



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION-MILIMANI LAW COURTS
HIGH COURT CIVIL APPEAL NO. 32 OF 2015

IN THE MATTER OF THE ESTATE OF JANE WANJA KIMUNYA (DECEASED)

BETWEEN

PETER NDUNGU 1ST
APPLICANT

HUMPHREY WAINAINA KANARI 2ND
APPLICANT

ANDREW KIMUNYA KANARI 3RD
APPLICANT

AND

JANET WAITHIRA KIMUNYA 1ST
RESPONDENT

HANNAH WANJIRU KIMUNYA 2ND
RESPONDENT

RULING

INTRODUCTION

The Notice of Motion Application dated 9th April 2015 is the subject of this Ruling and Peter Ndungu, 1st Applicant, Humphrey Wainaina Kanari, the 2nd Applicant, and Andrew Kimunya Kanari, 3rd Applicant, (hereafter ‘the Applicants’) seek the following orders:

1. ...

2. That pending the hearing and determination of the Application herein, this Honourable Court be pleased to order a stay of execution of the Decree of the Court given on 18th March, 2015 on such terms as it deems fit.

3. That pending the hearing and determination of the Appeal herein, this Honourable Court be pleased to order a stay of execution of the Certificate of Confirmation of Grant given on 18th

March, 2015 in relation to L.R No. Tinganga/Ndumberi/1631, on such terms as it deems fit.

4. That pending the hearing and determination of the Appeal herein this Honourable Court be pleased to grant a temporary injunction restraining the Respondents from transferring, alienating, assigning, charging, leasing, gifting, selling and/or in any way dealing with L.R No. Tinganga/Ndumberi/1631.

5. That this Honourable Court do grant such further orders as it deems fit in the interest of justice.

6. That the cost of this Application be in the cause.

The facts giving rise to the present dispute are largely undisputed. The deceased, Jane Wanja Kimunya died intestate on 14th March 2010. A Petition for Summons for Confirmation was filed on 25th May 2010 at the Chief Magistrate's Court at Kiambu namely, Succession Cause No. 111 of 2010, by Janet Waithera Kimunya, the 1st Respondent herein, and Peter Ndung'u Kanari, the 1st Applicant. The 1st Respondent however filed an Affidavit of Protest to Confirmation of Grant on 22nd January 2012 and the Chief Magistrate's Court heard and determined the matter and thereby rendered a decision on 18th March 2015. While being dissatisfied with the decision, the Applicants filed the present Application on 13th April 2015 and have sought for the orders as stated above.

On 14th April, 2015, the matter was placed before Hon. Lady Justice L.A Achode and the matter was certified as urgent and the Learned Judge granted a temporary injunction restraining the Respondents from transferring, disposing of, leasing, charging, assigning, gifting or in any way alienating the property known as L.R Tinganga/Ndumberi/1631 (hereafter 'the property') pending the hearing and determination of the present Application.

THE APPLICANTS' CASE

In an Affidavit in support of the Application sworn on their behalf on 10th April, 2015 by the 1st Applicant, Peter Ndungu Kanari, it was their contention that the Judgment in the Chief Magistrates' Court at Kiambu Succession Cause No. 111 of 2010 was delivered in favour of the Respondents by bequeathing the entire Estate of the deceased to them jointly and that being dissatisfaction with the said Judgment, they have in that regard filed an appeal before this Court challenging the same.

It was their argument that the Respondents in the execution of the Decree extracted therein, have extracted a Certificate of Confirmation of Grant and are in the process of transferring the property to themselves. Further, that Letters of Administration intestate were issued by the Kiambu Chief Magistrate's Court on 12th August 2010 and prior to the 1st Applicant filing for the confirmation of the grant, the 1st Respondent using a fraudulent Grant of Letters of Administration illegally transferred the property to herself.

