



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 50 OF 2019

In the Matter of the Estate of David Kamau Njoroge *alias* Njoroge David Kamau (Deceased)

EARNEST GICHERU KAMAU.....1ST APPELLANT

ESTHER NJERI KAMAU.....2ND APPELLANT

BEATRICE WANJIKU KIBE.....3RD APPELLANT

VERSUS

SAMUEL NDUNGU KAMAU.....1ST RESPONDENT

GRACE WAIRIMU KAMAU.....2ND RESPONDENT

RULING

1. On 21st March 2019 **Kutwa, SPM** delivered judgement in **Githunguri PM's Succession Cause No. 44 of 2018 In the Matter of the Estate of David Kamau Njoroge *alias* Njoroge David Kamau** dismissing an application for revocation of grant by **Ernest Gicheru Kamau** (1st Appellant herein). The said grant had been issued to **Samuel Ndung'u Kamau** and **Grace Wairimu Kamau**, the 1st and 2nd Respondents, respectively.
2. Aggrieved with the outcome, the 1st Appellant together with **Esther Njeri Kamau** and **Beatrice Wanjiku Kibe** (2nd and 3rd Appellants) filed an appeal to this court on 4/04/2019, raising ten grounds of appeal. Contemporaneously filed by the Appellants was a notice of motion seeking *inter alia* an order of temporary injunction to restrain the Respondents from interfering with the suit property, (which reference I understand to mean the estate of the deceased herein) in any manner pending determination of the appeal, and an order that the 1st Respondent renders accounts for the rental income collected from two estate properties in Eastleigh Nairobi, namely **LRN (possibly I.R or LR number) No. 36/111/1442** and **LRN (possibly I.R or LR number) No 36/5951/1**.
3. The motion was supported by the affidavit of the 1st Appellant stating *inter alia* that the estate of the deceased herein is in danger of dissipation through actions of the Respondents, which event would render the appeal nugatory. Although on 5th April, 2019 the court issued interim orders to maintain the status quo, the Appellants returned to court by a further application filed on 15th April, 2019 seeking specific injunctive orders to restrain the Respondents from charging, selling and/or transferring the asset described as land parcel **LR NO. 36/111/1442** which had allegedly been transferred in October, 2018 to the 1st Respondent. The court declined to give any interim orders indicating that the orders of 5/04/2019 sufficed. This motion was eventually withdrawn on 17/07/2019.
4. On 3/09/2019, yet another application was filed by the 2nd Appellant seeking to restrain the 1st Respondent from evicting her from the selfsame asset above, an order to restrain the 1st Respondent from interfering with the estate assets and order to compel the 1st Respondent to reopen the said Appellant's business premises located on land parcel **LR No. 36/111/1442**.
5. To the application dated 4/04/2019 the Respondents filed grounds of objection only. To the effect that the appeal and application were incompetent, that the court lacked jurisdiction to entertain both, and that the application had no merit. Concerning the second application dated 3/09/2019, the 1st Respondent swore an affidavit in opposition asserting that while the 2nd Appellant (**Esther Njeri Kamau**) was his sibling and rightful beneficiary of the estate of their parents, and specifically the estate herein, the Appellants had benefitted from a gift namely land parcel **LR No. Ruiru West/Block 1/2231**, rental income from a property described as number **36/VI/403** and premises known as **Premises Galore**.

6. He further deposes that the 1st Appellant was bequeathed a parcel of land namely **LR No. 36/5951 Eastleigh** and shares, and had collected rental income from the said premises even before the death of the parents; that the deponent had himself been bequeathed the property which is the main subject of the application dated 3/09/2019 and had developed it using his own funds and has had possession of the asset for 18 years; and that the 1st and 3rd Appellants had engaged hooligans to harass him at the said business premises. He states that the properties were bequeathed/gifted *inter vivos* to the siblings in the manner he deposed, by their deceased parents.

7. On 14.10.2019, the Court directed that the applications dated 4.4.2019 and 3.9.2019 be canvassed together through written submissions.

