



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E284 OF 2021

DAVID KIMANI KIRIGA.....1ST APPELLANT

MARY WANJIRU KIRIGA(Suing as administrators of

the Estate of Kiriga Githuba –deceased).....2ND APPELLANT

-VERSUS -

ESTHER MUGURE KIRIGA.....RESPONDENT

RULING

Before this Court is an application by the Appellant dated 24th December, 2020 seeking the following orders;-

- 1. THAT this Hon Court do grant a temporary injunction restraining the Defendant/Respondent by herself or by her agents servants employees and/or assigns from demanding or collecting rent from any of the tenants using and occupying the 12 stalls in the containers located at Timboroa in Eastleigh Nairobi pending the hearing and determination of the appeal.**
- 2. THAT this Hon Court do grant a temporary injunction restraining the Defendant/Respondent whether by herself her agents servants or employees from trespassing onto or harassing in any manner any of the tenants occupying the 12 stalls in the containers located at Timboroa in Eastleigh Nairobi or interfering in any way with their quiet possession and enjoyment of the said stalls pending the hearing and determination of the appeal.**
- 3. THAT this Hon Court do grant an injunction restraining the Defendant/Respondent either by herself her agents and/or servants from levying distress upon any of the tenants occupying and utilizing the 12 stalls in the containers located on Timboroa in Eastleigh Nairobi pending the hearing and determination of the appeal.**
- 4. THAT this Hon Court do grant an injunction restraining the Defendant/Respondent either by herself or by her agents servants and/or employees from taking control or physical occupation of the containers or from assuming ownership or transferring title of the containers to herself or to any other person or persons pending the hearing and determination of the appeal;**
- 5. THAT this Hon Court be pleased to issue any other such orders as it may deem fit and just in the circumstances of this case.**

The application is premised on the grounds on its face and the supporting affidavit of **MARY WANJIRU KIRIGA**, sworn on 24th May, 2021. The application is brought by the appellants in their capacity as the Administrators of the Estate of Kiriga Githuba (Deceased) following a *Limited Grant Ad Litem* issued by the High Court Family Division on 23rd December, 2020 and *Ad Colligenda* dated 17th August 2020 issued by the Chief Magistrates Court's in Kiambu seeks to preserve the deceased estate from imminent threat of waste and intermeddling from the Respondent. That the Respondent has threatened to forcefully seize, assume ownership thereof and effect rent collections of Container stalls numbers TRLU 6644836 and TRLU 6613460 which is part of the deceased's estate. Further that, unless restrained by this Court, the Respondent might proceed to take possession of the said properties and collect rental income or alienate/transfer the properties. Lastly, that the court has powers to grant the orders sought in order to protect the Estate from wrongful disposal or intermeddling pending the hearing and determination of this appeal and that the Application is not frivolous and is brought expeditiously without any delay.

The respondent opposed the application and filed a replying affidavit sworn on 17th March, 2021.

The application was determined by way of oral submissions. Miss Achieng, Counsel for the applicant submit that the applicants are seeking orders of injunction. The applicants have preferred an appeal against the ruling of the trial court delivered on 24th May, 2021. All the parties

are the deceased's children. The rent from the disputed property has always been collected by the administrators of the estate through an agent. The rent proceeds are being deposited in a bank account. It is submitted that the respondent has issued notices to the tenants threatening to levy distress for rent. The tenants have also been threatened with eviction. Ownership of the property is still in dispute. It is the threat to levy distress which necessitated the filing of the application and the appeal.

Counsel for the applicant further contend that the respondent has no court order allowing her to collect the rent. The agent used to collect the rent even during the deceased's lifetime. The rent is not being utilized. Should the court find in favour of the respondent, the administrators will release the money from the account. Since the applicants are not seeking orders of stay of execution pending the hearing and determination of the appeal, Counsel for the applicant maintain that there is no requirement to provide security as a condition for the granting of the orders being sought.

Mr. Thuku appeared for the respondent. Counsel contend that the application requires the provision of security. Counsel proposed to have the rent proceeds deposited either in a joint account of both advocates or in court. Once the trial court determines the issue of ownership, it will order how the money is to be released. No prejudice will be suffered if the rent is deposited as suggested by the respondent.

The issue at hand involves members of the same family. The appellants/applicants are the administrators of the estate of the late Kiriga Githuba. The dispute relates to the ownership of some containers that are being operated as shops in Eastleigh area, Nairobi. Whereas the applicants contend that the containers are part of the deceased's estate, the respondent maintains that she owns the containers having bought herself and annexed copies of sale agreement and payment receipts.

The applicants filed an application dated 24th December, 2020 before the trial court basically seeking to restrain the respondent from dealing with the containers. The suit before the trial court has not been determined. The plaint dated 24th December, 2020 is seeking a declaration that the deceased was the legal and beneficial owner of the two containers among other orders. That declaration has not been made.

In its ruling delivered on 27th April 2021, the trial court dismissed the appellants' application. The appeal is against that ruling. According to the trial court, the appellants failed to establish a prima facie case.

It is evident from the submissions of both parties that no prejudice will be suffered by any party if the rent proceeds are deposited either in the bank account, in court or in a joint account of both counsel. In my view, although the trial court is yet to determine the issue of ownership, the applicants' application for injunction restraining the respondent from collecting the rent was not granted. The dismissal of the application leaves the respondent free to collect the rent. Thus the proposal by the respondent to have the rent deposited in court or in a joint account is quite reasonable.

I do agree that the application herein is not seeking orders of stay of execution. To some extent the applicants are seeking the same orders that were not granted by the trial court. Had the applicants agreed to have the rent deposited in court or joint account, this appeal would not have been filed. The trial court would have determined the issue of ownership first and a substantive appeal filed by the party not satisfied with the decision. As of now, even the applicants are not benefiting from the rent and they cannot insist on collecting the rent. The only convincing issue raised by the applicants is that the tenants are conducting businesses and need not be disturbed. Copies of demand letters calling for backdated rent are part of the record of appeal. If that is to be allowed then some of the tenants might approach the court exhibiting their rent payment receipts. I do find that any threats to the tenants might disturb their business.

I do find that in the interest of justice, the rent proceeds should be deposited in a joint interest earning account of both counsels. That being the case, the respondent should not call for the rent or levy distress against the tenants.

In the end, the application dated 24th May, 2021 partly succeeds but is only allowed in the following terms: -

- 1) Counsel for both parties to open a joint account within thirty (30) days hereof.**
- 2) The agent who is collecting the rent from the two containers to continue collecting the rent and deposit it in the joint account as ordered herein.**
- 3) The respondent or his agent should not collect the rent proceeds or levy distress against any tenant occupying the stalls.**
- 4) Parties to explore the possibility of hearing the main suit before the trial court or prosecuting the appeal.**
- 5) Each party shall meet their own costs.**

DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF JULY, 2021

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S. CHITEMBWE

JUDGE