In re Estate of Elizabeth Wairimu Waiyaki (Deceased) (Succession Cause 94 of 2017) [2023] KEHC 3652 (KLR) (Family) (31 March 2023) (Ruling)

Neutral citation: [2023] KEHC 3652 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE 94 OF 2017

MA ODERO, J

MARCH 31, 2023

IN THE MATTER OF THE ESTATE OF ELIZABETH WAIRIMU WAIYAKI (DECEASED)

BETWEEN

LEWIS WILKINSON KIMANI WAIYAKI ..... 1ST APPLICANT

PETER GICHUHI WAIYAKI ..... 2ND APPLICANT

TIRAS BARAE WAIYAKI ..... 3RD APPLICANT

AND

EUNICE WAMAITHA WAIYAKI ..... RESPONDENT

RULING

1. Before this Court for determination is the Notice of Motion dated 20th December 2022 by which the Applicants Lewis Wilkinson Kimani Waiyaki, Peter Gichuhi Waiyaki and Tiras Barae Waiyaki seek the following orders:-

> " 1. Spent.
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> 2. Spent
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> 3. Pending hearing and determination of this suit, the Honourable Court be pleased to issue an injunction restraining the Respondent either by herself, through assignees, agents and/or employees from developing, utilizing, alienating, selling, advertising for sale, disposing of or in any other way interfering with the suit property.
>
> 4. That costs be provided for."

2. The application which was premised upon Section 3A, of the *Civil Procedure Act*, Order 41 Rule 1,2, and 4 of the *Civil Procedure Rules*, 2010, Section 68 of the *Land Registration Act* and Article 40 and 60(1) of the *Constitution* of Kenya was supported by the Affidavit of even date sworn by the three Applicants.

3. The Respondent Eunice Wamaitha Waiyaki opposed the application through her Replying Affidavit dated 3rd February 2023. The application was canvassed by way of written submissions. Though the parties indicated to the court that they had both filed written submissions no submissions were uploaded on the Court portal.

Background

4. The Succession Cause relates to the estate of the late Elizabeth Wairimu Waiyaki (hereinafter 'the Deceased') who died on 5TH April 2014. A copy of the Death Certificate Serial Number '03xxxx is annexed to the Petition for Grant of Probate. The Deceased died testate having left a written will dated 2nd November 1998. In said written Will the Deceased appointed four (4) of her sons as Executors of her Estate. However the four (4) appointed Executors later passed away. Therefore vide an Instrument of Appointment of Trustee/Executor filed in court on 6th June 2018, the three Applicants herein were appointed as Trustees and Executors of the Estate.

5. On 15th October 2020 Hon. Lady Justice Ali-Aroni (as she then was) delivered a judgement in this matter in favour of the Respondent. In the judgement the Honourable Judge ordered that the parcel known as Dagoretti/Kinoo/2482 (plot A) and a portion of Dagoretti/Kinoo/2503 (Plot X) be transferred to the estate of Dr. Benjamin Githeiya, the late husband of the Respondent. The Applicants contend that the said judgement was delivered without notice to the parties. Being dissatisfied with the decision of the court the Applicants filed a Chamber summons dated 27th October 2021 seeking leave to file appeal out of time. However before that application could be heard the Applicants filed this present application seeking injunctive orders in respect of Land Parcel No. Dagoretti/Kinoo/2482 (hereinafter referred to as the 'suit property') pending the determination of the suit.

6. The Respondent opposed the application for injunction orders on grounds that the orders being sought were not tenable as the suit had already been determined.

7. The Respondent averred that the suit property is a sub division of Dagoretti/Kinoo/375 which parcel of land had been distributed to all the sons of the Deceased. That the portion set aside for the Respondent's late husband Banjamin Githieya Waiyaki was to go to herself as the widow. Thereafter said portion was sub divided into three parcels being:

    (i) Dagoretti/Kinoo/2482

    (ii) Dagoretti/Kinoo/2483

    (iii) Dagoretti/Kinoo/2484

8. The Respondent further averred that Plot 2483 was somehow transferred into the name of her three (3) year old son whilst Plots 2482 and 2484 remained in the name of the Deceased herein. The Respondent states that her mother-in-law never interfered with her quiet possession of the suit property.

9. The Respondent states that after the death of the Deceased in the year 2012, the Applicants who are her brothers-in-law have given her no peace. That they have tried various means to evict the respondent from the suit property. The Respondent states that the Applicants desperate interest in the property is because the same has been earmarked for compulsory acquisition by the Government.

10. The Respondent contended that the judgement of 15th October 2020 remains valid and enforceable as to-date no appeal has been filed against the same and no stay of execution was granted. That the Applicants are guilty of laches as they filed their application seeking extension of time to file appeal eight (8) months after the judgement had been delivered. Finally the respondent states that the property in question was developed several years ago and that she has been in possession of the same for the past thirty-eight (38) years.

