



**In re Estate of Magret Wambare Jagongo (Deceased) (Family Appeal 1 of 2024) [2024] KEHC 14525 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14525 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
FAMILY APPEAL 1 OF 2024  
DK KEMEL, J  
NOVEMBER 22, 2024  
IN THE MATTER OF THE ESTATE OF  
MAGRET WAMBARE JAGONGO (DECEASED)**

**BETWEEN**

**DANIEL OKOTH WAMBARE ..... APPELLANT**

**AND**

**WILFRED OCHIENG WAMBARE ..... RESPONDENT**

**RULING**

1. The Appellant herein filed the present application dated 22<sup>nd</sup> January 2024 pursuant to section 47, 50, 26 and 76 of the Law of Succession Act, Rule 73 of the Probate and Administration Rules, section 79G of the Civil Procedure Act and which seeks the following orders:
  - i. Spent.
  - ii. That pending the hearing of this application inter partes, an order of temporary injunction do issue restraining the Petitioner/ Respondent herein (Wilfred Ochieng Wambare) from collecting, demanding or receiving any rent or rental income relating to the deceased's properties and that the same be paid to respective beneficiaries as it was before the irregular grant was issued.
  - iii. Spent.
  - iv. That each family to elect a representative to act as an interim administrator pending the appeal.
  - v. Spent.
  - vi. That costs of the application be provided for.



2. The application is supported by the grounds set out on its face and the supporting affidavit of the Applicant sworn on even date. The Appellant/Applicant's gravamen is *inter alia*; that the Respondent has irregularly taken out a certificate of confirmation of grant without the consent of eleven beneficiaries of the estate; that the Respondent has transferred the estate to himself and has directed tenants to channel all rents to him and locked out the other beneficiaries; that the Respondent is out to enrich himself from the estate of the deceased to the exclusion of the other beneficiaries; that the appeal raises weighty legal issues; that he stands to suffer substantial loss if the order of stay is not granted; that the Appellant/Applicant should be given an opportunity to lodge his appeal out of time so as to enable him challenge the orders of the lower court; that the estate stands to be wasted if the Respondent is not restrained and that the rest of the beneficiaries will be locked out of the estate in the end.
3. In response, the Respondent filed a replying affidavit dated 16/04/2024 wherein he averred *inter alia*; that the Appellant/Applicant has failed to demonstrate that he has a *prima facie* case with a probability of success; that the Respondent did not receive anything above than what was allocated during the confirmation of the grant; that the orders of the trial court have already been carried out and implemented and hence the injunction sought has been overtaken by events; that the Applicant has not filed any appeal in order to justify the grant of an order of stay of execution; that the application has been filed late in the day and that there is nothing to be stayed.
4. The application was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
5. Learned counsel for the Applicant, vide submissions dated 23/4/2023 placed reliance on the principles in the grant of a temporary injunction espoused in the case of *Giella v Cassman Brown and Another* [1958] EA 358. It was submitted that the Applicant has established a *prima facie* case with a probability of success in that the distribution of the estate is skewed in favour of the Respondent while the rest of the beneficiaries have been given a raw deal. On the issue of irreparable loss, it was submitted that the Respondent herein is out to disinherit the other beneficiaries of the estate and that they stand prejudiced in that the loss likely to be suffered will not be compensated by an award of damages. On the issue of balance of probabilities, it was submitted that the appeal will be rendered nugatory if the order sought is not granted and that the balance of convenience tilts in favour of granting the order in order to preserve the estate from dissipation.
6. I have considered the application, rival affidavits and submissions of learned counsels. It is not in dispute that a grant in respect of the estate of the deceased has since been issued and that the said grant has been confirmed and further, a certificate of confirmation of grant has also been issued. It is also not in dispute that the Appellant/Applicant is appealing against the confirmation of grant and has brought forward a raft other prayers that he wants this appellate court to grant in this appeal. It is also not in dispute that this court the ruling dated 17/4/2024 allowed prayer No. 3 of the Appellant/Applicant's application aforesaid pending determination *inter partes*. It is also not in dispute that vide the said prayer No. 3, the interim order was not only to subsist pending determination of the application as well as the Appeal. As prayer No. 3 has been granted, the issue for determination is whether the Appellant/Applicant has demonstrated that he merits the grant of the remaining prayers No. 2 and 4 of his application.
7. As regards prayer No. 2, it is noted that the Appellant/Applicant is seeking for an order of temporary injunction to restrain the Respondent from collecting, demanding or receiving any rent or rental income from the deceased's properties and that the same be paid to respective beneficiaries as it



was previously prior to the issuance of the irregular grant. The principles regarding the grant of an injunction were well settled in the case of *Giella v. Casman Brown* (1973) EA 358 and are as follows:

- i. That the applicant has established a prima facie case with high chances of success.
  - ii. That the applicant will suffer irreparable injury incapable of being remedied by an award of damages.
  - iii. That the balance of convenience tilts in favour of the applicant.
8. On the issue of establishment of a prima facie case, it was the appellant's submission that the certificate of grant issued to the Petitioner speaks for itself. That the distribution was uneven where the remote properties were given to the rest of the beneficiaries while the three prime properties were wholly given to the petitioner yet the same ought to be shared equally between the beneficiaries. The Appellant/Applicant has annexed a copy of the certificate of confirmation of grant which shows the distribution of the estate. As the prayer seeks to have the rental income be paid to each beneficiary as it used to be prior to the grant, I find the said prayer to be substantive in nature and that it is inappropriate to grant it at this stage and must be reserved for the determination of this appeal. Indeed, the Appellant is challenging the distribution of the estate of the deceased and hence, the issues in controversy should be reserved for the appeal herein. In any event, this court has already granted prayer No. 3 of the application which should be sufficient to preserve the estate pending determination of the appeal. In the premises, I find that the applicant has not established that he merits this prayer pending the determination of the appeal and to that extent, I see no reasons to delve into whether the conditions set out in the *Giella v Cassman Brown* case (*supra*) have been met by the Appellant/Applicant.
9. As regards prayer No.4, it is noted that the same seeks that each family member presents a representative to act as interim administrators pending determination of the appeal. I find this prayer to be substantive as it seeks to oust/remove the administrator from the estate yet the appeal is yet to be canvassed. Further, such a prayer ought to have been lodged before the trial court if any of the beneficiaries have any objections to the appointment of the Respondent as an administrator. It is instructive that no objection was lodged in the lower court. This court is only concerned with the preservation of the subject of the appeal at this stage and nothing more since the merits or otherwise of the appeal is yet to be determined. Already, prayer No. 3 has been granted and hence the same should be sufficient in the circumstances. Consequently, I find that the Applicant has not demonstrated that the said prayer should be granted at this stage.
10. Given the foregoing observations, it is my finding that the Appellant/Applicant's application dated 22/1/2024 succeeds only in terms of prayer No. 3 thereof. The rest of the prayers are found to lack merit and are dismissed. The parties are hereby directed to set down the appeal for hearing on priority basis. As parties are members of one family, I order each party to meet their own costs.

Orders accordingly.

**DATED AND DELIVERED AT SIAYA THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2024.**

**D. KEMEI**

**JUDGE.**

In the presence of:

M/s Okello.....for Appellant/Applicant

M/s Okanda.....for Respondent

Ogendo.....Court Assistant

