



REPUBLIC OF KENYA



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In re Estate of Reuben Masiza alias Reuben Magiza Baragaji (Deceased) (Succession Appeal 2 of 2023) [2023] KEHC 24441 (KLR) (25 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION APPEAL 2 OF 2023**

JN KAMAU, J

OCTOBER 25, 2023

**IN THE MATTER OF THE ESTATE OF REUBEN MASIZA
ALIAS REUBEN MAGIZA BARAGAJI (DECEASED)**

BETWEEN

SAPHANIA GWADOYA ISACHA 1ST APPELLANT

JOHN ASACHA GWADOYA 2ND APPELLANT

AND

FLORENCE AFANDII RENJI RESPONDENT

RULING

Introduction

1. In their Notice of Motion application dated 24th March 2023 and filed on 24th March 2023, the Appellants herein sought an order for stay of execution of the Judgment, Decree and all consequential orders pending the hearing and determination of the appeal herein.
2. The said application was supported by the 2nd Appellant's Affidavit that was sworn on 24th March 2023.
3. The Appellants contended that the Respondent was in the process of procuring a Certificate of Grant in which she had allocated herself L. R. No South/Maragoli/Buganda/1xx5 (hereinafter referred to as "the 1st subject property") to the exclusion of all other beneficiaries necessitating a temporary stay of execution of the Judgment and order that was issued in Succession Cause No 75 of 2018 Vihiga that was delivered on 28th February 2023 so that they could be heard in their application.
4. It was their averment that in the event that the order for stay of execution was not granted, they would suffer irreparable loss, damage and substantial loss and their appeal would be rendered nugatory. They pointed out that they filed their present application without undue or unreasonable delay and bona fides (sic) and that they were willing to abide by any conditions that this court may direct.



5. They also prayed that this court restrains the Respondent from intermeddling with the deceased's estate. They were emphatic that the Respondent would not suffer any prejudice if the court granted them the orders they had sought. They thus urged this court to allow the said application as it was just and fair.
6. In opposition to the said application, the Respondent swore a Replying Affidavit on 19th April 2023. The same was filed on 20th April 2023.
7. She asserted that she was a niece to the deceased and that the deceased herein, her father and the Appellants herein were brothers. She stated that the deceased held L.R. No South Maragoli Bugunda/1xx6 (hereinafter referred to as "the 2nd subject property") in trust for her father and that his name was registered during land adjudication. She pointed out this 2nd subject property was the subject of Vihiga Succession Cause No 75 of 2018 which was heard and adjudged to have belonged to her father as a result of which she was subsequently registered as the owner.
8. She was emphatic that she was not laying a claim to the 1st subject property which the Appellants ought to transfer through succession proceedings.
9. She explained that the Appellants raised an objection arising out of the Judgment which had an apparent error on the face of it having indicated that the 1st subject property would be registered in her name as opposed to her being registered as the owner of the 2nd subject property.
10. She asserted that the Appellants were taking advantage of the errors in the Judgment to get an injunction feigning ignorance that the Grant had long been confirmed and the title already registered in her name. She further added that the Appellants' claim was premised on a fallacy that she was married. She averred that she was entitled to equal inheritance and that their main agenda was to deny her what was rightfully hers.
11. She thus urged this court to dismiss the application herein as the same was made in bad faith and was frivolous, vexatious and an abuse of the court process.
12. The Appellant's Written Submissions were dated and filed on 16th June 2023 while those of the Respondent were dated 24th July 2023 and filed on 26th July 2023. The Ruling herein is based on the said written submissions which the parties relied upon in their entirety.

Legal Analysis

13. The Appellants placed reliance on Order 42 Rule 6(2) of the *Civil Procedure Rules* and on several cases amongst them the cases of *Butt vs Rent Restriction Tribunal* [1979] eKLR and *RWW vs EKW* [2019] eKLR to argue that it had met the conditions for being granted an order for stay of execution pending appeal.
14. They also relied on the case of *Anne Njeri Mwangi vs Muzaffer Musafee Essajee & Another* [2014] eKLR and National Industrial Credit Bank (Supra) (sic) (eKLR citation not given) to emphasise that an order for stay of execution would be granted if an applicant demonstrated substantial loss and if it had an arguable appeal.
15. They further referred this court to Article 159(2)(d) of the *Constitution* of Kenya that provides that courts shall administer justice without undue regard to procedural technicalities and Section 1(A)(1) and 1B(1)(a) of the *Civil Procedure Act*, 2010 (sic) that mandates courts to handle all matters before them with a view to attaining the just determination of proceedings.



