



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Muhia v Mwangi (Family Appeal E020 of 2024)
[2025] KEHC 2376 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2376 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL E020 OF 2024
FN MUCHEMI, J
MARCH 6, 2025**

BETWEEN

BEATRICE MUMBI MUHIA APPLICANT

AND

JOHN MAINA MWANGI RESPONDENT

RULING

Brief facts

1. The application dated 2nd July 2024 seeks for conservatory orders to restrain the respondent his agents, servants, employees or anybody acting in his authority from selling, disposing of, subdividing, alienating, wasting, planting, leasing or otherwise intermeddling with the property of the deceased known as LR No. Kiganjo/Mutati/T.255 pending the hearing and determination of this appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 22nd July 2024.

The Applicant's Case

3. By an affidavit sworn by the applicant's counsel, the applicant states that the respondent and herself are co-administrators of the deceased's estate with the applicant being the widow of the deceased's late brother. The Counsel avers that the trial court dismissed the applicant's application dated 19th September 2023 that sought to have the Certificate of Confirmation of grant revoked as not all the beneficiaries agreed on the mode of distribution of the estate.
4. It is further stated that the applicant's husband after his brother's death wanted to petition for letters of administration in the instant estate for purposes of subdividing each parcel of land amongst the families of the four brothers of the deceased. Before he could commence the proceedings, Muhia Kimotho, the husband of Mumbi Muhua passed on and so his wife stepped in his place together with the respondent, the applicant's nephew to petition for letters of administration.



5. The counsel for the applicant avers that all the members of the family knew that the deceased had held the piece of land they were living on trust for the family and the purpose of conducting the succession proceedings was to enable each person to get ownership documents of their respective portions of the land. The respondent was given the mandate of preparing documents and availing them in court on behalf of the estate since his co-administrator could not read and write and the succession was concluded with the belief that the grant represented the situation on the ground.
6. It is further deposed that on one occasion, the applicant went to farm on her piece of land and noticed that the respondent's sister in law had started constructing a house which encroached on another beneficiary's piece of land. Upon inquiry, the respondent's sister in law stated that the respondent had informed her that the court decreed that LR No. Kiganjo/Mutati/T.255 belonged only to the family of the deceased. Upon further inquiring from the surveyor whom the applicant's family had contracted to subdivide the portion of land rightfully for each household, he confirmed to the applicant that the said piece of land had not been included as a piece of land available for distribution in the grant. It was for that reason that they sought to revoke the grant and the trial court ruled against them. Furthermore, the Certificate of Confirmation of Grant as issued wrongfully disinherited some of the beneficiaries and is not as per the agreement of the family members on distribution. Counsel further avers that the respondent misrepresented facts by not including LR. No. Kiganjo/Mutati/T.255 in the schedule of distribution as property available to the families.
7. It is further deposed that LR. No. Kiganjo/Mutati/T.255 forms part of the estate of the deceased which he had held in trust for the benefit of the other beneficiaries and it is in the interest of justice that the respondent be restrained from dealing with the said property.
8. The deponent states that if the respondent is allowed to continue intermeddling with the said property, the applicant and other beneficiaries are likely to suffer irreparable damage as she and the other beneficiaries will not be able to recover the estate likely to be put to waste by the respondents.

The Respondent's Case

9. The respondent states that the application is frivolous, vexatious, devoid of any merit and ought to be dismissed with costs. The respondent further states LR. No. Kiganjo/Mutate/T.255 is registered in the name of his father, the deceased. The respondent avers that the applicant was not a child of the deceased and therefore not entitled in any way to inherit from the deceased. Further, the applicant was the deceased's sister in law having been married by the deceased's brother Muhia Kimotho.
10. The respondent avers that the deceased owned two parcels of land namely L.R. No.kiganjo/Embu/224 and Kiganjo/Mutate/ T.255 which parcels were both registered in his name. The respondent further states that the deceased allowed his brothers to settle and cultivate on LR. No. Kiganjo/Embu/224 on humanitarian grounds as they had been evicted on the land given to them by their deceased's father. The respondent argues that the applicant and the other families were not given a share of the suit land.
11. The respondent states that he petitioned for grant of letters of administration of the estate of the deceased and he consented to have the applicant as one of the administrators so as to protect her interest in LR. No. Kiganjo/Embu/224 where she was entitled to a share following a promise by the deceased. The applicant filed an application seeking the revision of the said grant which application was dismissed. The respondent argues that the applicant has no lawful claim or right to the suit land and her actions are solely calculated to frustrate and harass him.