8. In brief submissions, the Appellants' counsel submitted, citing the decision in **Damji Preghji Mandavia v Sara Lee Household and Body Care (K) Ltd. Nairobi Civil Application no. 35 of 2004** that the Appellants have an arguable appeal which will be rendered nugatory if the applications fail, as the estate could well pass on to the hands of third parties.

9. On their part, the Respondents questioned the arguability of the appeal and whether it would be rendered nugatory if the court declined the motion(s). On the first limb, reliance was placed on the decisions in **Safaricom Ltd V. Ocean View Beach Ltd & 2 Others Civil Application no. 327 of 2009**, and **Kenya Tea Growers Association & Another v Kenya Planters Agricultural Workers Union Civil Application No. 72 of 2001**, before launching on an in depth discussion of the evidence in the lower court. Apparently, the Respondents treated the two applications as brought under Order 42 Rule 6 (1) of the Civil Procedure Rules and asserted on the second limb that the lower court's order being a dismissal order is not executable or amenable to an order to stay execution. The Respondents also relied on the decisions in **Titus Kiema V. Northeastern Welfare Society [2016] eKLR** and the **Attorney General V. James Hosea Gitau Mwaura [2014] eKLR** and urged the court to dismiss the application(s).

10. The court has considered the respective affidavits and submissions of the parties. It appears that none of the parties' submissions directly addresses both applications dated 4/04/2019 and 3/09/2019 which primarily seek injunctive orders against the Respondents rather than the staying of execution. The application dated 4/04/2019 (hereafter the first application) invokes Order 42 Rule 6 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act while the application dated 3/09/2019 (hereafter the second application) invokes Order 40 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act.

11. The injunctive orders sought in both motions are intended as temporary orders pending appeal. None of the parties has invoked section 47 of Law of Succession Act or Rule 73 of the Probate and Administration Rules. Rule 63 of the probate and Administration Rules does not apply order 42 of the Civil Procedure Rules to succession disputes. Order 40 of the Civil Procedure Rules however is applied to succession causes and perhaps the principles applicable in relation to an application under Order 42 Rule 6(6) of the Civil Procedure Rules would be relevant to the determination of this matter. The court proposes to deal with the first and second motion together as per earlier directions.

12. The basic facts of this case are not in dispute. The Appellants and Respondents are siblings and children of the deceased herein, namely **David Kamau Njoroge alias Njoroge Daud Kamau** whose estate was the subject of **Githunguri SPM's Succession Cause No. 44 of 2018**. Secondly, the properties which are the subject of the instant applications were assets in the estate of the said deceased person and are now in contention. The court must determine whether this is a proper case for the granting of the orders sought.

13. As earlier stated, Rule 63 of the Probate and Administration Rules applies the provisions of Order 40 of the Civil Procedure Rules to probate causes. Further Order 42 Rule 6(6) of the Civil Procedure Rules provides that:

“Notwithstanding anything contained in sub rule 1 of this rule (providing for stay pending appeal) 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 the Subordinate Court or tribunal has been complied with.”

14. This Court also has wide discretion under Section 47 of the Law of Succession Act to “*entertain any application and determine any dispute under this Act.*”. For the purposes of considering the prayers in the instant motions, the granting of interlocutory injunctions is governed by the provisions of Order 40 Rule 1 of the Civil Procedure Rules which provides in part that:

“Where in any suit it is proved by affidavit or otherwise –

a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b)

the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

15. The principles governing the grant of an interlocutory injunction are settled. For the purposes of the instant motions, the court must determine whether the Appellants have brought their applications within the required threshold for the granting of an interlocutory injunction. What are the applicable principles? The decision of the Court of Appeal in **Nguruman Limited vs Jan Bonde Nielsen & 2 Others (2014) eKLR** is particularly illuminating as to the principles applicable to applications for interlocutory injunctions. The Court described the role of the judge in such application to be merely to consider whether the principles for the grant of the interlocutory injunction were met.