16. They submitted that dismissing their application would be condemning them without considering the evidence on record.
17. On her part, the Respondent placed reliance on the case of *Antoine Ndiaye vs African Virtual University* [2015] eKLR where it was held that an applicant had to demonstrate the three (3) prerequisites provided under Order 42 Rule (6) (2) of the *Civil Procedure Rules*. She further referred to the case of *Focin Motorcycle Co Ltd vs Ann Wambui Wangui & Another* [2018] eKLR where it was held that an applicant had to provide security before being granted an order for stay of execution.
18. She further relied on the cases of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR and *In Re Estate of Churko Stephen alias Richard Churko Guyo (deceased)* [2021] eKLR where the common thread was that substantial loss was the cornerstone and had to be demonstrated because such loss would render an appeal nugatory.
19. She submitted that since she was not laying claim to the 1st subject property, the Appellants would not suffer any substantial loss. She also pointed out that the Appellants had not provided any security or demonstrated sufficient cause why orders for execution should touch on the 2nd subject property.
20. On the issue of injunction, she submitted that the Appellants had not demonstrated that they had met the threshold of being granted an order for injunction. She relied on the cases of *Giella vs Cassman Brown Co Ltd* [1973] E.A. 358 and *Nguruman Limited vs Jan Bonde Nielsen & 2 others* [2014] eKLR where the common thread was that an applicant had to demonstrate a *prima facie* case with probability of success, that irreparable harm that could not be compensated by an award of damages would arise if the order for interlocutory injunction was not granted and that if the court was in doubt, it would decide the application on a balance of convenience.
21. She urged this court to award her costs in line with Section 27 of the *Civil Procedure Act* Cap 21 (Laws of Kenya) that provides that costs follow the event, a position she submitted was reiterated in the case of *Hussein Janohamed & Sons vs Twentsche Overseas Trading Co Ltd* (1967) EA 287.179.
22. Right at the outset, this court noted that both the Appellants and the Respondent had made alterations to their pleadings without following the proper procedure and/or that the alteration went to the root of the present application.
23. While the Appellants made alterations to their Notice of Motion application and countersigned the same, the contents therein varied from those in the 2nd Appellant's Supporting Affidavit. The alteration on the face of the present application indicated the property as L.R. South/Maragoli/Bugunda/ 1xx6 instead of L.R. South/ Maragoli/ Bugunda/ 1xx5. However, the averment under oath in Paragraph 6 of the said 2nd Appellant's Supporting Affidavit remained unchanged as L.R. No South/ Maragoli/ Bugunda/ 1xx5.
24. On her part, the Respondent altered the number of the Identity Card in her Replying Affidavit.
25. An affidavit is an oath and cannot be altered as the commissioner for oaths would have affixed his or her signature based on the averments that the deponent would have deponed. Any alterations in an affidavit after the same has been commissioned by a commissioner for oaths are null and *void ab initio* and render an affidavit defective and incompetent.



26. These were material irregularities and not technicalities that were contemplated in Order 19 Rule 7 of the *Civil Procedure Rules*. The said Order 19 Rule 7 of the *Civil Procedure Rules* states as follows:-
- “The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”
27. Where a deponent wishes to amend his or her affidavit, the proper procedure is for a deponent to swear a further and/or supplementary affidavit to clarify any averments in the initial affidavit. The Appellants herein therefore ought to have sought leave to file a further and/or supplementary affidavit to indicate the correct description of the property that was subject of the Appeal herein. The Respondent also ought to have filed a further affidavit to clarify her Identity Number in her Replying Affidavit. The Replying Affidavit was therefore null and void, defective and incompetent and did not therefore form a basis for opposition to the Appellants’ present Notice of Motion application.
28. As the 2nd Appellants’ Supporting Affidavit was proper, this court and held that their application was technically unopposed on facts only. However, the Respondent had filed Written Submissions on points of law which this court considered in opposition to the Appellants’ Written Submissions.
29. The above notwithstanding, as the Appellants did not file a further affidavit to explain the discrepancy in the description of the property that was the subject of the Appeal herein, there was a disconnect in the orders they had sought in their present application. As was pointed hereinabove, the description of the property on the face of the present application was different from the description in Paragraph 6 of the 2nd Appellant’s Supporting Affidavit.
30. In view of the said disparity, this court was not persuaded that the Appellants had demonstrated that they had met the threshold of being granted an order for stay of execution pending appeal as it was not clear which property was really the subject of the Appeal herein.
31. Further, although they filed the present application without undue delay, the decision having been delivered on 28th February 2023 and the application having been filed on 24th March 2023, they had not demonstrated that they would suffer irreparable loss if the court did not grant them the orders they had sought.
32. This court perused the Judgment of 28th February 2023 and noted that the same made a reference to the 1st subject property, which the Learned Trial Magistrate had already determined was owned by Appellants herein. He also concluded that the 2nd subject property was owned by the Respondent herein. However, in his disposition, he directed that the 1st subject property would be registered in the name of the Respondent herein. There was no indication if the parties herein had sought and obtained a clarification on this determination.
33. The Respondent had conceded that the 1st subject property, the subject of the Appeal herein belonged to the Appellants herein as she was only entitled to the 2nd subject property. It was the view of this court that if this discrepancy was rectified and/or clarified by the Learned Trial Magistrate, there would be more clarity in the matter and confirm which subject matter ought to be before this court on appeal for hearing and determination.
34. Notably, this court did not find it necessary to analyse the Respondent’s Written Submissions in respect of the prayer for injunction as the same was spent. The prayer had been sought pending the hearing and determination of the application herein.



Disposition

35. For the foregoing reasons, the upshot of this court's ruling was that the Appellants' Notice of Motion application that was dated and filed on 24th March 2023 was not merited and the same be and is hereby dismissed. Costs of the application will be in the cause.
36. It is hereby directed that the Appellants move the lower court appropriately with a view to getting clarity of the disposition in the Judgment by Hon S.O. Ongeru, SPM dated 28th February 2023.
37. As Vihiga Succession Cause No 75 of 2018 is yet to be forwarded to this court for purposes of hearing the Appeal herein, it is hereby directed that the same be mentioned before the Head of Station Vihiga Law Courts on 15th November 2023 for purposes of giving the aforesaid clarity.
38. Matter to be mentioned on 5th February 2024 to ascertain whether or not the said clarity will have been given with a view to this court giving further orders and/or directions, as regards the hearing and determination of the Appeal herein.
39. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF OCTOBER 2023

J. KAMAU
JUDGE

