In re Estate of Franciscah Wanjugu Gichuki (Deceased) (Succession Appeal E003 of 2022) [2023] KEHC 715 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 715 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

SUCCESSION APPEAL E003 OF 2022

CM KARIUKI, J

FEBRUARY 9, 2023

IN THE MATTER OF THE ESTATE OF FRANCISCAH WANJUGU GICHUKI (DECEASED)

BETWEEN

MICHAEL MACHARIA GICHUKI ..... 1ST APPELLANT

BERNARD MAINA GICHUKI ..... 2ND APPELLANT

ISAIAH MURIITHI THIMBA ..... 3RD APPELLANT

AND

AGNES WAMBUI GICHUKI ..... 1ST RESPONDENT

PURITY WANGARE GICHUKI ..... 2ND RESPONDENT

LYDIAH NGIMA GICHUKI ..... 3RD RESPONDENT

AND

ANGELIUS MWIHURI GICHUKI ..... ADMINISTRATOR

RULING

1. By an application brought under certificate of urgency dated 19/9/2022 applicant sought the following orders:

    a. Spent

    b. That pending the hearing and determination of this application interpartes, there be a stay of execution of the ruling delivered on the 25/8/2022 in Nyahururu C.m Succession Cause No, 7 Of 2017 in the matter of the estate of Franciscah Wanjugu Gichuki (deceased) and all the consequential orders issued pursuant thereto

c. That pending the hearing and determination of the appeal filed herein, there be a stay of execution of the ruling delivered on the 25/8/2022 Nyahururu Cm Succession Cause No, 7 of 2017 1n the matter of the estate of Franciscah Wanjugu Gichuki (deceased) and all the consequential orders issued pursuant thereto,

d. That the costs of this application be costs in the cause.

2. The Application is supported by the grounds on the face of the Application and the Supporting and Supplementary affidavit dated 19/8/2022 and 28/10/2022 respectively and the annxetures thereof and relied entirely on the said affidavits.

3. The Application was opposed through a Replying Affidavit sworn on 28/9/2022 by the Respondents herein.

Applicants case and submissions;

4. The Applicants case is that they have been residing on L.R Lakipia/Maramenet/130 together with their families since the year 1995 and have developed the land extensively by building permanent houses, where they reside on, planting trees and vegetation crops. In the event the ruling delivered on 25th August, 2022 is executed the Applicants contend that they stand to be evicted their crops, vegetation and trees cut in order for them to comply with the orders of the Court.

5. The Respondents are said to have threatened to execute the ruling as evidenced by the letter marked as "MMG4'. They do not and have never resided in the suit property. Alive to the fact that an application is discretionary and the same ought to be exercised judicially taking into consideration the rights to enjoyment of rightfully acquiring judgment and those of the aggrieved party but such a right ought to be exercised in a manner that would not render the appeal nugatory.

6. In the event stay is not granted and the Applicant's will be evicted, then the Appeal would be an academic exercise being that there would be no appeal to prosecute as the whole essence as to why the appeal has been filed is challenge the decision by the Court that Applicant's are seeking to stay.

7. Prior to her demise, the deceased left a will the subject genesis as to how and why the Applicants reside in the suit property. The purported will is subject of the instant appeal and furthermore the Court did not take into consideration that there were occupants of the suit land while making its determination as per the ruling delivered 25th August, 2022. As a matter of fact, the distribution was done inequitably. A perusal of the memorandum of appeal filed in Court on 15th September, 2022 the Appellants have raised four (4) grounds of Appeal and submit that the Appeal has high chances of success.

8. Again, the Respondents are intent on executing the ruling as they have already filed an application before the lower Court dated 18th October, 2022 annexed as "MMG7" seeking for evection of the Applicants.

9. This stands to render the Applicants homeless and destitute to say the least.

10. They Respondents have not demonstrated the loss they will suffer if stay is granted. Being elderly, he has sufficient reason to state one will suffer loss.

11. The instant application does not seek to keep the Respondent's from the deceased estate but seek to maintain the status quo of the Estate pending the hearing and determination of the appeal. In fact, the Applicant are intent on fast tracking the hearing and determination as evidenced by the letter seeking for typed proceedings which has been annexed as "MMG6".

12. That being said, substantial loss was defined in the case of *James Wangalwa & Another Vs Agnes Naliaka Cheseto* [2012] eKLR.Additionally, a stay of execution should only be granted where sufficient cause is shown. In *Antoine Ndiaye v African Virtual University* (2015) eKLR .

