



**Kamwanza v Kilili & 2 others (Succession Appeal E003 of 2023)
[2024] KEHC 115 (KLR) (17 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 115 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION APPEAL E003 OF 2023**

FR OLEL, J

JANUARY 17, 2024

**IN THE MATTER OF THE ESTATE OF GERALD MUSAU
KILILI (DECEASED)**

BETWEEN

JACQUILINE M KAMWANZA APPELLANT

AND

PHILIP MULEI KILILI 1ST RESPONDENT

ANDREW KILILI MULWA 2ND RESPONDENT

BRENDA MASISTA MULINDI 3RD RESPONDENT

RULING

1. The application before this court is the Notice of motion application dated 24th January 2023 brought pursuant to provisions of Section 1A, 1B and Section 3A of the *civil procedure Act*, Order 42 rule 6, Order 51 rule 1 of the *civil procedure rules* and all other enabling provision of law. Prayer 1, 2 and 3 are basically spent and the orders sought are that;
 - a. That the Honourable court be pleased to stay proceedings and execution of the ruling of the court delivered on January 10, 2023 in Kangundo CMCC No E70 of 2022, In the matter of Estate of Gerald Musau Kilili (deceased) pending the hearing and determination of the Appeal
 - b. That a preservative order do issue that the respondents do deposit the rental income of property L.R. NO 13767/118, Nairobi in court or in a joint account held by both advocates pending the hearing and determination of the Appeal
 - c. That costs of this application be provided for.



2. The application is supported by a supporting affidavit of the applicant jacqueline mwendu kamwanza dated 24th january 2023, where she depones that she is a widow of the late gerald musau kilili who died intestate on October 6, 2021. the respondents had illegally and without her knowledge moved kangundo chief Magistrate court and filed a succession cause regarding her husband's estate and upon learning of the same, she had filed an objection and an application to have the rents collected from property L.R. No. 13767/118 (hereinafter referred to as the suit property) to be preserved.
3. Initially it was agreed by consent that all rents be deposited in a joint account in the names of both advocates pending hearing and determination of the said succession cause, but later the respondent's advocates did apply for the said order to be set aside on the basis that the magistrate lacked jurisdiction to handle the matter. The trial court did consider both applications and vide its ruling delivered on July 10, 2023 the court held that the deceased and the respondent held the suit property as joint tenancy and that the property was not available for distribution. The applicant faulted this finding as it was made on the basis of a letter written by Area chief of Kangundo one Alexander Musembi, which letter was written in her absence and without her knowledge.
4. The said chief's letter had alleged that she had run away from home, which was not the factual position as she had been chased out of the matrimonial home (Kangundo/Isinga/2530), after the death of her husband and this forced her to move court and file Machakos High court civil case No E003 of 2022 against the 1st and 2nd respondent herein, where she obtained orders restraining them from evicting her and her children and/or intermeddling with the deceased Estate. Similarly the deceased had filed Nairobi ELC case No 391 of 2018 as against the 3rd respondent, where he sought for a declaration that he was the sole owner of the suit property but unfortunately passed on before the said case was completed.
5. The trial court was thus faulted for making final determination at the interlocutory stage and disinheriting the applicant and her children without giving her an opportunity to be heard on merit. The ruling had rendered her to be destitute and robbed her children of their source of school fee and other basic needs. If the orders issued were not stayed, there was real likelihood that the appeal as filed herein would be rendered nugatory as it raised triable issues and had high chances of success. The applicant also offered to provide security as shall be directed by court.
6. This application is opposed by the 1st Respondent Philip Mulei Kilili through his replying affidavit dated February 15, 2023. He did depones that the ruling delivered on January 10, 2023 was sound and the trial court was right in holding that the suit property was a joint tenancy between the deceased and the 3rd respondent. The current application constituted an abuse of the process of court as the applicant was seeking similar orders as sought before the trial court especially as regards the conservatory orders. A determination thereof had been made and the current application was res judicata. There was thus no valid grounds upon which stay of execution could be granted.
7. The respondent also denied the applicants allegation that the ruling determined the succession suit in its entirety. What was determined was the issue relating to ownership of the suit property and the said determination made was made on a point of law under section 60 of the *land registration Act*. The other aspects as relates to the estate of the deceased was yet to be determined and they should be allowed to conclude the succession process. The trial court listened to all parties and observed procedural fairness and the applicant's contention that she was not given a fair hearing was not accurate.
8. The respondent thus prayed that this application be dismissed



