



**Waweru v Waweru & another (Civil Appeal E069 of 2022)
[2024] KEELC 6703 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 6703 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL APPEAL E069 OF 2022
MD MWANGI, J
JULY 12, 2024**

BETWEEN

MARY NJERI WAWERU APPLICANT

AND

KEVIN KINYANJUI WAWERU 1ST RESPONDENT

SHEILA WAIRIMU MWARANGU 2ND RESPONDENT

RULING

(In respect of the Appellant’s application dated 24th November, 2023 seeking a temporary injunction restraining the Defendants /Respondents from transferring, selling, conveying, charging, leasing, attaching or in any way dealing with Plot No Title LR 12422/749 pending the hearing and determination of this appeal)

Background

1. What is coming up for determination is the Appellant’s application dated 24th November, 2023 seeking for orders that;
 - a. Spent
 - b. Spent
 - c. The court be pleased to grant whether by themselves, their agents, and/or employees or whomsoever is acting on their behalf from transferring, selling, conveying, charging, leasing, attaching or in any way dealing with Plot No Title LR 12422/749 pending the hearing and determination of this appeal.
 - d. Costs of the application be awarded to the Appellant/Applicant.



2. The application is premised on the grounds that the Appellant is the lawful administrator of the estate of John Waweru, who co-owned with one David Waweru Kinyanjui and Wairimu Kinyanjui all that property known as LR 12422/749 (Grant I.R. 120358). Sometimes back in 2011, the owners of the suit property decided to sell it to pay for the deceased's medical bills. Consequently, they entered into a sale agreement with the Respondents at an agreed purchase price of Kshs 1,250,000/= payable in instalments.
3. The Applicant avers that despite the successful transfer of the property to the Respondents on 30th May, 2011, they have willfully neglected their contractual obligations to pay the purchase price. Hence the suit before the subordinate Court was to recover the land.
4. The Applicant states that she has learnt that the Respondents were in the process of selling the property to Rosewall Management Limited, potentially undermining and lawfully defeating the Appellant's efforts to regain ownership of the property. In reference to the Lower Court matter, the Applicant faults the court for finding that her suit is statute barred pursuant to Section 4 (a) of the *Limitation of Actions Act* yet the suit is for recovery of land whose limitation period is 12 years. The Applicant and the estate of the deceased are yet to receive the agreed-upon purchase price and they are apprehensive that the Respondents will dispose of the subject property causing them irreparable harm.
5. The Application is further supported by the Affidavit of Mary Njeri Waweru, the Appellant/Applicant herein deponed on the 24th November, 2023. The averments of the said affidavit are generally a replica of the grounds in support of the application stated herein above.
6. The 1st Respondent was served with the application but did not file any response to the application.

2nd Respondent's responses

7. The 2nd Respondent opposed the application vide the grounds of opposition and a Replying Affidavit both dated 23 January, 2024. In the Grounds of Opposition, the 2nd Respondent avers that the application is frivolous, vexatious, misconceived and bad in law. She argues that there has been inordinate delay in filing the application as the Ruling being appealed from was delivered in July, 2022.
8. The 2nd Respondent contends that the Applicant has no locus standi. Further, that the Applicant has not complied with Order 9 Rule 9 in seeking to change Advocate after Judgement. No leave has been sought are required.
9. In the Replying Affidavit deponed by Sheila Wairimu Mwarangu, the 2nd Respondent contends that there exists no Appeal in the first place for non-filing of a Notice of Appeal. She maintains that the Lower Court correctly applied the law by finding that the suit was statute barred. This application is therefore aimed at delaying justice.
10. The deponent asserts that having paid a consideration of Kshs 1,250,000/= in the year 2011, the suit property was transferred to them and they are duly registered as the proprietors. She further stated that there is a pending suit being Milimani Children's Case 1006 of 2012 between the Respondents herein and that the suit property herein is the subject of execution proceedings. Therefore, the application herein is only intended to scuttle the Children's Case by avoiding the sale of the suit property to recover maintenance arrears.
11. She argues that the application is a sham and ought to be dismissed with costs.