16. The Court further observed that:

“...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella’s case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already by authoritative pronouncements in the precedents, they may be conveniently noted in brief as follows:

In an interlocutory injunction application, the Appellants has to satisfy the triple requirements to:

- a) establish his case only at a *prima facie* level
- b) demonstrate irreparable injury if a temporary injunction is not granted.
- c) allay any doubts as to (b) by showing that the balance of convenience is in his favor.”

17. The Court further stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by an applicant. Such that, it is not enough that the Appellants establish a *prima facie* case, they must further successfully establish irreparable injury, that is, injury for which damages recoverable at law could not be an adequate remedy. And where there is doubt as to the adequacy of damages, the court will consider the balance of convenience. Conversely, where no *prima facie* case is established, the court need not consider irreparable injury or balance of convenience. The Court of Appeal emphasized that the standard of proof is to *prima facie* standard.

18. Regarding the definition of a “*prima facie case*” the Court stated:

“Recently, this court in *Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 fashioned a definition for “*prima facie case*” in civil cases in the following words:

“In civil cases, a *prima facie case* 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 to call for an explanation or rebuttal from the latter. A *prima facie case* is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the appellant’s case upon trial. That is clearly a standard, which is higher than an arguable case.

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie case* lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie case* has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie case*. The Appellants need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie case* is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the appellant’s case is more likely than not to ultimately succeed.”

19. In *Madhupaper International Limited v Kerr* [1985] KLR 840 the Court of appeal stated that:

“The Court of Appeal’s jurisdiction to grant an injunction pending an appeal is discretionary and is to be exercised judicially and not arbitrarily. It would be wrong to grant the injunction where the appeal is frivolous or where to grant it would inflict greater hardship than it would avoid. In this case, to grant an injunction pending appeal would be wrong as it would probably inflict greater hardship than it would avoid.”

20. *Visram J* (as he then was), in my humble view distilled the applicable principles in *Patricia Njeri & 3 Others -Vs- National Museums of Kenya* [2004] eKLR. The learned Judge stated:

“The appellant did, however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application?

In the *Venture Capital case* (*Venture Capital and Credit Ltd –Vs- Consolidated Bank of Kenya Ltd Civil Application No. Nairobi 349 of 2003 (UR)*) the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in a whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:

- a) The discretion will be exercised against an appellant whose appeal is frivolous (See *Madhupaper International Limited –Vs- Kerr* [1985] KLR 840 which cited *Venture Capital*). The Appellant must state that a reasonable argument can be put forward in support of his appeal (*J. K. Industries –Vs-KCB 1982 – 88*) KLR 1088 (also cited in *Venture Capital*).
- b) The discretion should be refused where it would inflict greater hardship that it would avoid (See *Madhupaper supra*).

c) **The appellant must show that to refuse the injunction would render his appeal nugatory (See Butt –Vs- Rent Restriction Tribunal [1982] KLR 417 (cited also in Venture Capital).**

d) **The Court should also be guided by the principles in Giella –Vs- Cassman Brown & Company Ltd [1973] EA 358 as set out in the case of Shitukha Mwamodo & Others (1986) KLR 445 (also cited in Venture Capital).” See also Mukoma –Vs-Abuoga [1988] KLR 645.”**

21. Concerning the question of prima facie case which also ties in with the arguability of the appeal, it is not denied that the estate properties which are the subject of the appeal are assets to which both the Appellants and Respondents lay claims based on alleged rights of inheritance. The 1st Appellant alleged in his affidavit that the 1st Respondent forged signatures of the Appellants in obtaining confirmation of grant in the lower court. On his part, the 1st Respondent asserts that the deceased herein had gifted certain assets to his children during his lifetime, and in reference to the premises in which the 2nd Appellant allegedly conducts business asserts that it was gifted to him.

