



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 38 OF 2015

PURITY WANJIKU MURIUKI.....APPELLANT

VERSUS

SUSAN MUTHONI MURIUKI.....1ST RESPONDENT

FAITH FIDES KARUANA KAREITHI.....2ND RESPONDENT

(Being An Appeal from the Judgment and the Consequent Order of Hon. E. O. Wambo - Senior Resident Magistrate Sitting vide Kerugoya Chief Magistrate Succession Cause No. 245 of 2018 Estate of Francis Muriuki Muchira - Deceased Dated and Delivered on 9-5-2019)

RULING

1. The application pending before this court is the one dated 3rd April, 2020 brought under a certificate of urgency seeking the following orders.

(a) An order of injunction do issue restraining the Respondents by themselves, their servants, agents, relatives and/or anybody else acting through them from selling transferring or alienating plot number 104 Kutus Old Town, evicting or in any other way interfering with the appellant's occupation of plot number 104 Kutus Old Town pending the hearing and determination of this application.

(b) An order of injunction do issue restraining the Respondents by themselves, their servants, agents, relatives and/or anybody else acting through them from selling, transferring or alienating plot number 104 Kutus Old Town, evicting or in any other way interfering with the appellant's occupation of plot number 104 Kutus Old Town pending the hearing and determination of this appeal.

(c) That the court be pleased to stay any further proceedings in Kerugoya Chief Magistrate's Court succession cause number 245 of 2018 and Kerugoya CMCC No. 34 of 2020 until this appeal is heard and determined.

(d) Cost of this application be provided for.

2. The application is supported by the affidavit of Purity Wanjiku Muriuki sworn on 3rd of March, 2020 and deposes that Plot number 104 Kutus Old Town initially belonged to Francis Muriuki Muchira who died on 2nd January, 2014. The deceased was married to one Susan Muthoni in 1990's, she met him and became lovers.

3. Later in 1998, she got married to him and they established their matrimonial home at Kutus at Plot Number 104 Kutus Old Town. He cohabited with the deceased until he died. The burial committee recognized that the deceased had two wives. That she had one child with the deceased by name Stephen Mithamo. She has been living on the said plot. That despite the knowledge of the 1st respondent that she was her co-wife she filed Kerugoya High Court No. 489 of 2014 and she did not disclose her existence. Later she obtained letters of administration which was later confirmed.

4. On learning of the Succession cause, she filed an application for revocation of Grant which was referred to the Lower court and became Kerugoya Succ. Cause No. 285 of 2018.

5. The Court heard the case and held that she was not a wife and dismissed the case. She aggrieved with the finding of the Trial magistrate and has filed an appeal in this court.

6. It is her contention that, she had a good case with chances of success as the court did not analyze what constitutes a marriage,

and in what circumstances a presumption of marriage can arise.

7. That she will also urge the court to make a finding as to whether the lower court could hear a case for revocation of a grant issued by the High Court.

8. That the 1st Respondent in an effort to frustrate her transferred the plot where she lives at Kutus to one Fides Karuana Kareithi the 2nd Respondent herein and yet the deceased had several other properties.

Upon filing the appeal she filed an application for stay of prosecution and of further proceedings pending the hearing of the appeal.

9. That the 2nd Respondent filed an application that she be evicted from Plot number 104 Kutus Old Town since the plot had been transferred to her. On 12th March, 2020 both applications were dismissed.

10. That the Respondent has proceeded to file Kerugoya CMCC No. 34 of 2020 seeking for orders that she be evicted from the plot, and she has filed an application that she be restrained from entering into the plot or collecting rent from the tenants.

11. It is her contention that at the time the 2nd Respondent had the plot transferred to her, she knew or had the means to know that she was in occupation and she was expected to do due diligence by making enquiries from her and the neighbors as to what interest she has over the plot and she can therefore not claim to be a bonafide purchaser.

12. That she should not be evicted until the courts makes a determination as to whether herself, and her son are dependants. She pleads with the court to grant the orders sought.

1ST RESPONDENTS'

The 1st Respondent Susan Muthoni Muriuki opposed the application and I filed an affidavit sworn on 4th of May, 2020. Her contention is that, the applicant has not disclosed what she has done to warrant been restrained and court orders are not made in vain.

13. That she constructed Plot number. 104 Kutus with her husband from the produce of Coffee which her children were picking and the construction is the fruit of her sweat.

14. That the applicant failed to proof her status in her husband's estate and cannot be allowed to take occupation of the same. She contends that the applicant was not the wife of her deceased husband and that the appellant did not annex the memorandum of appeal to her application to show her on what grounds she is appealing from and there is nothing to stay from the Judgment of E.O. Wambo delivered on 9th May, 2019.