Applicant's Further Affidavit

12. The Applicant filed a Further Affidavit deponed on the 4th March, 2024 stating that there is no requirement in law to file a Notice of Appeal on an appeal emanating from the subordinate court to the High Court (read Environment and Land Court). She asserts that there is indeed a valid appeal pending since the Ruling was delivered on 22nd July, 2022 and the Memorandum of Appeal lodged on 19th August, 2022.
13. She further avers that the Respondents did not pay the entire purchase price for the land hence the estate of the deceased has the right to rescind the Agreement and recover the land. Therefore, the suit cannot be said to be time barred. Regarding the proceedings in Milimani Children's Case No 1006 of 2012, the Appellant avers that she is not a party to the proceedings therein, and in any event, that the said proceedings are irrelevant to the instant suit.

Court's Directions

14. The Application was canvassed by way of written submissions in accordance with the directions of the Court. The Applicant's submissions are dated 4th March, 2024 whereas the 2nd Respondent's submissions are dated 19th June, 2024. The Court has had a chance to carefully read the submissions and duly considered them.

Issues for Determination

15. Having considered the application, the affidavit in support, the response thereto as well as the rival submissions, it is my considered view that the issues for determination are;
 - a. Whether an order of interim injunction may be granted pending appeal.
 - b. Whether the Applicant has satisfied the test for the grant of an order of interim injunction pending appeal.

Analysis and Determination

A. Whether an order of interim injunction may be granted pending appeal.

16. Order 42, Rule 6 of the [Civil Procedure Rules](#) empowers this court in exercising its appellate jurisdiction to grant a temporary injunction. The rule provides that: -

“(6)Notwithstanding anything contained in sub rule (1) of this rule, the High Court shall have power in 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 a subordinate court or a tribunal has been complied with.”

17. Section 79G of the [Civil Procedure Act](#) provides for the time within which appeals from subordinate courts to the High Court can be filed as follows: -

“Every appeal from a subordinate court to the High Court shall be filed within thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.



18. As stated in Rule 6 above, where the procedure for instituting an appeal has been complied with the court may exercise its discretion to grant a temporary injunction. As this court stated in the case of *Kenya Harlequin Football Club v Quaco Two Hundred and Thirty-Two Ltd & another* (2022) eKLR, under the provisions of order 42 rule (1), appeals to the High Court (and courts of equal status off course), are in the form of a memorandum of appeal signed in the same manner as a pleading.
19. The Appellant/Applicant has therefore complied with the procedure for instituting an appeal (from a subordinate court or a tribunal) having filed a Memorandum of Appeal in accordance with the provisions of order 42. An order of interim injunction may therefore be granted if the application is merited.

B. Whether the applicant in this case has satisfied the test for the grant of an order of interim injunction

20. Justice Visram J (as he then was), while considering a similar application in the case of *Patricia Njeri & 3 others v National Museum of Kenya* (2004) eKLR, spelt out the principles to be followed in considering an application for an interim injunction pending appeal. He stated that the power of the court to grant any order of temporary injunction is discretionary. Discretion must however be exercised judicially and not in a whimsical or arbitrary fashion.
21. The exercise of that discretion should be guided by certain principles as follows: -
 - a) The discretion will be exercised against an Applicant whose appeal is frivolous.
 - b) The discretion should be refused where it would inflict greater hardship than it would avoid.
 - c. The Applicant must show that to refuse the injunction would render his appeal nugatory.
 - d. The court should be guided by the principles in *Giella v Cassman Brown & Company Ltd* (1973) EA 358.
22. It is important to note that this court is yet to hear and determine the appeal. The court will therefore be frugal with its words so as not to prejudice the hearing of the appeal.
23. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella v Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No 77 of 2012 (2014) eKLR where the Court of Appeal held that;

“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a *prima facie* level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.
24. Consequently, the Plaintiff ought to, first, establish a *prima facie* case. The plaintiff/Applicant submitted that they have established a *prima facie* case and relied on the judicial decision of *Mrao Ltd*



v First American Bank of Kenya Ltd (2003) EKLK in which the Court of Appeal defined a *prima facie* case in the following words:

