



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Kamau & 2 others (Civil Appeal E067 of 2023)
[2024] KEHC 8769 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8769 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E067 OF 2023
FN MUCHEMI, J
JULY 11, 2024**

BETWEEN

STANLEY NGONDI KAMAU APPELLANT

AND

FRANCIS WAITHAKA KAMAU 1ST RESPONDENT

PAUL WAWERU KAMAU 2ND RESPONDENT

JOSEPHAT NGIGI NDEGWA 3RD RESPONDENT

RULING

1. This application dated 29th December 2023 brought under Sections 3A of the *Civil Procedure Act* and Order 42 Rule 6 (1), (2) and (6) and of the Civil Procedure Rules seeks for orders of an injunction restraining the respondents, their servants, agents and/or employees from advertising for sale, disposing of, transferring, charging, selling by public auction or private treaty, leasing, letting or otherwise howsoever dealing with LR. No.s Ruiru East/Juja East Block 2/3875 currently sub divided into LR Nos. Ruiru East/Juja East Block 2/33992, 33993, 33994, 33995, 33996, 33997, 33998, 33999, 3400, 34001, 40108, 40109, 40110, 40111, 40112 and 40113, Ruiru East/Juja East Block 2/40949, 40950, 40951, 40952, 40953, 40954, 40955, 40956 pending the hearing and determination of the appeal. The applicant further seeks for orders for stay of execution of the judgment and order of the Chief Magistrate's Court Thika Succession Cause No. 126 of 2015 dated 27th November 2023.
2. In opposition to the application, the 2nd and 3rd respondents in their two Replying Affidavits dated 8th March 2024 opposed the application

The Applicant's case

3. The applicant states that he is a son of the deceased and his father's estate was distributed pursuant to the judgment in C. M. Succession Cause No. 126 of 2015 delivered on 27th November 2023. Being



dissatisfied with the said judgment, the applicant lodged this appeal on 22nd December 2023. The applicant argues that the appeal has high chances of success and that he stands to suffer irreparable loss if execution of the order is carried out.

4. The applicant states that the application has been filed without unreasonable delay. Further the applicant argues that his father's estate is extensive and includes LR No. Ruiru East/Juja East Block 2/3875 which has been subdivided into various parcels of land namely Ruiru East/Juja East Block 2/33992-33999, 34000, 34001, 40108-40113, Ruiru East/Juja East Block 2/40949-40956 which portions have already been transferred to strangers and/or third parties with no stake in his father's estate and therefore the estate stands the risk of being distributed further.
5. The applicant is apprehensive that unless an order for stay of execution is granted, the respondents may dispose, distribute or charge or deal in various ways with the estate rendering the appeal nugatory. The applicant states that the respondents shall not suffer any prejudice if the orders sought are granted.
6. The applicant states that it is in the interests of justice to the beneficiaries of the deceased's estate left out in the distribution of LR No. Ruiru East/Juja East Block 2/3875 to be safeguarded.

The 2nd & 3rd Respondent's Case

7. The 2nd & 3rd respondents state that the application has not been made in good faith as the applicant only intend to waste precious time of the court. The 2nd & 3rd respondents argue that they are bonafide purchasers for value with notice, a fact known to the applicant despite him arguing that the property of the deceased namely LR No. Ruiru East/Juja East Block 2/3875 was sub divided and transferred to strangers.
8. The 2nd & 3rd respondents further argue that they obtained the grant of letters of administration lawfully and although the applicant did not sign the consent, he gave them his verbal blessings to proceed. The 3rd respondent states that he purchased one (1) acre of land from LR. No. Ruiru East/Juja East Block 2/3875 from the deceased's wife one Rachel Gathoni Kamau before the succession process and that is how he was allowed by the court to be an administrator in the estate of the deceased so as to safeguard his interests.
9. The 2nd & 3rd respondents argue that the applicant had no interest in the suit land as he was already settled on his share of land left to him by the deceased. The 2nd & 3rd respondents aver that the family agreed on the mode of distribution and the applicant is already settled on his share and therefore has no valid claim in the parcel of land in question.
10. The 2nd & 3rd respondents further argue that the applicant has not explained how he will give security for costs on his appeal.
11. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

12. The applicant relies on the case of *Giella vs Cassman Brown Co. Ltd* (1973) EA 358 and submits that he has met the threshold to warrant the court in granting him an injunction. The applicant submits that the 1st and 2nd respondents are sons to the deceased whereas the 3rd respondent is a stranger to him and a busy body with no identifiable stake in the deceased's estate. The applicant argues that the respondents petitioned the lower court for grant of letters of administration intestate of the deceased's estate and the letters were issued on 2nd November 2015 and confirmed on 23rd May 2016.