Submissions

Appellant's Submissions

9. The appellant submitted that it was in order to grant the conservatory orders compelling the respondents to deposit all rent in court or into a joint interest earning account managed by the advocates herein to ensure that the estate of the deceased is not wasted away. This was important as the ruling of January 10, 2023, gave the 3rd respondent a carte blanc to present the said order and a copy of the death certificate to the land registrar and have the suit property registered in her names. If this process was undertaken, it would render the appeal to be a mere academic exercise and disinherit her and her children. Reliance was placed in *Re; Estate of Simon Kimendero* (2020) eKLR & *African Banking Corporation Limited Vrs Netsatar limited & 6 others* Nairobi, Mililmani Hcc No 299 of 2009(UR).
10. As to whether they were entitled to an order of stay of execution of the ruling appealed against, the appellant averred that she had met the statutory grounds the basis upon which the said order could be considered. This application had been filed without undue delay, and unless stay of execution was granted, she would suffer substantial loss and damage finally. She was willing to provide security as maybe directed by court. It was thus in order to grant the said prayer pending hearing and determination of the appeal filed. Reliance was placed in *RWW Vs EKW* (2019) eKLR & *Butt Vs Rent Restriction Tribunal* (1979) eKLR.
11. In conclusion, the appellant averred that she had demonstrated that they would suffer irreparable loss and that rents would be misappropriated with no accountability and thus it was in the interest of justice to have the rents preserved. Secondly, she had established factors to show that execution would irreparably affect and negate the core issue of the appeal and render the appeal to be nugatory. Substantive justice thus favored granting of the orders as sought.
12. Finally, on the issue of stay of proceedings, the appellant urged the court to find that a final determination had been made at an interlocutory stage regarding ownership of the suit property, which matter was the subject of this appeal. If no order of stay of proceedings was issued, the respondents were likely to proceed to have the grant confirmed and conclusively distribute the estate to her and her children's detriment. It was thus necessary to preserve the estate in its current form and have the appeal expeditiously heard and determined. Reliance was placed on the case of *Port Florence community Health care Vs Crown Health Care limited* (2022) eKLR, *Cooperative Bank of Kenya Ltd Vrs Banking Insurance of Finance union (Kenya)*, (2015) eKLR & *Niazsons (k) Ltd Vs China Road & Bridge Corporation (Kenya)* (2001) eKLR.

Respondents Submissions.

13. The respondents submitted that for a preservative order to be issued, the appellant had to prove that she had an arguable appeal, the property was estate property and the property was likely to dissipate or be wasted away. It had not been proved that the suit property forms part of the estate of the deceased as the said suit property was jointly owned by the deceased and the 3rd respondent. By law the said property automatically passed on to the 3rd respondent upon his demise. The trial courts finding was therefore right and to that extent and the appellant had no basis to claim otherwise. Reliance was placed on *Christopher Ndaru Kagina Vs Esther Mbadi Kagina & Another* (2016) eKLR.
14. On the issue of stay of execution, the respondent did submit that the appellant had not shown or demonstrated that registration of the suit property to the 3rd respondent would cause her irreparable



harm, loss and/or that the respondents are likely to dispose off the said suit property. Further the appellant had failed to deposit security as required in law and thus had not satisfied and/or met the condition precedent for stay of execution to be granted. Reliance was placed on *Loise Kanyokora Warui & Ano Vs Gladys Njeri Muriuki* (2002) eKLR.

15. As regards the final prayer for stay of proceedings, the respondent averred that their right to have litigation expeditiously conducted would be infringed by this order. The appellant also had not met the stringent threshold to have proceedings stayed as set out in the case of *Kenya Wildlife Service Vs James Mutembei* (2019) eKLR. The applicant therefore urged this court to find that this application was unmerited and thus should be dismissed with costs.