The applicant had sought an application for stay of execution but the same was dismissed.

15. It is further contended that her application for injunction is meant to mislead the court as to real status quo on the ground and the application has been brought with undue delay.

16. It is her contention that she is the legal wife of late Francis Muriuki Muchira and legal administrator of his estate. Her succession cause was completed and the ground was confirmed and she was awarded plot number 104 Kutus. She later sold the Plot to Faith Fides Karuana and she took possession of the plot.

She contends that the Registered owner of the plot cannot be restrained from utilizing her plot.

17. She further depones that Faith Fides Karuana filed Chief Magistrate Civil Case No. 34 of 2020 and restrained the applicant from collecting the rent from the plot.

18. She further depones that the applicant had filed Civil case number 11. 2015 at Wang'uru Court whereby she admitted that, the 2nd Respondent had taken over the plot and she had not applied for an order of injunction and the suit has been stayed.

19. She further depones that the applicant does not stand to suffer any loss as accounts will be taken and she cannot seek to benefit from what is already is belonging to another person.

20. She avers that, the applicant vacated the Plot and only goes to the plot to incite tenants against allowing the rightful owner to take possession.

She prays that the application be dismissed.

THE 2ND RESPONDENT: FAITH FIDES KARUANA KAREITHI

She has opposed the application and has filed a replying affidavit sworn on 4th May, 2020. Her contention is that she bought Plot Number. 104 Kutus from the 1st Respondent after the Grant was confirmed.

21. That she has never been served with a Memorandum of Appeal and it almost one year since it was filed and it is only meant as a delaying tactic. She contends that, the appeal has not been admitted and hence the delay and the order cannot be available to her at this stage as the appeal has not been admitted. She had filed an application seeking to evict the applicant, but the application was dismissed.

22. That the applicant cannot seek for orders not be evicted from the land in this suit.

23. That the orders would be in conflict with the orders issued in Civil Case number. 34 of 2020 in The Magistrate's Court where an order of eviction was issued.

24. She contends that she is an innocent purchaser without notice of any dispute, and that she is protected Under **Section 93 of The Law of Succession Act. Section 93 (1) of The Law of Succession Act provides:**

“A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”

25. That it is not true that the transfer was done fraudulently.

26. That the application lacks merit and ought to be dismissed. The parties agreed to canvass the application by way of written submissions.

For the applicant submissions were filed by Maina Kagio Advocates:

He submits that the application has merits.

27. That this court has jurisdiction to entertain any application and determine any disputes under this Act, and to pronounce such decrees and to make such orders as may be expedite.

28. That **Rule 73 of The Probate and Administration Rules**, It is provided:

“Nothing in this rules shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

29. That the applicant has all along been on the Plot in dispute and the question is on what basis she is there?

What the court had to determine is:

- Whether the applicant and her son were dependants of the deceased and therefore entitled to get a share of the properties left behind by the deceased.

30. He submits that the appeal is not frivolous and raises issues worth this court's consideration. He relies on **Order 42 Rule 15 of Civil Procedure Rules** which provides

15 (i) *“When a memorandum of appeal is lodged, the court to which such appeal is preferred shall send notice of appeal to the court from whose decree the appeal is preferred.*

(2) The court receiving such notice shall send with all practicable dispatch all material papers in the suit, or such papers as may be specially called for by the court to which such appeal is preferred.

(3) Either party may on application and upon payment of the requisite charges obtain copies of any such papers as aforesaid.”

31. He contends that there is no legal requirement that before the proceedings are typed and the file forwarded to the high court for purposes of rejection or admission of the appeal the appellant should have paid for the proceedings or have served the memorandum of appeal to the respondents **Order 42 Rule 12 of the Civil Procedure Rules refers.**

32. That the contention by the 2nd Respondent that the remedy for the applicant lies in the Environment and Land court is not true as that court cannot determine issues of revocation of grant and sharing of properties left behind by the deceased person, and therefore the appeal is properly before this court.

33. That the 2nd respondent was not a bonafide purchaser, she never conducted due diligence.

34. That the 2nd respondent cannot hide behind Section 93 of The Law of Succession Act, since the said provision cannot sanitize an illegality or be used to disinherit rightful beneficiary from her share.

35. He submits that the contention by the 1st Respondent in paragraph 3 of her replying affidavit that she does not understand what she is to be restrained from, is untrue as the orders sought in the application are self-explanatory.

36. The allegation that, the 2nd respondent took occupation of the plot upon purchase are not true as they have not deposed that she is in occupation.