Analysis and Determination

11. I have carefully considered the application before this court and the reply filed thereto. The only issue for determination is whether the injunction sought in the application ought to be granted.

12. Order 42 Rule 6(6) of the Civil Procedure provides as follows:

> (6) notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate Court or tribunal has been complied with." (emphasis added)

13. The above provision only envisages the grant of an injunction pending appeal by the High Court when the court is exercising its 'appellate jurisdiction'. It is clear that the merits of the suit were determined by Hon. Lady Justice Ali-Aroni (as she then was) in the judgement delivered on 15th October 2020. Therefore the Applicants prayers for injunction pending appeal cannot be entertained by this court which is now 'functus officio'.

14. In the case of *Batholomew Mwanyungu And 3 Others v Florence Dean Karimi* [2019] eKLR the court when confronted with a similar situation stated this:

> " It should be noted from the above provision of the law, and in particular Order 42 Rule 6 (6) that this Court has the power to grant injunction only when exercising its appellate jurisdiction. In the instant case, the Court has already rendered its decision and the applicant has stated that she intends to appeal to the court of Appeal against the decision of this court given on 18th April 2018. On that basis alone, I find that the court does not have the jurisdiction to entertain the present application and grant the order of injunction sought by the applicant." [own emphasis]

15. The reasons why a party whom judgement has been entered against is estopped from seeking an injunction pending appeal in the same court were explained in the case of *Chembe Katana Changi v Ministry For Lands & Settlement & 4 Others*[2014] eKLR in which the court pronounced itself as follows:

> " 14. There is no provision in the Civil Procedure Rules allowing a party against whom judgement has been entered to file an Application for injunction pending appeal.

15. The absence of such a provision, in my view, is for good reason. It will be an absurdity for the trial court to grant to a party an injunction after delivery of judgement considering that one of the principles that must be established by an Applicant in such an Application is to show that he has a prima facie case with chances of success.

16. Once a Judgement has been delivered, there will be no pending suit. It therefore follows that a party challenging a judgement cannot at the same time show by way of an application that he has a prima facie case with chances of success. A trial court which attempts to deal with such an application, as I have already stated above, will be sitting on its own appeal." (emphasis added)

16. I need not say any more on the matter. Injunction Orders are ordinarily granted so as to protect the subject matter of suit pending determination of the main suit. This suit has already been determined and Judgement rendered. It would be an absurdity for the court that delivered judgement determining the main suit to then undo its judgement by issuing an injunction after delivery of judgement.

17. As stated earlier the High Court is now 'functus officio' in this matter. It cannot revisit the issue. In *Chembe Katana Changi v Ministry For Lands And Settlement And 4 Others* [supra] the Court stated as follows:-

> " It is true that once the trial court decides the suit on merit, it becomes functus officio. The trial cannot revisit the issues that were before it in a subsequent application. Revisiting the issues that were ventilated in a trial would amount to a trial court sitting on its own appeal which is improper. The only occasion that the trial court can deal with a matter it has already heard and determined is during the execution process or when an Application for review of the judgement has been filed pursuant to the provisions of order 45 or when an Application for stay of execution pending appeal has been filed pursuant to the provisions of Order 42 Rule 6 of the civil Procedure Rules." [own emphasis]

18. Likewise in *Brian Muchiri Waihenya v Jubilee Hauliers Ltd & Another; Geminia Insurance Co. Ltd (interested Party)*[2018] eKLR, the court stated as follows:-

> " The doctrine of functus officio was well stated by the court of Appeal in *Telecom Kenya Ltd-vs-John Ochanda (suing on his behalf and on behalf of 996 former Employees of Telcom Kenya Ltd.* [2014] eKLR that:-
>
> "Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon-

The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re St Nazarire Co, (1879), 12 Ch.D 88. The basis for it was that the power to rehear was transferred by the Judicature acts of the appellate division. The rule applied only after the formal judgement had been drawn up, issued and entered, and was subject to two exceptions:-

> " ..... the doctrine does not bar a court from entertaining a case has already decided but is so barred from revisiting the matter in merit-based re-engagement with the case once final judgement has been entered and a decree issued, meaning procedural interlocutor applications only." [own emphasis]

19. The injunctive orders being sought by this Applicants herein may only be granted by the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules. Therefore even recourse to this courts inherent jurisdiction under Sections 1A, 1B or 3A of the *Civil Procedure Act* are not tenable.

20. In conclusion I find no merit in this application. The Notice of Motion dated 20th December 2022 is hereby dismissed in its entirety. The Applicants shall pay the cost for this application.

DATED IN NAIROBI THIS 31ST DAY OF MARCH, 2023.

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MAUREEN A. ODERO

JUDGE