22. In addition, looking at the grounds of appeal, without more, they raise clearly arguable points worthy of the court’s consideration on appeal, not only concerning the above issues, but also, more significantly, whether indeed the SPM’s court at Githunguri had the necessary pecuniary jurisdiction to deal with the material estate, which comprised of not less than three landed properties located in Eastleigh, Nairobi, one in Umoja Nairobi and in Ruiru. These are weighty issues to be argued on appeal. In **Stanley Kang’ethe Kinyanjui V Tony Keter & 5 Others [2013] eKLR** the court of appeal stated:

“The first issue for our consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable”.

See also **Denis Mogambi Mong’are V. Attorney General & 3 Others Civil Appeal No. Nairobi 265 of 2011 (UR 175/2011)** where the Court of Appeal stated that:

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”

23. The appeal herein cannot be said to be frivolous. It raises serious questions of law and arguments deserving the consideration of the court. The Appellants as undisputed heirs of their father’s estate had a right to an equitable share thereof, and for the 1st Appellant it is not contested that she was prior to her eviction operating from one of the assets of the estate to which the 1st Respondent lays a claim. The risk that the assets of the estate may be adversely dealt with or alienated appears real in this case, in which event the Appellants would suffer irreparably as such properties would no longer be available for distribution even if the appeal succeeded. Already one asset has been transferred to one of the beneficiaries as per the material on record and there is no knowing what the beneficiary will do with it.

24. In my view, there is a clear unmistakable right to be protected which is directly threatened by the act sought to be restrained. In **George Gathura Karanja v George Gathuru Thuo & 2 Others [2019] e KLR**, the Court of Appeal stated that:

“[A]n appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible. See the case of Stanley Kangethe Kinyanjui versus Tony Ketter & 5 Others, Civil Appeal No. 31 of 2012 where this Court stated inter alia thus:

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is irreversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party.”

25. In this case, if the assets of the estate are dissipated the appeal herein will clearly be rendered nugatory. It appears to this court therefore that if the discretion is exercised in the Appellants’ favour, it will prevent more hardship than it will inflict at this stage, as the Appellants will have the opportunity to argue their appeal with the suit properties secured until the final determination of the appeal. This consideration far outweighs the inconvenience that the Respondents will suffer by holding the property until the determination of the appeal. On the part of the 2nd Appellant, she will be able to canvass her claim to the business premises in the disputed asset.

26. The above findings notwithstanding, this is not a proper case for the issuance of interlocutory mandatory injunctions as conjunctively sought in prayers 2 and 3 of the motion dated 3rd September, 2019 as it appears that the 2nd Appellant is no longer in occupation of the premises the subject of the said orders and it is not clear from her affidavit when she was allegedly evicted therefrom, whether before or after the orders of this court of 5/04/2019.

27. As stated by the Court of Appeal in **Kenya Breweries Ltd. V. Washington Okeyo [2002] Eklr:**

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then, only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple ... act which could be easily remedied, or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than required for a prohibitory injunction.”

28. In **Nation Media Group & 2 Others V. John Haron Mwau [2014] eKLR** the Court of Appeal held that a temporary mandatory injunction **“Can only be granted in exceptional and in a clearest of cases”**. The facts of this case do not warrant the issuance of a temporary

mandatory injunction. Similarly, prayers 5 and 6 of the first application dated 4/04/2019 cannot be granted at this stage seeking as they do the rendering of accounts.

29. Both prayers marked as no. 4 in the first and second application are similar. Combining both, and considering the nature of the subject matter herein, this court will grant a temporary injunction pending determination of the appeal to restrain the Respondent administrators of the estate of David Kamau Njoroge and indeed all the beneficiaries to the estate from alienating, transferring, selling or in whatever manner dealing adversely with the assets of the estate listed in the petition filed in **Githunguri Succession Cause No. 44 of 2018**, and other assets allegedly omitted therefrom as were identified by the 1st Appellant in his application filed on 29/08/2018 to revoke the grant in the lower court. Parties will bear own costs considering the nature of the dispute.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 29TH DAY OF JULY 2021

C. MEOLI

JUDGE

In the presence of:

Mr Kimani h/b for Mr Kiarie for the Appellants

N/A for the Respondents

Kevin: Court Assistant