Analysis & Determination

16. I have carefully considered the notice of motion application, its Supporting Affidavit, and the Respondent's replying affidavit and the submission filed. The only issue for determination is whether;
- a. This court should grant orders of stay of proceedings and stay of execution of the ruling/order dated 10th January 2023 issued in Kangundo Chief Magistrate Succession Cause No E170 of 2022.
 - b. Preservatory order should be issued directing the respondent's to deposit the rental income of property L.R NO 13767/118 in court or in a joint account held by both advocates pending the hearing and determination of this Appeal.

I. Whether this court should grant orders of stay proceeding in Kangundo Succession cause No E70 of 2022 In the Matter of the Estate of Gerald Kili Musau and also further grant orders of stay of execution of the order dated 10th January 2023 issued therein.

17. In *William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others* [2019] eKLR, a 5-judge Bench of the High Court, after looking at our jurisprudential scan on the question of stay of proceedings, authoritatively laid out the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. Also See *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR; *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No. 43 of 2000); *David Morton Silverstein v Atsango Chesoni* [2002] eKLR: They laid down the following six principles:
- a. There must be an appeal pending before the higher Court;
 - b. where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
 - c. The Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
 - d. The Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;



- e. The Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
 - f. The Applicant must demonstrate that the application for stay was filed expeditiously and without delay.
18. Further In the words of Ringera J. in *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No. 43 of 2000):
- “As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously (emphasis added)”
19. What emerges from the discussion above is that the grant of a stay of proceedings pending the hearing of an interlocutory appeal in civil matters is a rare and exceptional remedy. As a general matter, an appellate court will only exercise its discretion to grant a stay of proceedings pending an appeal over an interlocutory matter before a magistrate’s Court or Tribunal only in exceptional circumstances. While difficult to determine with mathematical precision when the Court will use this power, it is only to be sparingly used where, in the words of South African authors, Gardiner and Lansdown (6th Ed. Vol. 1 p. 750),
- “grave injustice might otherwise result or where justice might not by other means be attained.” As the authors correctly write, the Court will generally “hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the Court below.”
20. The applicant did file this appeal within 14 days of the ruling being appealed against and no doubt the said appeal raises several triable and weight issues, chief amongst them is the jurisdiction of the court sitting as a succession court to conclusively determine issue of ownership of land at an interlocutory stage and whether the question of ownership of the suit parcel should be determined by the Environment and land court.
21. The respondents have not denied the appellants’ allegation that using the orders issued, they will be in a position to transfer the suit parcel to the 3rd respondent and/or dispose of the same rendering this appeal nugatory. Further in the circumstances of this case, if the proceedings are not stayed, the estate will be distributed without the “crown in the jewel” and if this appeal is successful it will take further judicial time and resources to undo/reverse the changes made in the suit property register. This in my opinion constitutes exceptional circumstances which dictate that the courts discretion should be exercised in favour of the appellant and have the proceedings stayed as this appeal is heard.
22. The second issue, which arises is the issue of stay of the orders dated January 10, 2023 pending hearing and determination of this appeal. In *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application



No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment that the application has been made without unreasonable delay, satisfaction of substantial loss and the furnishing of security. The Court, in exercising its discretion, should also further opt for the lower rather than the higher risk of injustice and finally the court will also consider the overriding objective as stipulated in sections 1A and 1B of the Civil Procedure Act, which the courts are now enjoined to give effect to. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589, Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997 & Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63:

23. The appellant is obviously aggrieved, by the judgment delivered and did file this appeal promptly. The grounds of appeal do disclose arguable grounds to challenge the ruling and as already determined above, there is real and grave risk of the appeal being rendered nugatory, if no stay is granted and the suit property is transferred to the 3rd respondent and/or to a third party. As regards the issue of security the appellant did depone that she is willing to abide by the orders of this court as regard's security. Further having regard to the circumstance of this case and the annexure's filed, the lower risk of injustice in this case tilts in favour of granting stay of execution to prevent interference with the registration of the suit property pending determination of this appeal.

II Whether a preservative order should be issued directing that the rent from L.R. NO 13767/118 be deposited in court and/or be deposited in a joint interest earning account held in the names of both Advocates.

