



**In re Estate of Nyaga Wambugu (Deceased) (Civil Appeal
82 of 2019) [2025] KEHC 1654 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1654 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 82 OF 2019
RM MWONGO, J
FEBRUARY 6, 2025**

IN THE MATTER OF THE ESTATE OF NYAGA WAMBUGU (DECEASED)

BETWEEN

**MARGARET NJERI MIGWI 1ST APPLICANT
FRANCIS WAMBUGU NYAGA 2ND APPLICANT
DUNCAN NJERU NYAGA 3RD APPLICANT**

AND

**PERIS WANJIRA MWANIKI 1ST RESPONDENT
NAFTALY NJIRU 2ND RESPONDENT
POLINE NJERI NJUKI 3RD RESPONDENT
ROSE WANJIRA MWANIKI 4TH RESPONDENT
FLORENCE WAWIRA MWANIKI 5TH RESPONDENT
EPHANTUS MURIITHI 6TH RESPONDENT
IRENE WAMBURA MWANIKI 7TH RESPONDENT
ERICK NJAGI MWANIKI 8TH RESPONDENT**

RULING

1. The application herein dated 08th December 2023 seeks the following orders:
 - a. That the Honourable Court be pleased to order that the respondent herein be restrained by way of temporary injunction from entering, cultivating or in any other way interfering with



the applicants' shares pending execution of the certificate of confirmation of grant issued by this honourable court;

- b. Costs of this application be in the cause.
2. The application is supported by an affidavit and grounds wherein the applicant asserts that a grant of letters of administration in the estate of the deceased was issued jointly to the 1st applicant and the 1st respondent. Following a rectified certificate of confirmation of grant, the deceased's estate – made up of land parcel number Ngariama/Nyangeni/225 – was distributed amongst all the applicants and respondents.
3. Following the decision on the distribution by the trial court, the 2nd applicant, 3rd applicant and the 3rd respondent filed a memorandum of appeal dated 04th November 2019, that is pending determination. The applicants' case is that when the estate was distributed, they proceeded to execute but they have been continually threatened by the respondents who want to evict them from the land. They have urged that it is only through a temporary injunction that the respondents can be stopped from visiting the applicants' land, which they have developed.
4. The 4th respondent filed a replying affidavit on behalf of all the respondents. She denied the averments made by the applicants and deposed that none of the respondents has stood in the way of execution of the estate as distributed by the trial court. On the contrary, she says it is the applicants who are frustrating the process of execution of the estate and that at some point, the respondents moved the court to sign the relevant documents.
5. She asserts that they obtained a court order to have the transfer documents signed by the Court's Executive Officer on behalf of the applicants who had become uncooperative. She produced a copy of the order issued by Hon. L.W. Kabaria, SRM at Gichugu Magistrate's court. She deposed that the applicants have been employing different tactics to frustrate actual distribution of the estate and that this application is one of those delay tactics. It was her case that it is dubious that the applicants would file the instant application before this court and not before the court that issued the grant in the first place. She urged the court to dismiss the application.
6. Through a further affidavit, the applicants state that the respondents were never supposed to be introduced to the court as beneficiaries of the deceased's estate but they forced the chief to introduce them as such through his letter. That the respondents' father is one Mwaniki Wambugu who owns land parcel number Ngariama/Nyangeni/153, which land the respondents ought to inherit since they have no claim on the estate of the deceased.

Parties Submissions

7. The applicants submit that the grant of letters of administration in the estate of the deceased was issued without their knowledge; That they did not know when the succession proceedings were initiated; and that some of the beneficiaries named by the area Chief in his letter are not in fact beneficiaries since they are not related the deceased. As to whether the subdivided titles are legitimate, they submitted that the respondents subdivided the property without the applicants' knowledge, an indication of an ulterior motive.
8. They stated that there are errors on some entries in the new title deeds arising from the subdivision. They cited fraud on the part of the respondents, who have subdivided the deceased's land, knowing that they are not his relatives. According to the applicants, the beneficiaries of the estate of the deceased are only 6 people who are named in the submissions.