Accordingly, that the transfer was effected on 30th May 2011, in which the same was transferred to the 1st Respondent and the same was done using a Grant purportedly issued in HCC Succession Cause No. 1245 of 2010, which upon investigation by the police, it was discovered that the Estate therein belonged to one Muturi Njau and in that regard, the 1st Respondent was charged in Kiambu SPMCC No. 1249 of 2012.

The Applicant's case was further that they were listed as beneficiaries in the Petition for Letters of Grant of Administration and as such, the Magistrate erred and misapplied the law by holding that they were not beneficiaries.

The Applicants asserted further that they are apprehensive that the Respondents shall proceed to dispose of the property and hence rendering their Appeal nugatory. Further, that they, in their Summons of Confirmation of Grant, only requested the Court to give the 2nd and 3rd Applicant half an acre each of the

property and the Court to further order the setting aside of a certain portion of the property for the burial of the deceased.

In their Supplementary Affidavit sworn by the 1st Applicant on 10th July 2015, the Applicants reiterated the foregoing assertions and argued further that the deceased did not have any biological or adopted children, but had children that she brought into her household and brought up as her own, including the 2nd and 3rd Applicants. Accordingly, that the Respondents are not sisters but children of different parents but were only taken in by the deceased.

The 1st Applicant denied making any false representations or statements as to the deceased's property and that the issue of the administration of the Estate was discussed in a family meeting wherein it was agreed that he and the 1st Respondent do petition for Grant of Letters of Administration. As such, he rebutted the Respondents' assertion that he approached them and offered to help with the administration of the Estate.

The Applicants maintained that the assertions by the Respondents are scandalous and demeaning as they at no time had the intention of disinheriting them. Accordingly, that they are entitled to petition and inherit their step-mother's property and as such, there was nothing wrong in them listing their names as beneficiaries. Further, that the proposed distribution of the Estate was as well agreed to by the family and that the 2nd and 3rd Applicants and/or their mother, Minnie Wambui Kanari, who was a step-daughter of the deceased, had not been considered by their father when the property was being sub-divided and hence they found it viable, just and equitable that they at least get a small portion from the deceased's Estate, since the property came from their father.

It was the Applicants' contention that their father, Andrew Kimunya Njuguna, was a staunch Christian and did not at any time have two wives. That their mother died in 1980 and shortly thereafter, their father married the deceased and hence, it is therefore not correct for the Respondents to assert that their father's Estate was divided between two wives. That in any event, when the sub-division was done, their father had taken the 2nd and 3rd Applicants as his children and hence, the deceased was meant to escheat the property to them and the Respondents.

They contended further that the 2nd and 3rd Applicants lived with the deceased on the property until they were old enough to fend for themselves and that contrary to the Respondents' assertions, the mere fact that a beneficiary is not residing on a parcel of land as at the time of the demise of the deceased, does not mean that he or she is not qualified to inherit from the deceased's Estate. Further, that after the demise of their sister, Minnie Wambui Kanari in 1980, their late father took the 2nd and 3rd Applicants while they were young.

It was the Applicants other contention that the Application before the Kiambu Magistrate Court was for the distribution and confirmation of the Grant and they were already listed in the Petition as beneficiaries and as such, the Learned Magistrate erred in disinheriting them. That the 1st Respondent has acted dishonestly and she in that regard has a pending criminal case in regard to the same.

According to the 1st Applicant, he does not live on the property as he has his own portion of land, he has not sought to benefit from the deceased's Estate but has always championed for the rights of the 2nd and 3rd Applicants, nowhere in the Memorandum of Appeal or the Supporting Affidavit has he raised the issue of trust held by the deceased or at all, and that they are only seeking a reasonable portion of the deceased's Estate and not to disinherit the Respondents.

They further argued that the contentions by the Respondents that they are anti-feminists are scandalous and lacking in any legal or factual basis and the same is only meant to solicit sympathy from the Court and to divert its attention to the substantive issues in their Appeal.

