



**Mutegi (Legal Representative of the Estate of the Late Eustace Mutegi Murungi) v Njoka
(Miscellaneous Succession Cause 52 of 2018) [2023] KEHC 2660 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2660 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MISCELLANEOUS SUCCESSION CAUSE 52 OF 2018**

LW GITARI, J

MARCH 9, 2023

BETWEEN

**JOSPHINE MUIRU MUTEGI (LEGAL REPRESENTATIVE OF THE ESTATE OF
THE LATE EUSTACE MUTEGI MURUNGI) APPLICANT**

AND

AGRIVINE KABURI NJOKA RESPONDENT

RULING

1. Before this Court is the Applicant's application dated September 16, 2022 brought under a certificate of urgency. The application seeks for the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. That pending the hearing and determination of the Appeal, this Honourable Court be and is hereby pleased to issue an injunctive order restraining the Respondent and the purchaser(s) either by themselves, their agents, their representatives, their servants and/or anybody acting at their behest from in any manner evicting and/or interfering with the Applicant's exclusive and free possession and/or utilization of, selling, trespassing onto, encroaching into, and/or dealing with parcel of land LR No Karingani/Muiru/145.
 - iv. That this honourable court be pleased to extend the time granted to the Applicant/Appellant within which to file a Record of Appeal at the Court of Appeal at Nyeri against the whole of the ruling delivered by this Honourable Court on July 22, 2021.
 - v. That this honourable court be pleased to issue any further orders it deems fit and just in the circumstances.
 - vi. That the costs of this Application be provided for.



2. The application is expressed to have been brought pursuant to the provisions under Rules 63, 67, and 73 of the Probate and Administration Rules (the “Rules”) and Articles 50 and 159 of the Constitution. It is premised on the grounds on the face of it and is supported by the affidavits of Josphine Muiru Mutegi sworn on September 16, 2022 and October 7, 2022.
3. The Applicant depones that this honourable issued an order staying the implementation and/or execution of the Ruling delivered by this Court on July 22, 2021. That the Respondent, in an effort to defeat the course of justice, has ignored and/or neglected to respect the said orders and has gone ahead to dispose off the suit properties, to wit LR No Karingani/Muiru/145 and LR Karingani/Weru/461, to third parties.
4. The Applicant further depones that the delay to file appeal her appeal within the statutory time provided was occasioned by the delay to acquire letters of administration ad litem appointing her as the legal representative of her late husband, the late Eustace Mutegi Murungi, in order to proceed with this matter in place of her late husband. That she was granted leave by this Court to appeal to the Court of Appeal, and that this Court directed her to file her Record of Appeal to the Court of Appeal of Appeal within 21 days. It is her stand that she was unable to file the Record of Appeal within the stipulated time due to delay in being provided with Certified typed copies of proceedings from the Court. That it is in the interest of justice, equity, and fairness that the orders sought be granted.
5. The application is opposed by the Replying Affidavit sworn by the Respondent on September 27, 2022. The Respondent depones that on May 12, 2022, this honourable court delivered its ruling giving the Applicant 21 days to file her intended appeal to the Court of Appeal. That the Applicant has since never filed her intended appeal. That after the twenty-one (21) days within which the Applicant was required to institute the appeal had lapsed, the Respondent proceeded to execute the judgment of this Court that was delivered on July 22, 2021. It is the Respondent’s case that his actions cannot therefore be said to be in any way mischievous or geared towards defeating the course of justice as the transfer of the suit properties were done on August 26, 2022 and June 27, 2022 respectively.
6. The Respondent further deposes that the stay order being relied upon by the Applicant were valid until the hearing and determination of the application dated February 28, 2022 and that the same lapsed on May 12, 2022 when the said application dated February 28, 2022 was determined by this Court. The Respondent thus contends that he cannot be faulted for executing the orders of this Court of July 22, 2021 since there were no orders barring him from doing so.
7. In addition, the Respondent contends that that the prayer for injunction being sought by the Applicant is similar to the orders of stay of execution that the Applicant sought in the application dated February 28, 2022 and as such, the said prayer is barred by the doctrine of res judicata.
8. Finally, the Respondent urges this Court to dismiss the application with costs to him terming the said application as an afterthought that lacks justification or merit.
9. In a brief rejoinder, the Applicant deposes in her Further Affidavit sworn on October 7, 2022 that vide a letter dated May 13, 2022, her advocates on record requested to be supplied with a copy of certified proceedings to enable them file the appeal to the Court of Appeal. That there was inordinate delay in getting the certified proceedings and the Applicant cannot be faulted for the delay. According to the Applicant, it would not have been possible for her to file the appeal without the certified proceedings and that the proceedings were only received by her advocates in or around the month of August 2022, at which time this Court was on vacation. It is therefore the Applicant’s contention that all the delays in filing her intended appeal have been satisfactorily explained and that no party stands to suffer any prejudice if the application is granted.



Analysis

10. Rule 67 of the [Probate and Administration Rules](#) provides as follows:

“Where any period is fixed or granted by these Rules or by an order of the court for the doing of any act or thing, the court upon request or of its own motion may from time to time enlarge such period notwithstanding that the period originally fixed or granted may have expired.”