9. The respondents submit that the applicants failed to disclose to the court which shares of the land the respondents were allegedly trying to evict them from. It was their contention that the appellants, as appearing in the memorandum of appeal were different from those appearing on the face of the application. They further submitted that following the certificate of confirmation of grant, the suit land has since been subdivided into 12 portions namely Ngariama/Nyangeni/2303-2314, to enable the beneficiaries to inherit their portions.
10. It was submitted that the applicants nevertheless remain disgruntled with the distribution since part of the land distributed has been lost to other beneficiaries through the distribution. The respondents' argue that no prejudice will be suffered if the appeal or the application fails because the respondents have never interfered with the applicant's peaceful occupation of the land.

Issues for Determination

11. The issue arising for determination is whether the application has merit.

Analysis and Determination

12. From the pleadings and submissions, the applicants are seeking a temporary injunction while the respondents are under the impression that the application is for stay of execution. These are 2 very different remedies in law and they are issued only on the court's discretion. The applicants have invited the court to consider their grounds that the respondents have been continually threatening to evict them from the land they occupy. The applicant's case is that the respondents visit them at night to issue such threats. It is on this basis that the applicants seek for an order of temporary injunction against the respondents pending execution of the certificate of confirmation of grant, which is the subject of the appeal herein.
13. In response to the application, the respondents deny the allegations made by the applicants and state that the applicants are the ones who have firmly stood in the way of completing execution of the estate. That the applicants have employed several tactics to delay the process unnecessarily. At some point, the respondents were forced to seek the court's intervention to sign the transfer documents on behalf of the applicants since they were being uncooperative. The court conceded and issued further orders to enable execution of the estate.
14. The relief of a temporary injunction is one that may be granted at the court's discretion. The principles for injunction are grounded on the old case of *Giella v Cassman Brown* (1973) EA 358 where the court set out the parameters for consideration before granting relief as follows:
 - i) Is there a prima facie case?
 - ii) Does the applicant stand to suffer irreparable harm?
 - iii) On which side does the balance of convenience lie?
15. From the respondents' submissions, it appears that the applicants had developed the land on which they currently reside. They will lose their investment if the distribution by the trial court is given effect. The applicants, on their part, take issue with the process of obtaining the grant and the legitimacy of the beneficiaries. In my view, these issues, indeed, raise a prima facie case, which case has been placed before this court through the memorandum of appeal.
16. It is also evident that the trial court was moved by the respondents for orders to have the Executive officer of the court sign the transfer documents on behalf of the applicants. Upon grant of such orders,



- the process of execution moved forward. To the applicants the threats of eviction are their basis for the impending loss, which will cause them irreparable harm that cannot be compensated by damages.
17. It is my view, however, that it is more likely that the applicants will suffer greater inconvenience if the order sought is denied since it is already evident that they have invested on the land as stated by the respondents.
 18. In *Bryan Chebii Kipkoech v Barnabas Tuitoek Bargoria & another* [2019] eKLR (cited in the case of *Margaret Njambi Kamau v John Mwatha Kamau & another* [2019] eKLR) the court stated:

“The court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor 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 would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it....”
 19. All in all, execution of the distribution of the estate has been set in motion. This court notes that the applicants are seeking to stop the respondents from threatening them and attempting to evict them from the land. The arguments herein pass the test for granting of a temporary injunction.
 20. However, it is clear that what the applicants should have sought for was an order of stay of execution pending appeal, and not a temporary injunction. Stay of execution pending appeal is a discretionary relief which may be granted if no prejudice will be suffered by either party.
 21. It was so held in the case of *Absalom Dova v Tarbo Transporters* [2013] eKLR:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”
 22. The court invokes Article 48 of *the Constitution* providing for the right to access to justice by all citizens, and Section 3A of the *Civil Procedure Act* on the Court’s inherent powers to make any orders to meet the ends of justice. As such, this Court, on its own discretion, may issue an order that is appropriate in the circumstances of this case.
 23. Accordingly, I hereby grant an order of stay of execution pending appeal.
 24. Given that this is a succession appeal, there is no order as to costs.

DELIVERED VIRTUALLY AT KERUGOYA HIGH COURT THIS 6TH DAY OF FEBRUARY, 2025

R MWONGO



JUDGE

Delivered in the presence of:

1. Duncan Njeru – 3rd Applicant in person
2. No other Party present
3. Francis Munyao - Court Assistant