24. Section 47 of the law of succession Act vests in the court wide discretion in granting protective powers for purposes of safeguarding the estate of a deceased person. The said section provides that ;

The High court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as maybe expedient.

25. "Similarly rule 73 of the probate and administration rules provide that;

"Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as maybe necessary for the ends of justice or to prevent abuse of the court process."

26. A reading of these two sections indicate that the high court is clothed with wide discretionary powers to do what is necessary to ensure that ends of justice are met. This position finds support in Millicent Mbatia Mulavu Vs Annah Ndunge Mulava & 3 others (2018) eKLR, where the High court affirmed that it has powers to issue injunctive orders for purposes of preserving the estate of a deceased person and also in the court of Appeal case of Floris Piezzo & Another Vs Giancarlo Falasconi (2014) eKLR where the said court expressed itself as follows;

"We have carefully considered the grounds of Appeal, rival submissions and the law. The application before the court was for temporary injunction to restrain the appellant from dealing with the suit premises in a manner inimical to the estate of the deceased. The question which arose and had to be determined first was whether the court had jurisdiction to grant an injunction in a succession cause.



The appellants took the position that the court had no such jurisdiction, whereas the respondent took the contrary position. However, the High court was persuaded that rule 73 of the probate and administration rules reserved the courts inherent jurisdiction to allow for grant of an injunction in deserving cases. We totally agree with this conclusion. We have no doubt at all that the law of succession gives the court wide jurisdiction to deal with testamentary and administration issues of an estate.....in other words. We are of the same view that section 47 of the Act gives the court an all-embracing power to make necessary orders including injunctions where appropriate to safeguard the deceased estate. This section must be further read with Rule 73 of the probate and administration rules which further emboldens court's jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court. We would imagine that such orders include injunctive orders.”

27. In *CMC Holding Ltd & Another Vs Jaguar Land Rover Exports Ltd* eKLR the court while highlighting the purpose of interim measures of protection held as follows;

“The measures are intended to preserve the asset or evidence which is likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of the interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral .The court must be satisfied that the subject matter of the arbitral will not be in the same state at the time the arbitral reference is concluded, before it can grant an interim measure of protection.”

28. From the pleadings filed it can be gleaned that there are several issues the trial court will have to resolve, namely; who between the appellant and the 3rd respondent is the widow/widows of the deceased as defined under section 3(5) of the *law of succession Act*, who are the beneficiaries and/or dependents of the deceased under Section 29 Of the *law of succession Act*, and what constitutes the deceased estate, which is available for distribution. This appeal too raises arguable grounds as already discussed above.

29. From the pleadings it has been shown that before his death the deceased was in full control of the said rents and had even sued the 3rd respondent to have her name removed from the suit property register. The appropriate status quo and what is equitable then would be preserved rents collected from the suit property and place both parties on equally footing at the end of this appeal process. As it is the respondents are enjoying rents from the said building exclusively to the detriment of the appellant and her children and did not undertake to preserve or refund the same should they lose out in this appeal. The appellants too should they succeed in this appeal, will only recover the said rents by further litigation which goes against the grain of the overriding objective of the court.

Disposition

30. The upshot is that the notice of motion application dated January 24, 2023 is merited and is allowed in terms of prayers (4) and (5) namely;
- a. Pending hearing and determination of this appeal, further proceedings and the ruling/order dated 10th January 2023 in Kangundo Succession cause No E170 of 2022 are hereby stayed.
 - b. That a preservatory order be and is hereby issued directing all rents collected from property known as L.R. NO 13767/118 be deposited directly/digitally in a joint account held in the names of both advocates herein at a reputable commercial Bank.



- c. As a condition for stay of execution the appellant will within the next 60 days from the date of delivery of this ruling, deposit Kshs 200,000/= in court as security for this appeal.
- d. The costs of this application will abide by the Appeal.

31. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF JANUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 17TH DAY OF JANUARY, 2024.

In the presence of:-

Ms Nguluku for Applicant

Mr Nyakundi for Respondent

Court Assistant- Susan/Sam

