



REPUBLIC OF KENYA



KENYA LAW
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**Maina v Kamau & another (Civil Appeal E005 of 2025)
[2025] KEHC 4901 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4901 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E005 OF 2025
EM MURIITHI, J
APRIL 24, 2025**

BETWEEN

SARAH WANJIKU MAINA APPELLANT

AND

FLORENCE WANJIRU KAMAU 1ST RESPONDENT

ALEXANDER MUNENE MWANGI 2ND RESPONDENT

*(An appeal against the judgment of Hon. S. M. Nyaga - (PM)
delivered on 27th November 2024 in Baricho Succ. E254 of 2021)*

RULING

1. Upon the Judgment of the trial court delivered on 27/11/2024, the appellant who claims as a child of the deceased whose estate is subject of this appeal, filed on 10/1/2025 a Memorandum of Appeal dated 10/1/2025 on the ground of misapprehension of sections 29(a) and 35 of the [Law of Succession Act](#) and evidence in support of the appellant's case that she was a child of the deceased.
2. Subsequently, by Summons dated 7/2/2025 the appellant brought an application for preservation of the estate assets by specific orders for inhibition as follows:
 - “1. This application be certified as urgent and be heard ex-parte in the first instance.
 2. An order of inhibition do issue against the titles of land parcel numbers Kiine/Sagana/5599, Kiine/Gacharo/6365, Kiine/Gacharo/6366 and Kiine/Gacharo/6367 pending the hearing and determination of this application.



3. An order of inhibition do issue against the titles of land parcel numbers Kiine/Sagana/5599, Kiine/Gacharo/6365, Kiine/Gacharo/6366 and Kiine/Gacharo/6367 pending the hearing and determination of this appeal.
 4. Costs of the application be provided for.”
3. The appellant’s application relies on facts set out the history and cause of action in the Supporting Affidavit, principally, that:

- “3. That the 1st Respondent herein filed Baricho Magistrate’s court succession cause number E254 of 2021 in respect of the estate of the said deceased. A grant was issued to her and later confirmed whereby the 2nd respondent who is a stranger to the estate, and who was said to have entered into a sale agreement with the 1st respondent after the death of the deceased herein was made one of the beneficiaries the estate of the deceased. Annexed and marked SWM-1 is a copy of the certificate of confirmation of grant.
4. That I filed summons for revocation of grant on grounds that I being a child of the deceased was not involved or informed of the succession proceedings and I was not given anything from the estate. I also challenged the legality of the sale agreement entered into by the 1st and 2nd respondents after the death of the deceased, and before the confirmation of the grant.
5. That in a judgment delivered on 27th November 2024, the court dismissed my application hence this appeal.
6. That land parcel number Kiine/Sagana/5599 has since been registered in the name of the 1st Respondent. Annexed and marked S.W.M-2 is a copy of the search certificate of L.R No. Kiine/Sagana/5599.
7. That the title of land parcel number Kiine/Gacharo/488 has since been closed on partition to land parcel numbers Kiine/Gacharo/6365, 6366 and 6367. Annexed and marked SWM-3A, 3B and 3C are copies of the search certificates.
8. That to prevent any transfer, sub-division or charging of the properties, there is need to place inhibition orders against the titles of the four parcels of land aforementioned.”

4. The 1st Respondent opposed the application by a Replying Affidavit sworn on 19/2/2025 raising the three grounds of competency of the appeal, the want of standing of the appellant and the alleged true nature of the application as a stay application from a negative order, as follows:

- “2. That the application dated 7th February, 2025, is without any merit.
3. That I am advised that there is not a proper appeal filed before this court upon which this application can be based on.
4. That the ruling which is sought to be appealed against was delivered on 27th November, 2024, in the presence of all the parties.
5. The applicant if aggrieved by the said ruling, ought to have filed a memorandum of appeal by the 27th December, 2024, as the law allows 30 days to do so.



6. That the memorandum of appeal herein is dated 10th January, 2025, and it was therefore filed out of time without leave of this court.
7. That the application brought by the applicant seeks inhibition which can only be imposed to preserve the parcels of land pending a proper appeal with chances of success.
8. That it would be futile to issue the said orders when there is not proper appeal with chance of success.
9. That the parcels of land in question are rightly registered in my names that of 2nd respondent and the applicant has not demonstrated why inhibition should be placed thereon.
10. The applicant has failed to show any nexus with the estate of the deceased and she is therefore misguided in seeking the said orders.
11. That the orders appealed against are negative orders dismissing her application in the lower court and she is essentially seeking stay through the back door while such orders cannot issue on a negative order of dismissal.
12. That the application having no merit should therefore be dismissed with costs.”