37. If that were the position, there would have been no need for the 2nd respondent to file for a suit seeking to have the applicant evicted from the suit plot.

38. He submits that the status quo at the time of filing the Succession cause should be maintained, been that the applicant was and is in occupation of the suit plot exclusively.

39. That there is need to preserve the property, pending the hearing and determination of the appeal.

For the 1st Respondent Submissions were filed by: Anne Thungu & Company Advocates.

They submitted that the application is brought under **Order 42 Rule 6 (6) of The Civil Procedure Rules** and the test applied in the exercise of its discretion in regard for application for injunctions pending appeal is in the case of; **PATRICIA NJERI & 3 OTHERS -VS- NATIONAL MUSEUMS OF KENYA (2004) eKLR** which was quoted with approval by Mureithi J in **Julius Musili Kiunga -vs- K.C. B Limited & Another.**

(2012) eKLR. It was stated;

“ The Appellants 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 not be exercised against an Applicant whose appeal is frivolous (See Madhupaper International Limited -vs- Kerr(1985) KLR 840 which cited Venture capital). The applicant 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 Applicant 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 Limited (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.

Starting with the well-known principles of: Giella -vs- Cassman Brown & Co. Limited (1973) EA 358 the Applicants herein have established a prima facie case. A prima facie case was described in Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others (2003) eKLR. The Court stated:-

“ The power of the Court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of the law and evidence.....

So what is a prima facie case? I would say in civil cases it 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 as to call for an explanation or rebuttal from the latter. “

40. It is further submitted that the 1st respondent does not know why orders are been sought against her, and yet she is not in occupation of the suit land.

41. That the court is been asked to act in vein, and issue orders against parties who are not affected by the orders sought. He has relied on: **Mis. Civil Cause No. 1 of 2004 (O.S)** In the Matter of an application **Under Section 38** of The Limitation Of Actions

Act and In The Matter of **L.R. No. 33883 Charles Matheka -vs- Shacho Industries Limited**, where it was stated more importantly, interim injunction pending for more application was not sought immediately after the Judgment was delivered.

42. Again though the application for Injunction was filed under Certificate of Urgency, certification in that behalf does not appear to have been sought nor was Interim Injunction sought pending hearing of the application.

43. That been the position, there was nothing lawfully to prevent the defendant from disposing off the suit property after Judgment in its favour was delivered.....”

44. It is submitted that; the applicant has not demonstrated that she has an arguable appeal, there is no proof of service of memorandum of appeal, and no steps to prosecute the appeal.

45. It is further submitted that, the order of Injunction is sought in undue delay, and they urge the court to find that the delay in seeking the Injunction orders shows that there is no urgency, and delay disentitles her from getting the orders sought.

On the issue of status quo, it is submitted that the applicant is not in possession of the plot.

46. It is submitted that since the 2nd respondent is already In possession of the plot, it will create great hardship to her as the registered owner of the possession to be restrained from collecting rent, and deeming with the plot the way she deems fit. There is a danger of the tenants running the plot down. It is also submitted that, there is a court decision in CMCC No. 34 of 2020 and the applicant was restrained from collecting rent from the Plot.

47. It is further submitted that the applicant has not come to court with clean hands as it is not denied that the applicant vacated the plot and only comes to ground to incite the tenants against allowing the rightful owner to take possession.

48. The Applicant is seeking discretionary orders of Injunction which are equitable orders. In the Case of ; **Giella -vs- Cassman Brown** the court stated that;

“ where the court is in doubt it will determine the case on the balance of convenience.”

She submits that, the balance of convenience is in favour of dismissing the application.

49. It is also submitted that the applicant does not stand to suffer any loss as the accounts will be taken and she should not try to benefit from what already belongs to another person.

50. The applicant has not demonstrated what loss she will suffer, if the orders are not granted, if she is allowed to continue to living and controlling the tenants in the premises, she will be interfering with the property rights of a registered owner.

51. That the orders sought are oppressive and this court is been asked to perpetuate an illegality by aiding a trespasser and a tenant to intermeddle with the proprietary right of a registered owner.

52. It is also submitted that no reason have been advanced for the court to order a stay for other suits In CMCC No. 245 of 2018, and Kerugoya CMCC No. 34 of 2020. The applicant has not demonstrated that she has an appeal which will be rendered nugatory.

53. That the Application is without merits.

For the 2nd Respondent, Submissions were filed by Ikahu Ngangah Advocates

He submits that the 2nd Respondent was a purchaser without notice of any defects to the Title as all processes had been undertaken.

