



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**HIGH COURT CIVIL APPEAL NO. 27'A' OF 2017**

**NANCY WAMBA NDAMBIRI.....APPLICANT**

**V E R S U S**

**JEPHITHA NJUE ERNEST NDAMBIRI.....1<sup>ST</sup> RESPONDENT**

**DAVID KINGANGI ERNEST.....2<sup>ND</sup> RESPONDENT**

**RULING**

The appellant Nancy Rwamba Ndambiri has filed an application dated 19/02/2018 seeking the following orders;

- i) Stay of execution of judgment of 07/06/2017, 23/08/2017 and 22/12/2017 in **Succession Cause No. 59 of 2017** and stay of distribution of the estate of the deceased.
- ii) Temporary injunction against the respondents to restrain them or their agents from transferring, disposing, encroaching upon and/or intermeddling with **Ngariama Thirikwa/236**.

The respondents' did not file any response despite having been served as per the affidavit of service dated 08/03/2018. Therefore the application was unopposed.

**Issues arising:**

**1. Temporary injunction.**

The procedure for seeking temporary injunction has been provided under **Order 40(1) Procedure Act**. There are 3 principles that govern issuance of interlocutory injunction:

- i. Prima facie Case
- ii. Balance of Convenience;
- iii. Irreparable injury

These principles were settled in the case of *Giella –v- Cassman Brown*.

The appellant filed an appeal on 06/07/2017 against the judgment of 07/06/2017 which was confirmation of grant.

In addition, the appellant claims that on 23/08/2017, the trial court included Plot No. Muthigini and Kiosk which were left out but she was never served with the said application.

That on 14/02/2018, the respondents in the company of police officers and strangers started demarcating the land as per the photos which are annexed to her affidavit.

On 22/12/2017, the trial court granted Eric Mwangi Mbogo who was never part of the petition 2.46 acres out of **Ngariama Thirikwa/236** and he was also never served with the application.

The respondents have not adduced any proof of service to refute the claim that the appellant was never served with the two applications she

has therefore established a prima facie case with chances of success. This warrants the granting of an injunction.

## **2. Stay of execution**

### **Order 42, rule 6**

*No order for stay of execution shall be made under subrule (1) unless—*

*a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

*b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.*

The appellants need to satisfy the court on the following conditions before they can be granted the stay orders:

a) Substantial loss may result to the applicant unless the order is made,

b) The application has been made without unreasonable delay, and

c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

These are the conditions which a party wishing to get orders for stay must establish.

#### **a) Substantial loss occurring**

In the case of **Charles Wahome Gethi v Angela Wairimu Gethi [2008] Eklr**

The Court of Appeal held the following view on the issue of substantial loss;

**The applicant does not claim that the respondent intends to sell the portion of land in dispute and that it will not be in existence by the time the appeal is determined..... In the circumstances of this case, the applicant would suffer substantial loss rendering the appeal, if successful nugatory only if the suit land is disposed of before the appeal is determined. The applicant does not claim that the suit land would be disposed of. The applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the appeal, if successful would be rendered nugatory.**

The judgment of the court was on the distribution of the estate of the deceased whereby the appellant is claiming that some beneficiaries were not provided for. In addition, the respondents in the company of police officers and strangers have started demarcating the land. If stay is not ordered the land may change hands before the appeal is heard and determined. The applicant will therefore suffer substantial loss.

#### **b) Requisite security**

The appellant has stated that he is willing to provide security. It is upon the court to order such security and the applicant to comply.

#### **c) Was there undue delay?**

The applicants being aggrieved with the judgment of the trial court delivered on 07/06/2017 proceeded to file an appeal on 06/07/2017 and application for stay of execution on 19/02/2018. The delay was for about 7 months. Considering that the appeal was filed in time and an application for stay which was filed before the trial court was rejected, the delay was not inordinate. The application was filed on 19/2/18 after the respondent in the company of police and strangers invaded the land on 14/2/18 and started demarcating. The applicant moved with speed to seek this orders.

#### **In Conclusion :-**

The applicant has established the grounds to warrant this court to make orders of injunction. She has also proved that she is likely to suffer substantial loss unless the court makes an order for stay of execution.

I therefore order as follows:-

1. There will be an order of injunction as prayed in prayer -3- of the application pending hearing and determination of the appeal.
2. There be stay of execution as prayed in prayer -2- of the application pending the hearing and determination of the appeal.
3. The applicant to provide security by depositing Kshs 20,000/- as security for costs within 14 days from the date hereof.

4. Costs shall be in the cause.

**Dated at Kerugoya this 26<sup>th</sup> Day of July 2018.**

**L. W. GITARI**

**JUDGE**