



REPUBLIC OF KENYA



KENYA LAW
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**Njuguna v Githui & 2 others (Family Appeal E002 of 2023)
[2025] KEHC 2350 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2350 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL E002 OF 2023
FN MUCHEMI, J
FEBRUARY 6, 2025**

BETWEEN

JOHN GATHUNGU NJUGUNA APPELLANT

AND

DENNIS GACHIE GITHUI 1ST RESPONDENT

SHELMITH MUGURE KIUMI 2ND RESPONDENT

TERESIA NYAMWATHI GATHUNGU 3RD RESPONDENT

RULING

Brief facts

1. The applications for determination are dated 24th October 2023 and 23rd May 2024 respectively. The application dated 24th October 2023 seeks for orders for stay of execution of the orders issued on 9th October 2023 by Honourable J.A. Agonda in Chief Magistrate's Court at Ruiru in Succession Cause No. E006 of 2020, Estate of Florence Ng'endo Kiumi. The applicant further seeks for the court to issue a restraining orders against the 1st respondent from trespassing, selling, transferring, mortgaging, charging, leasing or in any wAy Dealing With The Estate Properties Namely Lr No. Ruiru Kiu Block 3/743, Kirimukumyu/ngandu/63, Plot No. 2270, Kahawa Sukari Limited, Plot No. 2271 Kahawa Sukari Limited, Kilifi/vipingo/238, spare parts business in Nyamakima in Nairobi, Equity Bank Accounts namely 026019256856, 0260190108293, 0260190248582, 0260193617605 and 09401977619816 and shares in Africa Breweries Limited, Equity Bank Limited, Kenya Commercial Bank Limited, Nation Media Group, Scan Group Limited and Safaricom Limited. The application further seeks for the court to vest the management of the estate in the appellant and the 2nd and 3rd respondents and to vest the management of the estate in the public trustee pending the hearing and determination of the appeal.



2. The second application dated 23rd May 2024 seeks for orders of appointment of a Public Trustee under the [Public Trustee Act](#) to manage and administer the estate of Ann Wamuyu Gathungu. Further, the applicant seeks for orders of a temporary injunction restraining the 1st respondent whether by himself and/or his agents from selling, transferring, charging or mortgaging or in any manner whatsoever intermeddling or interfering with the suit premises. The applicant further seeks for orders of stay of the orders issued in the ruling delivered on 17th December 2019 appointing the 1st respondent as the sole trustee of the estate of Ann Wamuyu Gathungu.
3. In opposition to both applications the respondents filed Replying Affidavits dated 20th July 2024.

The application dated 24th October 2023

i) The Applicant's Case

4. The applicant states he is the husband to the deceased, Florence Ng'endo Kiumi having married her through Kikuyu customary laws and their union was blessed with one child namely, Ann Wamuyu Gathungu (deceased).
5. The applicant further states that he lived and worked as an engineer with KBC in Kenya until the year 2002 when he moved to the United States of America in search of greener pastures and the deceased was left behind to manage their properties, which were duly registered in her name but in trust for him for they are matrimonial properties.
6. The applicant further states that on 21st January 2021, their daughter petitioned for grant of letters of administration intestate alleging that she was the only dependent of the deceased without his knowledge, involvement and to his exclusion. Pursuant to that, the Honourable Court issued a grant of letters of administration on 19th July 2021 to their daughter and was later confirmed on 25th February 2022.
7. The applicant states that the then petitioner was able to transfer most of the assets of the estate into her name to which she proceeded to obtain title deeds.
8. The applicant argues that the grant was obtained by means of untrue allegation of a fact, to the extent that he was not included in the petition as a dependent/beneficiary of the deceased. The applicant further states that he came to learn of the succession cause when his daughter died.
9. The applicant states that the estate has been plundered by the 1st respondent, an intermeddler (the boyfriend of the petitioner, now deceased) who went ahead and evicted the tenants from LR No. RUIRU KIU BLOCK 3/7 in a bid to collect and misappropriate the funds collected from the rental properties and businesses of the deceased to his exclusion. The applicant further states that he is aware that he has since sold some vehicles which were part of the estate and has also sold one of the parcels of land to one Patrick Mufoya. Further he transferred a property into his mother's name and is collecting income from their business in Nyamakima Nairobi rental income from every month.
10. The applicant avers that the death of his daughter is currently under investigations and the said Dennis Githui Gachie is one of the persons of interest.
11. The applicant states that upon the death of his daughter, the said Dennis together with his mother invaded the estate properties and have been wasting them. Upon confronting him, the said Dennis stated to the applicant that he wanted to sell the said properties and relocate to the United States.
12. The applicant avers that he challenged the issuance and confirmation of the grant at his exclusion vide an application dated 22nd May 2023 whereby the respondents in the matter were the stepsister to and