The Applicant's Submissions

12. The applicant relies on the case of Wangalwa & Another vs Agnes Naliaka Cheseto cited with approval in the case of In Re Estate of Kithumbu Nyaga Elijah [2021] eKLR and Rhoda Mukuma vs John Abuoga (1988) eKLR and submits the grant that is in force leaves room for the property to be used by the respondent's family members in whatever manner he deems fit to the detriment of the interests of the applicant's family and the family members to the brothers of the deceased. The applicant argues that if stay is not granted, the substratum of the appeal will be defeated and would render it otiose and a mere academic exercise to canvass the appeal to finality. The applicant further argues that such an action will be irreversible and she will not be reasonably compensated by way of damages while appreciating the peculiar premium she and the members of the family place on the suit land.
13. The applicant further relies on the cases of Phillip Chemwolo & Another vs Augustine Kubede [1982-88] KLR 105 and Multiscope Consulting Engineers vs University of Nairobi & Another [2014] eKLR and submits that for the ends of justice to be met, it would be fair to hear the appeal to its logical end as the appeal is premised on the ground that the trial court misdirected itself in finding that the applicant and other members of the family had not proved any beneficial interest in the suit property which they verily know it belongs to them.

The Respondent's Case

14. The respondent relies on the case of Giella vs Cassman Brown [1973] EA 358 and submits that the applicant has not met the conditions for grant of an injunction. The respondent further relies on the case of Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others Civil Appeal No. 39 of 2002 and submits that the suit property is registered in the name of the deceased who is his father. The applicant is not a beneficiary of the deceased and neither does she reside on the suit land. The respondent argues that the law is clear that registration and issuance of a title deed is conclusive proof of ownership of land unless fraud or misrepresentation is established. Thus, the respondent argues that the applicant has not illustrated that she has any claim of beneficial ownership of the suit land and therefore the appeal has no chances of success. Therefore, the respondent submits that the applicant has not established a prima facie case to warrant the grant of an injunctive relief.
15. The respondent submits that he and his siblings have been living on the suit property for many years as the same was given to them by the deceased. Further he and his brother have constructed permanent structures on the suit property and have no intention to sell the same to third parties.
16. The respondent refers to the cases of Elizabeth Muthoni Hussein vs Vikesh Jinit Shah [2018] eKLR and Fredrick Nganga Thuo vs Peter Mungai Njuho [2019] eKLR and submits that the applicant has not demonstrated in any way that she stands to suffer irreparable damage that cannot be compensated by way of damages.
17. The respondent further relies on the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR and submits that the applicant has not demonstrated that the balance of convenience tilts in her favour.
18. Relying on the case of Patricia Njeri & 3 Others vs National Museum of Kenya [2004] eKLR, the respondent argues that the applicant has not satisfied the principles for grant of temporary injunction pending appeal. The respondent relies on the case of Madhupaper International Limited vs Kerr [1985] eKLR and submits that it would be wrong to grant a temporary injunction pending appeal where the appeal is frivolous or where the injunction would inflict greater injustice than it would avoid. The respondent further relies on the case of Kenya Commercial Bank Limited vs Nicholas Ombija



[2009] eKLR and submits that an arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before the court.

The Law

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

19. 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.

20. In the instant case, the ruling of the trial court was delivered on 2nd July 2024 whilst the Memorandum of Appeal was filed on 8th July 2024. 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.
21. 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.

22. 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

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.

28. On perusal of the Memorandum of Appeal, the applicant challenges the ownership of LR. No. Kiganjo/Mutati/T.255 on the premise that the said land ought to have been included in the estate of the deceased as he held it in trust for his other brothers. I have perused the proceedings of the lower court and the impugned ruling delivered on 2nd July 2024 and noted the court's reasoning. From the record, the applicant before the magistrate failed to produce any evidence that the suit property was



ancestral land before it was registered in the name of the deceased. Without delving into the merits of the appeal, it is my considered view that the applicant has failed to demonstrate that she has an arguable appeal or a prima facie case with a probability of success.

Irreparable Injury.

29. 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.”

30. Therefore, has the applicant demonstrated that she 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 the suit property being ancestral land will be sold to third parties by the respondent thus disinheriting the beneficiaries of the estate rendering the appeal nugatory. From the court record, it is not contested that the respondent and his siblings live on the suit property, a fact admitted by the applicant herself. Furthermore, the applicant having failed to adduce evidence showing that the suit land was ancestral property before it was registered in the name of the deceased, it therefore follows that the applicant has failed to show that she stands to suffer irreparably if the injunctive orders are denied. Accordingly, it is my considered view that the applicant has not shown that she will suffer irreparable damage or how the appeal will be rendered nugatory if a temporary injunction is denied.

Balance of Convenience Test

31. 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.

32. Consequently, it is my considered view that the balance of convenience tilts in favour of the respondent because the inconvenience caused to him will be much greater than that likely to be caused to the applicant. Thus the balance of convenience tilts against the applicant but in favour of the respondent.

33. It is noted that the supporting affidavit to this application was sworn by the counsel for the applicant instead of the party herself. It is not in order for a counsel to depose on controversial issues. The suits herein are about stay of execution pending appeal. However, the issues can only be ventilated by the deponent speaking to the entitlement to the deceased's estate in addition to other issues. The counsel has deposed on the said entitlement of his client which issues as very contested in the appeal. Although



the respondent did not ask the court to strike out the affidavit, the result of its inclusion weakens the applicant's case in this application.

Conclusion

34. I thus opine that the application dated 2nd July 2024 lacks merit and is hereby dismissed.

35. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