13. The applicant submits that during the succession proceedings, the respondents left out some of the properties of the deceased. Upon obtaining grant of letters of administration and upon confirmation of grant, the respondents sub divided the suit properties thus: LR. No. Ruiru East/Juja East Block 2/3875 into Ruiru East/Juja East Block 2/33992-33999, 34000, 34001, 40108-40113 and LR. No. Ruiru East/Juja East Block 2/40113 into Ruiru East/Juja East Block 2/40949-956.
14. The applicant submits that he got wind of the respondents' fraudulent acts and sought for the grant to be revoked and the court rendered its judgment on 27th November 2023 dismissing the application for revocation of grant. The applicant argues that the trial court erred both in law and in fact in dismissing the revocation on grant whereas on 4th August 2022, it revoked the grant and ordered that all 3rd parties who legitimately and illegitimately acquired interest in the resultant sub divisions of land be served for hearing of the matter.
15. The applicant argues that the deceased's estate has already been sub divided, transferred to strangers and stands the risk of being distributed further or otherwise dealt with by the said strangers before the appeal is heard. The applicant further argues that he stands to suffer irreparable loss and damage if the deceased's estate is further redistributed without the appeal being heard. The applicant is apprehensive that unless an injunction is granted as prayed, the appeal shall be rendered nugatory.
16. The applicant argues that he has established a prima facie case as the trial court revoked the grant on 4th August 2022 and later reversed its decision on 27th November 2023 therefore sitting on its own appeal. Furthermore, the applicant argues that the 2nd respondent in his affidavit confirmed that the applicant did not give consent to the obtaining the grant of letters of administration. Additionally, the applicant argues that the evidence of the lower court ought to be re-evaluated because the 3rd respondent did not comply with Section 82 of the Law of Succession as he admitted purchasing one acre of the land from the deceased's widow. The applicant further argues that the 3rd respondent is not a dependent according to Section 29 of the Law of Succession Act and that the trial court distributed the estate half way despite some properties being left out is a cause that the decision by the lower court ought to be reconsidered.
17. The applicant submits that he will suffer prejudice and irreparable harm unless the injunction is granted as he has been disinherited from the deceased's estate. The applicant further argues that other beneficiaries have also been left out yet the estate of the deceased has been inherited by strangers who are alleging that they are purchasers for value. Additionally, the applicant submits that the respondents may proceed to have the deceased's estate wasted further to his detriment. The applicant submits that the respondents shall not be prejudiced if the orders sought are granted.
18. The applicant relies on Order 42 Rule 6 of the Civil Procedure Rules and the case of Butt vs Rent Restriction Tribunal [1979] and submits that he has met the conditions set out for one to be granted an order of stay of execution. On the issue of substantial loss, the applicant relies on the decision of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR and submits being a dependant of the deceased, he stands to be disinherited from his father's estate.
19. The applicant submits that he and other beneficiaries have been left out in the administration of the estate and in the event the lower court's decision is not challenged, the deceased's estate will be wasted beyond his reach. Further, the applicant argues that if the execution of the judgment is not stayed, the appeal will just be a mere academic exercise and thus rendered nugatory.
20. Relying on the case of Tarbo Transporters Ltd vs Absalom Dova Lumbasi [2013] eKLR, the applicant submits that the court has the discretion to grant stay of execution without demanding him to furnish security for the due performance of the orders. the applicant further submits that the application was



filed timeously as judgment was delivered on 27th November 2023 and the appeal was filed on 20th December 2023 and the instant application, on 29th December 2023.