maternal aunt of the deceased. The applicant states that the two petitioned the court for grant of letters of administration after he filed letters of citation in respect of the Estate of Wamuyu. The 1st respondent filed a preliminary objection challenging the applicant's capacity to file the case and asked the court to have the replying affidavit by the respondents struck out for being defective. The applicant further states that the 1st respondent alleged that he was the administrator of the estate of Wamuyu yet he has never been issued with any grant to that effect.

13. The applicant states that the trial court rendered its ruling on 9th October 2023, to the effect that the summons for revocation of grant was unmerited and proceeded to dismiss it.
14. The applicant avers that he raised several questions on the conduct of the court as the said findings were prematurely made and without hearing the parties particularly at the point of hearing the preliminary objection. Thus, the applicant avers that he has a right to the share of the estate of the deceased by dint of being her spouse.

ii) The 1st Respondent's Case.

15. The 1st respondent avers that the appellant was never married to the late Florence Ngendo Kiumi, who was the mother to his wife, the late Ann Wamuyu Gathungu. Furthermore, the applicant stated vide a Notarized Affidavit that he was never married to the late Florence Ngendo Kiumi.
16. The 1st respondent states that the late Ann Wamuyu Gathungu was raised by the late Florence Ngendo Kiumi and studied up to University level where she earned her degree and thereafter went to the USA after obtaining citizenship and underwent further studies during which period they met and started a family.
17. The 1st respondent states that the appellant was made aware of the intention to file the petition for the grant of letters of administration of the estate of the late Florence Ngendo Kiumi and that the petitioner sent to the late Ann Wamuyu Gathungu an affidavit to aid the process. Thus, the late Ann Wamuyu Gathungu legally obtained letters of administration. Further, the applicant did not raise the issue of being a dependent of Florence Ngendo Kiumi in the lower court and thus it constitutes new evidence which the 1st respondent's urges the court to strike out.
18. The 1st respondent states that the appellant failed to disclose to the lower court that he sent the late Ann Wamuyu Gathungu an affidavit, whereby he stated that he was not married to the late Florence Ngendo Kiumi, and that he had no interest in the Estate of Florence Ngendo and that he had no claim at all, future or present.
19. The 1st respondent states that he is a stranger to LR No. RUIRU/KIU BLOCK 3/7 and denies ever intermeddling or plundering or in any way, shape or form evicting any tenant from the said land. The 1st respondent argues that the annexures marked JGN-4a constitute new evidence on appeal and were never presented for analysis by the lower court and ought to be struck out.
20. The 1st respondent states that the applicant wanted no part in the life of his mother in law and was not involved in her treatment. During the burial preparations, the appellant was not mentioned in her eulogy, which the 2nd respondent helped to prepare and neither did the applicant attend the burial or participate in the arrangements thereto. The 1st respondent further states that at no point did he have any conversation with the applicant concerning the property of the deceased.
21. The 1st respondent states that he has lived together with Ann Wamuyu and their two daughters at Kahawa Sukari for over three years when his wife passed away. His own mother had to go and assist with taking care of his two daughters who are still in his custody, care and protection.