In their Written Submissions filed on 27th April 2016, the Applicants contended that under **Order 42 Rule 6** of the **Civil Procedure Rules**, in an application for stay pending an Appeal, a Defendant must

show that he or she has filed an appeal, substantial loss may result if stay is not granted, should file the Application without unreasonable delay, and has to provide security for the due performance of the Decree that may ultimately be binding on him or her.

They submitted further that they have complied with the said provision and that their Appeal is merited for the decision of the Kiambu Magistrate's Court of disinheriting them is without any legal justification.

The Applicants relied on the decision in **TABRO TRANSPORTERS LTD VS ABSALOM DOVA LUMBASI [2012] eKLR** for the proposition that:

“In law, the fact that the process of execution is likely to be put in motion, by itself, is not a ground for granting stay of execution. The Applicant must show that substantial loss will occur if the execution is not stayed. But what does substantial loss entail?...”

The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”

According to the Applicants, and in reliance on **GIELLA VS CASSMAN BROWN [1973] EA 358**, they have established a prima facie case with high chances of success, they are likely to suffer irreparable damages if the orders sought herein are not granted and an award of damages cannot be an adequate remedy in the circumstances and in any event, the balance of convenience tilts in their favour.

For the foregoing reasons, the Applicants therefore argued that they have a meritorious Appeal and they urged the Court to allow the present Application and grant the orders sought therein and that they are ready to abide by any condition that shall be imposed by the Court.

THE RESPONDENTS' CASE

In response to the Application, the Respondents filed an Affidavit sworn on 5th June 2015 by the 1st Respondent, Janet Wanja Kimunya.

It was their contention that they are the sole survivor children of the deceased and that at the time of her death, she left a number of properties including parcels of land namely Kiambu Municipality Block 5/Kiamumbi/11566; Kakuzi/Kimiriri/Block IV/188; Ndumberi/Ting'ang'a/1631; and shares namely in Cooperative Bank, Gatatha Farmers Company Limited, and Kiamumbi Farmers Cooperative Society; and money in Equity Bank under account No. 0640193364795.

The Respondents rebutted the assertions by the Applicants in regard to the ownership of the property and stated that the same are false and that in any event, it was the 1st Applicant who approached the 1st Respondent and offered to help her acquire Grant Letters of Administration. In that context, it was their further argument that the 1st Respondent was not aware that the 1st Applicant was duping them with an intention to disinherit them by including the names of their (Applicants) brothers and nephews as dependants.

It was their contention that upon agreeing to the 1st Applicant's demands, he filed for Summons of Confirmation dated 22nd November 2011 and proposed to give them all the properties save for three parcels of land, which were to be distributed to the Applicants in various proportions namely, the 1st Applicant was to hold 0.25 Acres out of Ndumberi/Ting'ang'a/1631 to hold in trust for the entire family for burial purposes; the 2nd and 3rd Applicants were to receive 0.5 acres respectively out of the property.

The Respondents maintained that the property was hired in the year 1987 from a larger parcel of land being Ndumberi/Ting'ang'a/111 and that prior to 1987, the same was registered in their late father's name, Andrew Kimunya Njuguna. That their father, having married two wives, while still alive and well, subdivided the land for the two families and their mother was given the property, while their step-mother

was given the parcel known as Ndumberi/Ting'ang'a/1632, 1630, 1629 and 1627 all measuring 5 acres. Accordingly, that in 1997, while still alive, their father registered the title to the property in favour of their mother.

The Respondents asserted that to date, they have been in exclusive possession and enjoyment of the property and the Applicants have never at any time lived on or occupied the property. Further, that the Applicants are not dependants of the deceased as their mother has at no time provided or lived with them.

As regards the intended Appeal by the Applicants, it was the Respondents' position that the same is unmerited for the reasons that the 1st Applicant is lying to the Court and yet he admitted to the trial Court that they never lived on the property; his claim that he was holding the property in trust for any persons is not established; he has no legitimate claim to any of the deceased's property; the 2nd and 3rd Applicants are adults fully engaged in employment as they had earlier stated in evidence; the claim for a family burial place is untenable for as the property does not belong to any of the Applicants and neither is it a public burial site.