“... 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

25. In the instant case, the Applicant has stated that she has a *prima facie* case in that her appeal raises arguable grounds with a probability of success. The Applicant avers that she co-owned the suit property with her deceased husband. She attached a title confirming so. The deceased, through a power of attorney, transferred the suit property to the Respondents, a fact undisputed by the Respondents. The purchase price was to be paid in installments to the Applicant's deceased husband prior to his passing. However, following his demise, the Respondents failed to honor the agreement, defaulting on their payment obligations and refusing to pay the purchase price. The 2nd Respondent on the other hand contend that she, together with the 1st Respondent, are the registered proprietors of the suit property having purchased it from the deceased and paid the full purchase price.
26. It is evident that the Applicant has a protectable interest in the suit property. As to whether the suit is time barred as determined by the lower court, that is an issue that shall be dealt with at the hearing of the main appeal. The role of this court at this stage is to consider whether the Appellant has demonstrated an arguable appeal.
27. In the case of *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR, the court held that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court.
28. Having considered the averments by the Applicant and the rejoinder by the 2nd Respondent, it is my finding that the Appellant/Applicant has established a *prima facie* case and demonstrated that she has an arguable appeal.
29. On the issue as to whether the Appellant/Applicant shall suffer irreparable injury should the temporary injunction not be granted; the Applicant asserts that the Respondents are in the process of selling the suit property. She has in fact attached an Agreement for Sale between the Respondents and a third party. The 2nd Respondent has on her part argued that they intend to sell the suit property to recover the maintenance arrears owed to her by the 1st Respondent. She stated that the sale is subject to a court order issued by the Children's Court. In response thereof, the Applicant contends that she is not a party to the case pending at the Children's court. Further, the said case is irrelevant to the issues raised herein.
30. I agree with the Applicant that disposing of the suit property will alter the subject matter of the suit and further convolute the ownership wrangle and render the appeal nugatory.
31. Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR, balance of convenience was defines as follows:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show



that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting.”

32. The applicant has argued that the balance of convenience tilts in her favour. She argues that should the court not grant the temporary injunction, the Respondents will proceed with the sale thus extinguishing the subject property and the pending appeal will become an academic exercise.
33. This court has considered the rival positions on this matter and notes that it is enjoined by Sections 1A and 1B of the *Civil Procedure Act* to ensure the ends of justice are met in a manner that is just, expeditious, proportionate and affordable.
34. Further, Section 13 (7) (a) of the *Environment and Land Court Act*, (2011) gives this court the mandate to grant preservation orders. In the event that the Appeal fails to succeed, the Respondents will proceed with the execution of the order of the Children’s court. On the other hand, should the appeal succeed, the suit property will already have been transferred thus complicating it for the Appellant/Applicant.
35. In view of the foregoing, I find that the Appellant/Applicant has met the criteria for grant of orders of temporary injunction pending appeal.
36. I have taken note of the 2nd Respondent’s contention that the Appellant/Applicant has not sued as an administrator of the deceased’s estate. I agree with the Applicant’s submission that this amounts to a misjoinder of the deceased estate which cannot be the sole basis on which the instant appeal is defeated as provided under Order 1 Rule 9 of the Civil Procedure Rules. The Appellant/Applicant attached the Grant of Letters of Administration Intestate issued on the 29th August, 2016. She evidently has the locus standi to institute the proceedings on behalf of the estate of the deceased.
37. In the premises, the Appellant/Applicant’s Notice of Motion Application dated 24th November, 2023 be and is hereby allowed as follows;
 - a. A temporary injunction is hereby issued restraining the Defendants /Respondents whether by themselves, their agents, and/or employees or whomsoever is acting on their behalf from transferring, selling, conveying, charging, leasing, attaching or in any way dealing with Plot No Title LR 12422/749 pending the hearing and determination of this appeal.
 - b. That costs of this application shall abide the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF JULY, 2024

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Ochieng for the Applicant

Ms. M’Mbetsa for the 2nd Respondent.

Court Assistant - Yvette

M.D. MWANGI



JUDGE