22. The 1st respondent avers that after the death of his wife, he was asked to record a statement at DCI Mathira East and after the post mortem, the pathologist confirmed the cause of death and hence they were allowed to burry her.
23. The 1st respondent avers that the estate of the late Florence Ngendo Kiumi was wholly distributed to the late Ann Wamuyu Gathungu and now vests with their children, as was the wish of their mother and he together with his co-administrators intend to ensure that the entire estate is kept safe for the sake of the children.
24. The 1st respondent states that the trial court gave directions on hearing of the application by the appellant and on his preliminary objection that parties file their respective submissions and hence the applicant cannot claim to not have been given an opportunity to be heard. Further, the 1st respondent states that the trial court, upon examining the evidence presented, especially the fact that the appellant herein, the 2nd & 3rd respondents did not have the best interests of the two children at heart and their sole aim was to gain access and control of the Estate of the late Ann Wamuyu Gathungu.
25. The 1st respondent states that the 2nd and 3rd respondents did not seek the consent of those who were first line beneficiaries of the estate of the late Ann Wamuyu Gathungu before filing a limited grant for her estate and thereafter proceeding to concede to the applicant's application for revocation of the grant issued to the late Ann Wamuyu Gathungu.
26. The 1st respondent states that the introduction of new evidence and inadmissible evidence by the applicant is offensive to the appellate process and urges the court to strike out all elements found to constitute new evidence on appeal.
27. The applicant filed a Further Affidavit dated 12th October 2024 and states that he and the late Florence Ngendo were married traditionally back in the year 2022 in Kenya before moving to the USA and lived together as husband and wife in both countries.
28. The applicant states that he and the late Florence Ngendo were working in formal employment and through their hard work and joint efforts, they were able to acquire some properties in Kenya and outside Kenya. The applicant further avers that in the year 2002 he moved to the USA in search of greener pastures and his late wife was left behind to manage their properties which they agreed would be registered in her name.
29. The applicant states that he lived in the USA with his daughter and his late wife during the formative years of her life and he has watched her grow up

The application dated 23rd May 2024.

i) The Applicant's case

30. The applicant states that the 1st respondent has been illegally and unlawfully intermeddling with the suit property yet he has not obtained letters of administration intestate for the suit property to qualify him as an administrator. Furthermore, the 1st respondent is not a dependant under the provisions of Section 29 of the *Law of Succession Act*.
31. The applicant argues that the trial court in its ruling on 9th October 2023 found that he did not produce enough evidence to prove that he was the husband of Florence Ngendo Kiumi and he was not granted an opportunity to prove his case yet the trial court went ahead to declare the 1st respondent a spouse to Ann Wamuyu Gathungu. Thus, the applicant argues that if the presumption of marriage is applicable



to the 1st respondent, the same should be applicable to him and he should be given a chance to prove that he was a spouse to Florence Ngendo Kiumi.

32. The applicant states that the 1st respondent is a person of interest in the investigations of the death of Ann Wamuyu Gathungu who died under mysterious circumstances while visiting the 1st respondent's home in Nyeri.
33. The applicant states that it is only just that this Honourable court appoints a public trustee being an independent office with no affiliation to any of the beneficiaries to assist in avoiding conflict between the beneficiaries in respect of administering the estate.