Further, it was their other argument that the Applicants are being selfish by purporting to disinherit property belonging to their mother yet they own their share and which they (Respondents) are laying no claim to, and that in any event, the main reason why the 2nd and 3rd Applicants are fighting them is on the grounds that they do not believe in women owning land and as such, they want the title to the property to be given in their (the 1st and 2nd Applicants) favour so that they can decide what to give to them.

In their Further Affidavit sworn by the 1st Respondent on 27th July 2015, it was their further argument that the Affidavit by the 1st Applicant is contradictory and full of falsehoods as he at one point alleges that they are not the deceased's children but at some point he admits that they are. Accordingly, that he largely raises matters of evidence and yet, he did not raise the same before the trial Court and hence, the same remain an afterthought.

Accordingly, they asserted that the criminal case against the 1st Respondent was withdrawn on 23rd April 2013 on the ground that she was not in any way involved in the forgery of any documents as it had been alleged. That, the said case was in any event a conspiracy against him so as to have him jailed so as to have the 2nd and 3rd Applicants take the property. Furthermore, that the present Application is pegged on falsehoods calculated to mislead the Court and as such ought to be dismissed and the Court ought to further evaluate the evidence that the Applicants adduced at the trial Court.

In their Written Submissions dated 10th May 2016, the Respondents reiterated the assertions in their affidavits and submitted further that the Applicants have not disclosed any issue that warrants orders of stay. Additionally, that the Memorandum of Appeal dwells on issues that the trial Court adequately addressed and that the 1st Applicant has not shown why the 2nd and 3rd Applicants should benefit from the property.

In the Respondents' further view, the decisions relied on by the Applicants are not applicable in the present case as the facts therein are radically different from those of the present case. In addition, that the Applicants are merely engaging them in costly manoeuvres so as to waste down the deceased's Estate and frustrate the fruits of the Judgment rendered by the trial Court.

Finally, it was their submission that the Applicants have not demonstrated that they have an arguable appeal with any probability of success and neither have they shown that the Appeal would be rendered nugatory if the orders sought herein are not granted. As such, they stand to lose nothing or suffer any prejudice if the orders sought are not granted.

For the foregoing reasons, they therefore urged the Court to dismiss the present Application together with the intended Appeal by the Applicants.

DETERMINATION

I have read and considered the Parties' respective pleadings and submissions. The key question for determination is whether the orders sought in the Notice of Motion Application dated 9th April 2015 ought to be granted in the circumstances.

At the core of the Application is the question of whether orders of stay of execution should be issued pending the Appeal of the decision of the trial Court. In that regard, the law on stay of execution is outlined under **Order 42 Rule 6** which stipulates that:

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

2. No order for stay of execution shall be made under sub-rule (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.

3. Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

4. ...

5. ...

6. Notwithstanding anything contained in sub-rule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

As can be discerned from the above provision, this Court is vested with the powers of granting orders of stay of execution provided an Applicant demonstrates that substantial loss may result to the applicant unless the order is made and further, an Application for stay ought to be made without unreasonable delay. In that regard, **RAYMOND M OMBOGA VS AUSTINE PYAN MARANGA, KISII HCCA NO. 15 OF 2010**, Makhandia, J. (as he then was) pointed out thus:

"... It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed...."

On the question of substantial loss, Odunga J. in **REPUBLIC VS THE COMMISSIONER FOR INVESTIGATIONS AND ENFORCEMENT 'EX-PARTE' WANANCHI GROUP KENYA LIMITED, MISCELLANEOUS CIVIL APPLICATION NO. 51 OF 2013**, observed that:

"[43] It is therefore not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant

should show the damages it would suffer if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be done if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay.” (Emphasis added)

Additionally, in *JAMES WANGALWA AND ANOTHER VS AGNES NALIKA CHESETO, BUNGOMA HC MISC APPLICATION NO 42 OF 2011*, concerning substantial loss, it was observed that:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...” (Emphasis added)