54. That the 2nd respondent had filed an application dated 13th June, 2019 for eviction which was dismissed on the application on the opposition by the applicant herein.

55. That upon dismissal the 2nd Respondent filed Civil Case no. 34 of 2020 at the Chief Magistrate’s court Kerugoya, restraining any interference of the plot at Kutus No. 104 and an order dated 24th March, 2020 was granted, and the applicant complied with the order and has never been appealed against, and still remains in force. That there has never been any order of stay of execution, of the Grant or proceedings in the matter. That the 2nd respondent is protected Under Section 93 of The Law of Succession Act and he prays that the application be dismissed.

ANALYSIS AND DETERMINATION

I have considered the application, the affidavits and the submissions filed by the parties.

The issue which arises for determination is Grant of Injunction.

The Law on Granting of Interlocutory injunction is set out on **Order 40 Rule 1 (a) (b) of The Civil Procedure Rules**. It provides:

“ where in any suit it is proved by affidavit or otherwise:-

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

(b) the defendant threatens or intends to remove or dispose of his property in circumstances, affording reasonable possibilities that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit 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.”

56. The conditions for consideration in granting an injunction has been well settled in the case of; **Giella -vs- Cassman Brown & Company Limited (1973) EA 358** where the court expressed itself on the conditions a party must satisfy for the court to grant an interlocutory injunction.

“First an applicant must show a prima facie case with probability of success.

Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

Thirdly, if the court is in doubt it will decide an application on a balance of convenience.”

57. The circumstances for consideration before granting a temporary Under **Order 40 (1) of The Civil Procedure Rules**, requires a proof that any property in dispute in a suit is in danger of been wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree, or that a defendant threatens or intends to remove or dispose of the property. The court in such situations is enjoined to grant a temporary injunction to restrain such acts.

58. In the instant case there is no doubt that the suit property is in danger of been alienated as the 2nd respondent does not deny that it has bought the land in dispute.

59. The applicant has filed this appeal arising from a Succession cause, where she was claiming the suit property as a dependant that is; the wife of the deceased. She was dissatisfied with the decision of the lower court and hence she has filed the Appeal to this court.

60. There is no dispute that the court can in proper cases grant an injunction pending appeal. The court exercises discretion. The applicant has filed a Memorandum of Appeal. **Section 79 of the Civil Procedure Act** provides that every appeal from the sub-ordinate court to the High court shall be filed within 30 days. **Order 42 rule 15 of the Civil Procedure Rules** provides that when a Memorandum of Appeal is lodged, the court shall send notice of appeal to the court from whose decree the appeal is preferred. The appeal is filed upon filing a Memorandum of Appeal.

61. From the submissions by both parties and the averments in the affidavit the issues can only be determined by this court upon hearing the appeal. There has been a multiplicity of suits in the lower court as deponed by the parties. The dispute is far from over in view of this appeal. On the issue as to whether the applicant has a prima facie case, the applicant has stated that she had lived on the plot with her husband. There is a determination by a court with competent jurisdiction that she is not a wife and the decision has not been set aside. The plot was sold after the grant was confirmed. The plot has now changed hands as the 2nd respondent is now the registered owner. The applicant has therefore not established a prima facie case with chances of success. Secondly there was unreasonable delay in filing this application. The balance of convenience does not tilt in favour of the applicant. Equity aids the vigilant not the indolent.

62. The second consideration is whether the court should order stay of proceedings. **Order 42 rule b(1) of the Civil Procedure Rules** provides that no appeal shall operate as a stay of execution or proceedings except as the court may order. The court is called upon to exercise discretion to order stay. It is trite that the discretion must be exercised judiciously. This appeal arises from the proceedings in a succession cause. **Rule 73 of the Probate and Administration Rules** gives the court discretion to make such orders as would be necessary for the ends of justice. It provides:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as maybe necessary for the ends of justice or to prevent abuse of the process of the court.”

63. The Rule gives the court wide powers to make such orders as would be necessary for the ends of justice.

64. In this matter the applicant has failed to bring the application within the ambit of **Order 40 rule 1 Civil Procedure Rules** and the principles for the grant of an injunction as laid down in the case of **Giella -v- Cassman Brown** (supra). I however find that there is need to order that the status quo be maintained and all the proceedings in the Lower court be stayed in view of this appeal as the High Court takes precedence.

65. I order that prayers (b) and (c) on the application are declined. I grant prayer (d) on the application and further order that the status quo be maintained so as to ensure that the appeal is not rendered nugatory. I make no orders as to costs.

Dated at Kerugoya this 29th Day of May 2020

L. W. GITARI

JUDGE