The 1st Respondent's Case

34. The 1st respondent avers that the application is defective and lacks merit as the supporting affidavit has been sworn by the applicant's advocate and not by the applicant himself. Further paragraphs 2, 3, 4, 6, 7 and 9 contains facts that were outside the record of the proceedings of the lower court and ought to be struck off or the entire affidavit be struck off for being incompetent and defective.
35. The 1st respondent states that his wife, the late Ann Wamuyu Gathungu obtained letters of administration in the estate of Florence Ngendo Kiumi and the same were confirmed and transmission of all her assets was undertaken. Upon the death of his wife in July 2022, the 1st respondent states that he filed a petition for grant of letters of administration to her estate alongside Ngayuni Rose Gikeno (his aunt), Daniel Kiumi Kinyua (her cousin) and Christine Ivy Ngima Karoki (her cousin). The 1st appellant avers that the beneficiaries of the estate of his wife as indicated in the petition are their two daughters namely; Maya Roselyn Muthoni Gachie and Joy Riziki Ngendo Gachie.
36. The 1st respondent states that the law on appointment of a public trustee is very clear and the deponent established cogent reasons as to why the office of the public trustee should be involved in a matter in which his client could not establish locus standi.
37. The 1st respondent avers that he and his daughters reside on the same premises they did when the deceased was alive and thus it would be impractical and detrimental to himself and his daughters to dispose of the property. Furthermore, it was the deceased's wish that the property be preserved for his two daughters.
38. The 1st respondent states that he who comes to equity must come with clean hands and the appellant and his counsel have failed to make material disclosures that were critical in aiding the court arrive at a just decision.
39. The 1st respondent states that the applicant does not stand to suffer any prejudice as he had no locus standi to file the application in the lower court and he has not demonstrated by way of evidence that the estate is at risk of being wasted away.
40. The applicant filed a Further Affidavit dated 15th October 2024 and states that the matter deponed to in his supporting affidavit by counsel form part of the court proceedings in the lower court and are part of the court record or arise from the facts and evidence attested to in the Memorandum of Appeal. The applicant further states that there is no express prohibition in law against an advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client.
41. The applicant further states that there are no contentious issues which are outside his counsel's knowledge and his advocate handled both the dispute in the lower court and the instant court thus the issues he has deponed are within his knowledge.



42. The applicant avers that the estate he refers to is the estate of Florence Ngendo Kiumi which is the subject matter of the appeal yet the evidence adduced being the Amended Grant forms part of new evidence which is inadmissible and not relevant to the instant case as it relates to the estate of Ann Wamuyu Gathungu and thus urges the court to expunge the same.
43. The applicant states that the post mortem report is a secondary document which is not certified or authenticated and cannot be adduced casually without calling the maker and is therefore inadmissible and should be struck out.
44. The applicant argues that the appeal has high chances of success and if stay of execution is not granted, the estate stands the risk of being wasted and grievous loss being incurred which cannot be compensated by way of damages.
45. The applicant states that the appeal and instant applications were brought without undue delay. Further, the gravity of the issues to be addressed not only establish a prima facie case but risk being swept under the rug if not entertained by the court thereby occasioning great injustice.
46. Directions were issued that the applications be canvassed by way of written submissions and from the record only the applicant complied by filing his submissions on 12th and 15th October 2024. The respondents on the other hand had not filed their submissions by the time of writing this ruling.

The Applicant's Submissions on the application dated 24th October 2023.

47. The applicant relies on Order 42 Rule 6(2) of the Civil Procedure Rules and the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR and submits that he stands to be disinherited and disowned resulting in him losing his substantive right as a beneficiary and spouse of the deceased. Further, the applicant submits that there is no legal foundation for the appointment of the 1st respondent as a trustee of an estate he has no colour of right over as is provided in Section 29 of the *Law of Succession Act*.
48. The applicant submits that the appeal raises arguable issues with high chances of success and if stay of execution is denied, it shall render the intended appeal nugatory and he shall suffer irreparable harm. The applicant further submits that the application has been filed timeously as the ruling was delivered on 9th October 2023 and the instant application together with the memorandum of appeal were filed on 24th October 2024.
49. The applicant argues that he is willing to provide security for the judgment if called upon by the court to do so. Furthermore, he argues that the respondents do not stand to suffer any prejudice in the event no security is given and the application for stay is allowed.
50. The applicant relies on the cases of Giella vs Cassman Brown & Co. Ltd 1973 EA 358 and Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR and submits that he has satisfied the conditions set out to warrant the grant of a temporary injunction. The applicant argues that it is not in dispute that he is the father to the late Ann Wamuyu Gathungu and that she had a relationship with him and throughout was aware of his existence yet he refused to acknowledge him during the filing of the succession cause of the estate of Florence Ngendo. The applicant further submits that the 1st respondent proceeded to petition the court for grant of letters of administration in the estate of Ann Wamuyu all to his exclusion and the properties are currently at the verge of being disposed to unknown third parties. The applicant argues that those are all questions that the court can only determine upon scrutiny of the evidence to be adduced and prosecution of the appeal.