5. The 2nd Respondent did not oppose the application.

6. The Court heard oral submissions by Counsel for the parties, and ruling was reserved.

Competency of Appeal

7. Section 79G of the *Civil Procedure Act* provides for appeals within thirty days as follows:

“79G. Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of 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:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

[*Act No. 10 of 1969*, Sch.]”

8. As urged by Counsel for the Applicant Rule 63 of the *Probate and Administration Rules 1980* incorporates the provisions of Order 50 of the *Civil Procedure Rules*, as follows:

“63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules

- (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with



the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

- (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.

[LN 269 of 2017, r. 2.]”

9. Under Order 50 rule 4, time for doing or taking any step under the Rules under does not run in the period of the Christmas vacation of the court between December 21 and January 13 the following year, as follows:

“[Order 50, rule 4.] When time does not run.

4. Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.”.

10. Accordingly, the 30-day period allowed for appeal under section 79 G of the Civil Procedure Act does not run during the three-week Christmas vacation. On this computation, the 30-day period allowed for filing of appeal from a decision delivered on 27/11/2024 would expire and the Memorandum of Appeal herein filed on 10/1/2025 is within time.
11. In addition, for appeal in the law of succession which does not exist as of right, the time for appeal would accord to the order granting leave to appeal. The issue of leave to file appeal from determinations in Succession Causes was not raised by any respondent, and this Court cannot use it for purposes of determination of the application. However, the Court may observe that the question raised in the Memorandum of Appeal is not frivolous and the Court would, and does, grant leave to appeal.

Standing of the Appellant

12. The Respondent object that the applicant has “has failed to show any nexus with the estate of the deceased”. This is the matter for determination in the appeal in which the Appellant accuses the trial court of failing to give effect to the evidence before it supported her case as a child of the deceased and a dependant within section 29(a) of the Law of Succession Act.

Nature of the Application

13. Counsel for the applicant agreed that there can be no stay of execution of a negative order of dismissal of suit and urged that this was an application for preservation of estate pending appeal where the respondent would suffer no prejudice as the property remained registered in the names of the respondent.



14. To be sure although there cannot be an order for stay from the negative order for a dismissal of suit, there is scope, and courts do frequently consider and grant applications for injunction pending appeal from a decision dismissing a suit or indeed, a similar application for injunction, in the trial court. See the Erinford principles in *Madhupaper International Ltd v Kerr* [1985] eKLR. The rationale is given in the old case of *Wilson v Church (No 2)* 12 Ch D (1879) 454, per Cotton LJ at p 458 held “when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”
15. See also Order 42 Rule 6 (6) of the *Civil Procedure Rules* which provides significantly as follows:
“(6) Notwithstanding anything contained in subrule (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 a subordinate court or tribunal has been complied with.”
16. The Court finds that whether the appellant is entitled to share in the estate of the deceased is an arguable case, which need not be a case that eventually succeeds. See *Dennis Mogambi Mang'are v Attorney General & 3 Others* [2012] eKLR.
17. The Court determines that the application for orders of inhibitions is competent and justified for the protection of the estate so that the appellant’s appeal herein if successful, is not rendered nugatory. The appeal would be rendered nugatory, if successful, and the Respondents in the meantime disposed of the estate assets subject of the appeal.

Orders

18. Accordingly, for the reasons set out above, the Court grants an order for preservation of the estate assets in dispute pending hearing and determination of the appeal in terms of the prayers Nos. (2) and (3) of the Summons dated 7/2/2025 as follows:

- “2. An order of inhibition do issue against the titles of land parcel numbers Kiine/Sagana/5599, Kiine/Gacharo/6365, Kiine/Gacharo/6366 and Kiine/Gacharo/6367 pending the hearing and determination of this application.
3. An order of inhibition do issue against the titles of land parcel numbers Kiine/Sagana/5599, Kiine/Gacharo/6365, Kiine/Gacharo/6366 and Kiine/Gacharo/6367 pending the hearing and determination of this appeal1.”

19. The costs of the application shall be costs in the Appeal.

Order accordingly.

DATED AND DELIVERED THIS 24TH DAY OF APRIL 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Kagio for the Applicant.

Mr. Kimunya for the 1st Respondent.

Mr. Karingithi for the 2nd Respondent.