13. Thus, from the foregoing, the Applicants submit that they have clearly demonstrated substantial loss they will suffer and the appeal will be rendered nugatory thus sufficient cause given to this Court to allow stay.

14. The ruling was delivered on the 25th August,2022 and 30 days stay of execution was granted. The instant application was filed on 19th September, 2022 before the lapse of 30 days granted by the Court. Thus, submitted that the Application was brought within reasonable time and as such there is no delay. The Applicant is ready and willing to furnish security as the Court may direct.

Respondents'case and submissions

15. The respondents' case is that Administrator petitioned for the estate, and left out all the Respondents in the cause. The Administrator made the trial court to believe that the estate had only sons. The grant of letters of administration was confirmed and the estate was distributed to the sons of the deceased. The Respondents learnt of the said confirmation, and moved the court for revocation of grant of letters of administration and certificate of confirmation. The parties consented on the revocation of certificate of confirmation, and the matter was set down for hearing on the issue of distribution.

16. The Administrator filed summons for confirmation of grant and distributed the estate to the sons of the deceased only. His mode of distribution was a replica of what had been revoked, and it was supported by the Applicants herein. On their part, the Respondents gave their preferred mode of distribution and proposed that the estate be distributed equally to all the beneficiaries. The parties tendered their respective evidence in support of their preferred mode of distribution, and in a ling delivered on 17th February 2020 the trial court distributed the estate equally to all the beneficiaries in terms with the Respondents preferred mode of distribution.

17. The Applicants herein decided to challenge the said distribution. By summons dated 4th May 2021, the Applicants moved the trial court for revocation of grant on the basis that the deceased died testate. The summons for revocation was heard through oral evidence, and the Applicants advanced the same testimony that they had relied on in support of the summons for confirmation. Their version was that the deceased had stated how she intended her estate to be shared out, and they relied on what they describe as the Will.

18. The trial court dismissed the summons for revocation on the ground that the deceased had not left behind a valid will. The Applicants were aggrieved by the said ruling, and they filed the current appeal. It is the validity of the said will that is the subject of the current appeal.

19. The above is the factual background of the current appeal.

20. In the current summons, the Applicants are seeking for stay of execution of the certificate of confirmation. It is not in dispute that the Respondents are the daughters of the deceased. They are thus entitled to benefit from the estate on equal footing and strength as the Applicants. The mere fact that the Applicants are sons does not give them superior rights over the Respondents.

21. It is not in dispute that the Applicants have taken undue advantage on account of gender to prevent the Respondents from benefiting from the estate. It is well settled that a court should not allow a party to seek orders to preserve an undue advantage that he/she may be illegally enjoying. The Applicants would want the current status quo to be maintained, as they are in exclusive possession and use of the

entire estate. They have made sure that none of the Respondents benefits in any way from the estate, a fact that they have expressly admitted. It is time that the estate benefits all the beneficiaries without any form of discrimination.

22. In *Gusii Mwalimu Investment Co. Ltd & 2 Others- versus- M/S Mwalimu Hotel Kisii Ltd* [1996] eKLR, the Court of Appeal held; -

> "As was stated in *Thompson v Park* [1944] 2 E.R. 477, a litigant cannot wrongfully and illegally bring about a state of affairs and then apply to court to preserve that state of affairs as the status quo by way of an injunction. In that case Goddard L.J. (as he then was) said at p. 479:"

23. In *Catherine Masinde v Chriss Makhanu Masinde* [2007] eKLR, the court held; -

> "No court should permit a party to take undue advantage of a legal provision under the circumstances which are unjustified and ma malafide".

24. It is evident that the Applicants are not likely to suffer any irreparable loss and damage. The Applicants claim to have built residential houses on Laikipia/Marmanet/130. The Applicants current application is mainly aimed at stopping the distribution of this parcel of land. From the evidence that was adduced and the certificate of search filed while petitioning for the estate, the said parcel of land measures 11.7 hectares (29 acres).

25. The Applicants have not exhibited photos showing how they have put up residential houses in all the 29 acres. This land is big enough to accommodate all the deceased's children with each getting 4 acres.

26. The Applicants have not demonstrated the irreparable loss that they will suffer if the Applicants were allowed to benefit on the same measure as them. The actual position is that it is the Applicants that will continue to suffer loss as they cannot benefit from the estate.Reliance is made on the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR.

27. By allowing the Respondents to benefit from the estate, the Applicants will not suffer any irreparable injury. This state of affairs will be reversible if the appeal court will rule that the Respondents should not benefit. In the circumstances, it is fair and just not to discriminate the Respondents on account of gender from benefiting from the estate.