51. The applicant submits that the 1st respondent does not deny that the subject property belonged to the deceased Florence Ngendo and devolved to Ann Wamuyu. The applicant further submits that the acts of the 1st respondent through his advocate on record purporting to evict tenants from land parcel LR No. RUIRU KIU/BLOCK 3/743 yet he is not in possession of the grant of administration amounts to intermeddling with the free estate of the deceased pursuant to Section 45(1) and (2) of the [Law of Succession Act](#).
52. Furthermore, the issue of locus still being alive and pending determination, the applicant urges the court to protect his ascertainable interests and prevent the same from loss and damage or unlawful disposal, loss which cannot be adequately compensated by way of damages. The applicant further submits that the balance of convenience tilts towards setting aside the ruling and orders issued on 9th October 2023 as he will not only lose property but risk his right as a beneficiary and spouse of the estate of his late wife.
53. The applicant relies on section 66 of the [Law of Succession Act](#), Section 7 of the [Public Trustee Act](#) and the case of Re Estate Gurdial Kaur Sihra (Deceased) [2020] eKLR and submits that the appointment of an administrator is purely discretionary and the same can only be countered upon prejudice to be suffered in the exercise of such discretion. The applicant further submits that the court ought to appoint the Public Trustee as the administrator of his late wife's estate to prevent wastage and or intermeddling of the estate.

The Applicant's Submissions on the application dated 23rd May 2024.

54. The applicant relies on Order 19 Rule 3(1) of the Civil Procedure Rules, Rule 9 of the Advocates (Practice) Rules and the case of Kwacha Communications Limited & Another vs Pindoria Holdings Limited & Another [2022] eKLR; Hakika Transporters Services Ltd vs Albert Chulah Wamimitaire [2016] eKLR and Pattni vs Ali & 2 Others [CA No. 354 of 2004](#) (UR 183/04) and submits that his advocate did not depone to matters that are contentious or outside his personal knowledge. The applicant argues that his advocate on record, Mr. Ndegwa is handling the dispute in the lower court and the instant court and therefore the issues he has deponed on are within his knowledge.
55. The applicant further relies on Section 66 of the [Law of Succession Act](#) and the case of Re Estate Gurdial Kaur Sihra (Deceased) [2020] eKLR and submits that the court has the discretion to appoint the Public Trustee when those entitled to administer the estate make it impossible to effectively administer the estate. The applicant argues that the 1st respondent has threatened to dispose of the estate and relocate to the USA and therefore the Public Trustee as a neutral body is better placed to safeguard and administer the estate pending the resolution of any outstanding issues.
56. The applicant further relies on the cases of Henry & 4 Others [vs County Government of Vibiga \(Cause 76 of 2021\)](#) [2022] KEELRC 13371 (KLR) (2 December 2022) (Ruling) and Giella vs Cassman Brown (1973) EA 358 and submits that the issues he has raised are weighty and deserve to be canvassed and determined to their logical conclusion. If the said orders are not stayed and the respondents restrained from wasting the said estate, no pecuniary award would be sufficient to reconstitute him who is in his advanced years.



The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

57. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-

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 orders 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 1st 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.

58. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

59. Substantial loss was clearly explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

60. The applicant argues that he stands to be disinherited resulting in him losing his substantive right as a beneficiary and spouse of the deceased. I have perused the record and noted that the applicant has argued that he is the husband to the late Florence Ngendo who is the mother to his daughter, the late Ann Wamuyu. Notably, the estate in this suit relates to that of Ann Wamuyu and the applicant has



not demonstrated how he was a dependent of hers pursuant to Section 29 of the Law of Succession. The applicant has further not shown that the deceased was maintaining him prior to her death. Furthermore, the deceased, one Ann Wamuyu was the sole beneficiary of the estate of her mother Florence Ngendo. Notably, the applicant claims that he was left out of the distribution of her estate but he does not deny the fact that he swore an affidavit dated 15th February 2021 averring that he was not married to the late Florence Ngendo and neither did he want to participate in the succession of her estate. Therefore, it is evident that the applicant has not demonstrated how he stands to suffer substantial loss by being disinherited by the deceased. Thus it is my considered view that the applicant has not demonstrated the substantial loss he stands to suffer.

Has the application has been made without unreasonable delay.

61. The ruling was delivered on 9th October 2023 and the applicant filed the instant application on 24th October 2023. It has taken the applicant about 3 weeks between the date of the ruling delivered in the trial court and the time when it filed the instant application, thus the application has been filed timeously.

Security of costs.

62. The purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

63. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has not offered to furnish any security for the due performance of the decree.

64. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

65. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondents their right of enjoying their judgment. I have perused the grounds of appeal and without going into the merits of the appeal noted that they do not raise any arguable points of law.



66. From the foregoing, it is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal.

Whether the applicant has met the requisite conditions to warrant the granting of a temporary injunction.

67. Order 42 Rule 6(6) of the Civil Procedure Rules 2010 empowers this court to grant a temporary injunction on terms it deems fit so long as the procedure for filing an appeal from the subordinate court has been complied with. It provides thus:-

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 a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate court or tribunal has been complied with.

68. In the instant case, the ruling of the trial court was delivered on 9th October 2023 whilst the Memorandum of Appeal was filed on 24th October 2023. To that end, the applicant duly complied with the procedure for instituting an appeal before this court and thus the court has jurisdiction to entertain the present application.

69. The principles for granting of a temporary injunction pending appeal are now well settled. Those principles were set out by Visram J (as he then was) in *Patricia Njeri & 3 Others vs National Museum of Kenya* [2004] eKLR where the learned Judge 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 *Venture Capital & 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:-

The discretion will be exercised against an applicant whose appeal is frivolous. (*Madhuaper 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.

The discretion should be refused where it would inflict greater hardship than it would avoid. (*Madhupaper supra*).

The applicant must show that to refuse the injunction would render his appeal nugatory (*Butt vs Rent Restriction Tribunal* [1982] 417).

The court should also be guided by the principles in *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358.

70. The principles in *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358 were restated by Ringera J, (as he then was) in [*Airland Tours & Travel Limited vs National Industrial Credit Bank Nairobi \(Milimani\) HCCC No. 1234 of 2002*](#) as follows:-

- a. A prima facie case with a probability of success at trial;
- b. The applicant is likely to suffer an injury, which cannot be adequately compensated in damages;



- c. If the court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of convenience;
- d. The conduct of the applicant meets the approval of the court of equity.

A prima facie case with a probability of success at trial

71. What then constitutes a prima facie case? In the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125,

In civil cases a prima facie case 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 being infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly, a standard, which is higher than an arguable case.

72. Similarly, in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR the court stated:-

The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion....The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the appellant's case is more likely than not to ultimately succeed.

73. The determination of whether the applicant has a prima facie case with chances of success in the instant application calls for a consideration of whether the applicant has an arguable appeal.

74. Concerning what comprises an arguable appeal, the Court of Appeal stated in *Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others* [2013] eKLR that:-

The first issue for our consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.

