the rental income received from Mombasa/ Block have been accounted for and the Applicant has been receiving his share from the said property through his agent, Dina Komba via M-pesa on mobile number 0721 379 362, and the Applicant's share of the income received after expenditure in respect of Mombasa/Block XII/101 has been remitted to the Applicant through his agent, one Noormohamed Abdalla of mobile number 0722 830 552. Annexed and marked "AAM-3 and 4" is a copy of the M-pesa statements and petty cash vouchers.
8. The Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 others* (2014) eKLR the court held that;

"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

9. The court in *Nguruman Limited* (supra), found that the three conditions and stages have to be applied as separate, distinct and logically. It was held that;

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."



10. In the instant case, I find that the defendant/applicant has established a prima facie case but has not established what irreparable loss they would suffer as he receives rent through his agent as demonstrated by the respondent. I find this application has no merit and is dismissed with costs. Parties are advised to comply with order 11 and set down this matter for hearing.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF JANUARY 2023.

N.A. MATHEKA

JUDGE