28. In the circumstances the court is urged to dismiss the summons dated 19th September 2022 with costs.

Issues, Analysis And Determination

29. After considering the affidavits, the submissions and the law, I find the issues are whether the applicant will suffer substantial loss if stay is not granted and order as to costs.

30. 8. Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* provides as follows:

> "(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless –

(a) the court is satisfied that substantial loss may result to the 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."

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 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. According to section 1A (2) of the *Civil Procedure Act*:

"the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective."

10. Under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties"

31. In *Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others* Civil Application No. Nai. 263 of 2009, Nyamu, JA on 20/11/09 held inter alia that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way.

32. The same Judge in *Kenya Commercial Bank Limited vs. Kenya Planters Co-operative Union* Civil Application No. Nai. 85 of 2010 held that:

" where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case."

33. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is

to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the *Civil Procedure Act* are attained.

34. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome.

35. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice.

36. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman vs. Amboseli Resort Limited* [2004] 2 KLR 589. This was the position of Warsame, J (as he then was) in *Samvir Trustee Limited vs. Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:

37. In *Samvir Trustee Limited vs. Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:

> " Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...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 judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."

38. On the first principle, Platt, Ag.JA (as he then was) in *Kenya Shell Limited vs. Kibiru* [1986] KLR 410, at page 416 expressed himself as follows:

> " It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. .....".

On the part of Gachuhi, Ag.JA (as he then was) at 417 held:

> "It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."

39. Un contested facts of the matter is that the Administrator petitioned for the estate, and left out all the Respondents in the cause. The Administrator made the trial court to believe that the estate had only sons. The grant of letters of administration was confirmed and the estate was distributed to the sons of the deceased. The Respondents learnt of the said confirmation, and moved the court for revocation of grant of letters of administration and certificate of confirmation. The parties consented on the revocation of certificate of confirmation, and the matter was set down for hearing on the issue of distribution.

40. The Administrator filed summons for confirmation of grant and distributed the estate to the sons of the deceased only. His mode of distribution was a replica of what had been revoked, and it was supported by the Applicants herein. On their part, the Respondents gave their preferred mode of distribution and proposed that the estate be distributed equally to all the beneficiaries. The parties tendered their respective evidence in support of their preferred mode of distribution, and in a ling delivered on 17th February 2020 the trial court distributed the estate equally to all the beneficiaries after hearing the parties.

41. The Applicants herein decided to challenge the said distribution. By summons dated 4th May 2021, the Applicants moved the trial court for revocation of grant on the basis that the deceased died testate. The summons for revocation was heard through oral evidence, and the Applicants advanced the same testimony that they had relied on in support of the summons for confirmation. Their version was that the deceased had stated how she intended her estate to be shared out, and they relied on what they describe as the Will.

42. The trial court dismissed the summons for revocation on the ground that the deceased had not left behind a valid will. The Applicants were aggrieved by the said ruling, and they filed the current appeal. It is the validity of the said will that is the subject of the current appeal.

43. The equal distribution is one sought to be stalled pending appeal. It is not in dispute that the Respondents are the daughters of the deceased. They are thus entitled to benefit from the estate on equal footing and strength as the Applicants. The mere fact that the Applicants are sons does not give them superior rights over the Respondents. It is now a constitutional imperative under article 27 that no form of discrimination on basis of gender is permissible least of all in sharing of estate of deceased parent to the beneficiaries.

44. Thus ,the is whether sharing equally would of parties deceased father esta31. The Applicants have not exhibited photos showing how they have put up residential houses in all the 29 acres. This land is big enough to accommodate all the deceased's children with each getting 4 acres.

45. 32. The Applicants have not demonstrated the irreparable loss that they will suffer if the Applicants were allowed to benefit on the same measure as them. The actual position is that it is the Applicants that will continue to suffer loss as they cannot benefit from the estate.te of 29 acres ,would render occasion substantial loss to the applicant?

46. 33. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, thus; -

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy".

47. By allowing the Respondents to benefit from the estate, the Applicants will not suffer any irreparable injury. This state of affairs will be reversible if the appeal court will rule that the Respondents should not benefit. In the circumstances, it is fair and just not to discriminate the Respondents on account of gender from benefiting from the estate.

i. In the circumstances the court finds no merit in the application and thus dismisses the summons dated 19th September 2022 with no orders as costs.

DATED, SIGNED, AND DELIVERED AT NYAHURURUON THIS 9TH DAY OF FEBRUARY 2023.

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CHARLES KARIUKI

JUDGE