75. Similarly, in *Dennis Mogambi Mong'are vs Attorney General & 3 Others Civil Appeal No. Nairobi 265 of 2011 (UR 175/2011)* where the same court stated that:-

An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration.

76. The applicant challenges the judgment of the Magistrate on the premises that the grant issued to the late Ann Wamuyu Gathungu in respect of the estate of the late Florence Ngendo Kiumi ought to be revoked as it was obtained by concealing material facts particularly that the applicant was a spouse to the late Florence Ngendo Kiumi and therefore a beneficiary. From the record of the trial court, the court dismissed the applicant's application for revocation of grant on grounds that he did not prove that he was a dependant of the deceased. Further that the deceased did not maintain him prior to her death. The trial court went further and found that the applicant did not provide any evidence to show that he was married to the deceased's mother or whether a trust was created on the estate property of



the late Florence Ngendo. Thus without delving into the merits of the appeal, it is my considered view that the grounds of appeal fail to demonstrate that the applicant has an arguable appeal or a prima facie case with probability of success.

Irreparable Injury

77. In *Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 Others* [2016]eKLR the court considered Halsbury's Laws of England on what irreparable loss is and stated that:-

“First, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”

78. The issue is whether the applicant demonstrated that he will suffer irreparable loss unless the injunction is granted, which loss would not adequately be compensated by an award of damages? The applicant has argued that he stands to be disinherited in the event the injunction is not issued. From the record, it is evident that the applicant has failed to demonstrate before the Magistrate that he was a beneficiary of the estate of the deceased or that the deceased was maintain him prior to her death. The court said that the applicant failed to show that he was married to the deceased's mother one Florence Ngendo and failed to rebut the evidence against him showing that he waived his rights to inherit from her estate. As such, it is my considered view that the applicant has not demonstrated that he will suffer irreparable damage or how the appeal would be rendered nugatory if a temporary injunction is denied.

Balance of Convenience Test

79. In the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* [2018] eKLR, the court in dealing with the issue on balance of convenience held as follows:-

The meaning of balance of convenience in favour of the plaintiff is that if the injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience 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.

80. Having considered the material before me herein, it is my considered opinion that the balance of convenience tilts in favour of the respondents because the inconvenience caused to them will be much greater than that caused to the applicant. The applicant has not met the threshold as set out in the case of *Giella vs Cassman Brown*.

81. The applicant has further argued that the court ought to appoint the Public Trustee as the administrator of the deceased in order to avoid wastage. Section 66 of the Law of Succession provides



for the order of priority in entitlement to a share of the estate of the deceased who has died intestate as follows:-

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- a. The surviving spouse or spouses, with or without association of other beneficiaries;
- b. Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- c. The Public Trustee; and
- d. Creditors.

82. According to Part V of the [Law of Succession Act](#) sets out the order of priority in entitlement to a share in the estate of the deceased whereby priority is given to the surviving spouse, followed by the children of the deceased, then the parents of the deceased in the event that the deceased was not survived by a spouse or children, other relatives follow thereafter.

83. The Magistrate court issued letters of administration intestate to late Ann Wamuyu in respect of the estate of her mother, the late Florence Ngendo. The late Ann Wamuyu was the sole administrator and beneficiary of the estate as she was the only child of the deceased. It was not in dispute that the deceased was a child of the late Florence Ngendo and therefore a dependent under Section 29 of the [Law of Succession Act](#). As such, it is not necessary to appoint a Public Trustee to administer the estate. Under Section 66 of the Succession Act the deceased's child ranks higher in priority to the public trustee in intestacy. The public trustee falls in 3rd position in order of priority and would only be appointed administrator as a call of last resort.

84. Considering the foregoing, it is my considered view that the applications dated 24th October 2023 and 23rd May 2024 lack merit and are hereby dismissed with costs to the respondents.

85. It is here so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 6TH DAY OF FEBRUARY 2025

F. MUCHEMI

JUDGE