The 2nd & 3rd Respondent's Submissions

21. The respondents submit that the 1st and 2nd respondents are sons of the deceased and they were issued with grant of letters of administration in Succession Cause No. 126 of 2015 which was later confirmed. The respondents submit that they subsequently distributed the estate of the deceased as the beneficiaries of the estate agreed. The respondents further submit that the applicant was aware of the whole process and had given his verbal blessings to them to obtain the grant and distribute the estate.
22. The respondents submit that the applicant has no issue with the distribution of the estate save for LR No. Ruiru East/Juja East Block 2/3875 currently subdivided into LR Nos. Ruiru East/Juja East Block 2/33992-33999, 34000, 34001, 40108 – 40113 and Ruiru East/Juja East Block 2/40949 – 40956. The respondents further argue that the applicant raised the same issues at the lower court and the honourable magistrate was satisfied that the applicant was part of every step taken in the succession process and was only contesting the distribution of the said property having consented to the distribution.
23. The respondents submit that the sons of the deceased had already been given shares of their inheritance and were all satisfied with their shares including the applicant but he declined the property, destroyed the house that was on it and decided to settle on the property that he is settled on currently, which property is part of the estate.
24. The respondents state that their mother then decided to sell one acre to the 3rd respondent and the remaining 2 ¼ acres was given to the 2nd respondent as his share of his inheritance. The respondent states that the applicant is aware of the said facts and that he denied the share of his property as it was not valuable at that time and he has only come to claim it after he realised that there is value at the moment after the said property had already been subdivided and sold to other third parties. The respondents further submit that the applicant and his siblings all agreed to the said mode of distribution of the estate.
25. The respondents rely on Section 93 of the *Law of Succession Act* and submit that the suit parcels have already been sold to third parties, who are innocent buyers for value without notice. Some of the third parties have already erected permanent structures on the said parcels where they live with their families. The respondents state that it is prudent to protect the interests of the purchasers and if the applicant is not satisfied, he ought to be compensated from the vast estate of the deceased as there are more properties to the estate.
26. The respondents submit that the other beneficiaries of the estate have no complaints. Further, the respondents submit that the family is large consisting of seven children and only the deceased's wife and the 2nd respondent got a share of the suit property. The respondent further state that the widow of the deceased sold her share to the 3rd respondent for purposes of medication and the 2nd respondent got his share from his mother and sold the land to various people who hold valid land titles. Thus, the respondents state that the vast estate remaining will cater for the interests of everyone including the applicant.
27. The respondents argue that the appeal has no chances of success and pray that the same be dismissed.

The Law

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



28. Order 40 Rule 1 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.

29. In the instant case, the ruling of the trial court was delivered on 27th November 2023 whilst the Memorandum of Appeal was filed on 22nd December 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.

30. 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. (*Madhuaper 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.

31. 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

32. 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 been 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.

33. 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.

34. 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.

35. 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.

36. 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.

37. I have perused the Memorandum of Appeal and noted that the applicant has challenged the judgment of the court on the premises that the family of the deceased did not agree on the mode of distribution and that the letters of administration were obtained fraudulently and by concealment of material facts. From the record, the said below court revoked the grant on 4th August 2022 and proceeded to hear the matter vide viva voce evidence. Upon hearing all the parties in the summons for Revocation of grant the trial court found that the applicant failed to satisfy it on the grounds he had relied on. 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

38. 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.”

39. The question here is whether the applicant has demonstrated that they 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 deceased's estate is vast and further, the applicant was given land in Gathage being parcel no. 416 which is part of the estate. Furthermore, the mother of the applicant and his brother both led evidence that the applicant was given land in Juja but he refused to take it up for it was not of much value at that time. The 2nd respondent states that the family is ready to give another portion of land from the vast estate of the deceased. As such, it is my considered view that the applicant has not demonstrated that he will suffer irreparable damage or that this appeal would be rendered nugatory if a temporary injunction is denied.

Balance of Convenience Test

40. 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.

41. Having considered the principles laid down, it is my considered view that the balance of convenience tilts in favour of the respondents on the premise that the inconvenience likely to be visited on them will be much greater than that caused to the applicant if the orders sought are granted.

42. The applicant in my view has failed to satisfy the requirements of granting an injunction.

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.

43. 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.

44. 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.

45. 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.

46. The applicant argues that he stands to suffer irreparably if stay is not granted as a dependent of the deceased he has been left out in the distribution of the estate and he stands to be disinherited from the deceased's estate. It is not in dispute that the estate of the deceased is vast and that the family is still ready to give another portion of the estate to the applicant. The applicant currently resides on land in Gathage L.R. NO. 416 which he was given and is still part of the deceased's estate. Thus, the applicant cannot claim to be disinherited from the estate of the deceased as he wants the court to believe. It is therefore my considered view that the applicant has not demonstrated that he stands to suffer substantial loss. Has the application has been made without unreasonable delay.



47. The Judgment in the lower court was delivered on 27th November 2023 and the applicant filed the instant application on 4th January 2023. Taking into account that the Christmas vacation period fell within that period, it is my considered view that the delay of one (1) month is not inordinate. I find that the application was filed timeously.

Security of costs

48. 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.

49. Evidently, the issue of security is discretionary and it is upon the court to determine the security and the requisite terms. The applicant has not offered any security for the performance of the decree. This court takes note of the fact that this is a succession cause between family members will proceed to determine whether deposit of security is necessary in the event that this application is successful.

50. It is imperative that, 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.”

51. 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 a 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.

52. It is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal.

53. Consequently, it is my considered view that the entire application dated 29th December 2023 lacks merit and is hereby dismissed with costs.

54. It is hereby so ordered.

RULING DELIVERED, DATED AND SIGNED AT THIKA THIS 11TH DAY OF JULY 2024.

F. MUCHEMI



JUDGE