11. Rule 73 of the Rules provides that:

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

12. The Applicant has also invoked the provision of Article 50 and 159 of the [Constitution](#). Article 159(2) of the [Constitution](#) provides that:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

- (a) justice shall be done to all, irrespective of status;
- (b) justice shall not be delayed;
- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
- (d) justice shall be administered without undue regard to procedural technicalities; and
- (e) the purpose and principles of this Constitution shall be protected and promoted.”

13. On the other hand, Article 50(1) of the [Constitution](#) gives a party the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

14. The Applicant in this case has raised the issue of delay of receipt of typed proceedings from the court as a ground in support of his application. The Supreme Court in [County Executive of Kisumu v County Government of Kisumu & 8 others](#) [2017] eKLR was keen to note that the issue of delay of getting typed proceedings is well known in our legal system and on this basis; the Courts have previously extended time and held that such a delay is not caused by a party requesting for the proceedings but by the court and that as such this issue consists of facts beyond the control of a party. The Court in that case went on to cite the case of [Hassan Nyanje Charo v Khatib Mwashetani and 3 Others](#), eKLR [2014] where the same court stated as follows:

“(27) Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail..

(28) Would it be in the interests of justice then to turn away an applicant who has, prima facie, exercised all due diligence in pursuit of his cause, but is impeded



by the slow-turning wheels of the Court's administrative machinery? We think not."

15. In the same case of *County Executive of Kisumu v County Government of Kisumu & 8 others* (supra) the court went on to state as follows in this regard:

"(26) However, we hasten to add that a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the Court."

16. The Applicant herein contends that they received the proceedings sometime in the month of August. Upon receipt of the said proceedings, the Applicant's case is that could not file the present application immediately as this Court was on vacation. The present application was finally filed before this court on September 16, 2022. In my view, the delay in filing the present application was not inordinate and the same has been satisfactorily explained. The delay to be supplied with typed copies of the proceedings was indeed inordinate and did contribute to the failure by the Applicant to file the intended appeal within the stipulated time. In the circumstances, it is my view that the Applicant has successfully made her case to warrant this Court to extend the time for her to file her intended appeal.

17. However, the suit properties have already been sold and transferred. The Applicant contends that there were stay orders in place when the Respondent proceeded to transfer the properties to third parties. On this issue, I am inclined to agree with the Respondent's stand that the orders of stay of execution of the ruling delivered in July 22, 2021 that were issued on March 17, 2022 were given pending the hearing and determination of the application dated February 28, 2022. The said orders of stay thus lapsed on May 12, 2022 when the application dated February 28, 2022 was determined. It thus follows that the sale and transfer of the suit land was done within the confines of the law. Having found so, the next issue to determine is whether the Applicant is deserving of the injunctive relief sought.

18. In *Lake Tanners Limited & 2 others v Oriental Commercial Bank Limited* [2010] eKLR, the Court of Appeal held that the purpose of injunctions pending appeal is to preserve the status quo pending appeal. The principles that should guide a court in an application for an order of injunction pending appeal were set out in the case of *Patricia Njeri v National Museum of Kenya* [2014] eKLR as follows:

- i. An order of injunction pending appeal is a discretionary one which will be exercised against an Applicant whose appeal is frivolous.
- ii. The discretion should be refused where it would inflict greater hardship than it would avoid.
- iii. The Applicant must show that to refuse the injunction would render the appeal nugatory.
- iv. The Court should also be guided by the principles set out in *Giella v Cassman Brown Ltd* 1973 EA 358."

19. As noted above, the suit land in this case has already been sold and transferred to third parties. It thus follows that it would be in vain for this Court to grant the injunctive order sought against the Respondent as she is no longer a proprietor thereof. She therefore has no locus standi to any dealings with the suit land.



20. With regard to the status quo in relation to the purchasers, it is can be deduced from the affidavits on record that they are yet to obtain vacant possession of the suit land. The Applicant deposed that her and her family are still in occupation and utilization of the suit land and that they have absolutely nowhere else to go. The Applicant thus claims that she is bound to suffer substantial loss unless the purchasers are restrained from any dealings involving the suit land pending the hearing and determination of the appeal.
21. To this end, I note that there is no evidence that has been adduced by the Applicant to the show a threat of eviction. There is therefore no threat of irreparable injury to the Applicant in my view. Furthermore, the purchasers of the suit land are not parties in this application. Granting the injunctive order against them would definitely inflict great hardship to them given that they have not been afforded an opportunity to be heard. This would be unjust.
22. In *Charter House Investments Ltd v Simon K Sang & 3 Others* CA Civil Appeal No 315 of 2004 [2010 eKLR], the Court of Appeal stated:-
- “Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the Court requires protection and maintenance of the status quo. The award of a temporary injunction by Courts of equity has never been regarded as a matter of right even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the Court balances the convenience of the parties and possible injuries to them and to third parties. In the Giellacase (supra), the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with a reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.”
23. Given the circumstances of this case, it is my view that the Applicant has failed to demonstrate that the balance of convenience tilts in her favour to warrant the grant of the injunctive order sought.
24. The upshot of the foregoing is that the present application partly succeeds. I allow the application in terms of prayer No 4 on the application only. I order that:
- 1) Time to file the appeal is extended by fourteen (14) days from today.
 - 2) Prayer (2) on the application is spent.
 - 3) Prayer (3) on the application is declined and is therefore dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 9TH DAY OF MARCH 2023.

L.W. GITARI

JUDGE

9/3/2023

The ruling has been read out in open court.

L.W. GITARI

JUDGE

9/3/2023