Finally, in *MACHIRA T/A MACHIRA & CO ADVOCATES VS EAST AFRICAN STANDARD (NO 2) [2002] KLR 63* it was held that:

“...To be obsessed with the protection of an appellant or intending appellant in total disregard or fleeting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

This Court is duly guided by the foregoing authorities and I do not see any reasons whatsoever to depart from the same. The question then that I must answer at this juncture is whether the Applicants have made out a case to warrant the grant of orders of stay. In that context the Court notes that the key grievance by the Applicants is in regard to the decision by the trial Court in regard to the parcel of land known as L.R No. Tinganga/Ndumberi/1631 mainly in terms of the distribution of the said property as per the Certificate of Confirmation of Grant extracted by the Respondents as a result of the Judgment rendered by the trial Court.

The Court is not expected to go into the merits or demerits of the trial Court’s decision but merely to limit itself to findings on whether the circumstances warrant the grant of orders of stay. In that regard, and in line with **Order 42 Rule 6**, this Court is satisfied that the Applicants have made out a prima facie case which shall warrant a substantive determination of whether the 2nd and 3rd Respondents have any claim to the property since the Applicants are challenging the fact that the trial Court made a finding that they have no such claim. The Applicants claim that the deceased did not have any biological children of her own and the Applicants just like the Respondents were adopted by the deceased and therefore are entitled to benefit from the deceased's estate as the Respondents have done. These assertions by the Applicants call for a substantive determination which can only be done through hearing of the intended appeal on merits.

On whether the Applicants stand to suffer substantial loss, the appeal is founded on a claim to the property aforesaid and if by chance the Applicants succeed in their appeal, they stand to get their entitlement, if any, to the property. The loss they stand to suffer if the orders of stay are not granted may not be adequately remedied by way of damages as the subject-matter shall be disposed off.

On the final ground in Applications such as this, the Applicant must apply for stay without unreasonable delay. Although the phrase ‘unreasonable delay’ is not defined in the **Civil Procedure Act and Rules**, each case has to be looked at depending on its own special circumstances and merits. In the context of the

present case, the decision by the trial Court was rendered on 18th March 2015 and the present Application was filed under Certificate of urgency on 13th April 2015. That, in this Court's view, is reasonable time and as such, the present Application is well within this Court.

In conclusion, the right to appeal the decision of a lower Court is a constitutional entitlement which should be read together with the right of every individual to access justice as stipulated under **Article 48** and **50** of the **Constitution**.

In the circumstances of the present case therefore, and in striking a balance between the need of the Respondents to enjoy the fruits of the Judgment rendered by the lower Court and the Applicants' right to challenge the decision in the form of an appeal, the Court is satisfied that the wheels of justice tilt in favour of the Applicants so as to enable this Court determine the issue on merit and in finality. It is also to be noted that the Parties herein made submissions largely on the merit of the intended Appeal and as such, it is only just that this Court hears and determines the same when properly moved on appeal.

DISPOSITION

Based on analysis and findings above, the following are the orders that commend themselves in the circumstances:

- 1. The execution of the decree of the Court given on 18th March 2015 is hereby stayed pending the hearing and determination of the Appeal herein.**
- 2. The execution of the decree given on 18th March 2015 in terms of the Certificate of Confirmation of Grant in relation to L.R No. Tinganga/Ndumberi/1631 is hereby stayed pending the hearing and determination of the Appeal herein.**
- 3. The temporary injunction order restraining the Respondents from transferring, disposing of, leasing, charging, assigning, gifting or in any way alienating L.R No. Tinganga/Ndumberi/1631, granted by Hon. L. Achode J. is hereby extended pending the hearing and determination of the Appeal herein.**
- 4. The Appellants shall file appeal within 60 days from today in default these orders shall abate.**
- 5. Let each Party bear their own costs to this Application.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH SEPTEMBER 2016

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF

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