



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Mzee Ibrahim Memia (Deceased) (Succession Cause 34 of 2019) [2023] KEHC 17863 (KLR) (17 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17863 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 34 OF 2019**

G MUTAI, J

MAY 17, 2023

IN THE MATTER OF THE ESTATE OF MZEE IBRAHIM MEMIA (DECEASED)

BETWEEN

AYUB MZEE MWANGI & 4 OTHERS APPLICANT

AND

DAPHINE IBRAHIM MEMIA RESPONDENT

RULING

Introduction

1. There are 2 applications before this court. The first one was filed by the Respondent on February 24, 2023. The said application seeks the following orders: -
 1. Spent
 2. Spent
 3. That this honourable court be pleased to grant orders of stay of execution of the judgment delivered on June 30, 2022 and any orders arising thereto pending the hearing and determination of the Appeal No 95 of 2022 filed on October 3, 2022;
 4. Spent
 5. That this honourable court be pleased to issue a temporary injunction restraining the Applicants/Respondents jointly and severally their agents, servants, employees and or officers from possessing, accessing, auctioning, selling, proclaiming, attaching, dealing and or disposing off the property being Plot No Subdivision 2105/I/MN and Plot No Subdivision 2095/I/MN pending the hearing and determination of appeal No 95 of 2022 filed on October 3, 2022;



6. That costs of the application be provided for.
2. The grounds upon which the application is based is set out in the body of the said motion. In brief it is stated that the Applicants attempted to have an independent agent collect rent from the disputed properties. The Respondent avers that she has always collected rent from the said premises even during the lifetime of the deceased. She further avers that there have been serious breaches of the peace which have forced her to seek the help of the National Police Service. She states that she needs the rental income for her own upkeep as she is a retired senior citizen with no other source of income. The court was requested to issue the orders sought in the interest of justice pending the hearing and determination of the appeal. The Respondent referred to the conduct of the Applicants. In her view the Applicants had no interest in the deceased during his lifetime. It was only after he died that they came to disturb, harass and disinherit her, she claimed.
3. The motion is supported by the affidavit of Daphine Ibrahim Memia. The said affidavit was sworn on February 24, 2023. The affidavit raises the same averments as those raised in the grounds. The Respondent annexed to her affidavit an application filed before the Kadhi's Court on November 25, 2022, a Notice of Preliminary Objection dated January 13, 2023, a photocopy or an OB entry, a Memorandum of Appeal as well as an extract of the Record of Appeal.
4. The Applicants filed their application on March 14, 2023. The said application seeks the following orders: -
 1. That this Honourable Court be pleased to appoint an independent agent to collect the rental income from plot number subdivision 2105/I/MN and plot number subdivision 2095/I/MN and the same be deposited with the Court's account pending distribution;
 2. That this honourable court be pleased to order the Respondent to provide and render a true statement of account of the collection of rental income from plot number subdivision 2105/I/MN and plot number subdivision 2095/I/MN from the deceased estate following the demise of the deceased on December 9, 2018 to date in respect of the suit premises within 14 days of this order;
 3. That this honourable court be pleased to direct that the total rental income unilaterally collected by the Respondent from plot number subdivision 2105/I/MN and plot number subdivision 2095/I/MN to the exclusion of the Applicants from the deceased's estate following the demise of the deceased on December 9, 2018 to date be taken into account in determining beneficiaries shares during the distribution of the deceased's estate;
 4. That this honourable court may be pleased to issue any other order it may deem fit to grant;
 5. That the costs of this application be provided for.
5. The Applicants aver that the judgment of this court awarded the Respondent 50% share of Plot No Subdivision 2105/1/MN and Plot No Kilifi/Mtwapa/1308 while the remaining 50% share of the properties was to be distributed in accordance with the Islamic law to the heirs of the estate. They further aver that the Respondent was aggrieved by the said decision and opted to file an appeal at the Court of Appeal which is now pending. They, on their part, filed an application before the Kadhi vide which they sought to have an independent agent to collect rent from the Plot No Subdivision 2105/I/MN and Plot No Subdivision 2095/I/MN which was rejected by the court below when the Respondent raised a Preliminary Objection which challenged the jurisdiction of that Court to hear and determine the application which was before it. The said court determined that it lacked jurisdiction. After that happened an application raising the same grounds as those raised in the Kadhi's Court was



filed before this Honourable Court. The Applicants seek same orders as those they had sought in the court below.

6. The Supporting Affidavit, which is sworn by Ayub Mzee Mwangi, reiterates the grounds stated in the Motion. He attached to his affidavit the judgment of this court and the ruling of the Honourable Kadhi.
7. The Respondent's application is opposed. Ayub Mzee Mwangi swore a Replying Affidavit. He denied harassing the Respondent and accused her of enriching herself unlawfully to the detriment of the other beneficiaries. She sought court's help in having the rental income collected by a neutral party with the proceeds being deposited in court pending distribution upon the conclusion of the appeal.
8. In similar vein the Applicant's application is opposed. The Respondent deponed that she had all along collected the rent, even during the lifetime of the deceased and that none of the beneficiaries had ever complained. She deponed further that she uses the rent proceeds to take care of herself and that it would be injurious to her to have the only income she has, having long retired, taken away. The Respondent disputed the percentage of the estate that she had been given by this court and asserted that the judgment was clear and unambiguous that the estate be shared out in accordance with the Islamic law to the 7 heirs of which she is one. In her view, with the Kadhi Court having declared itself to be without jurisdiction and the judgment of this court being dependant on a finding by the Kadhi's Court, the judgment of the High Court was incapable of execution. The Respondent therefore argued that the Applicants were trying to execute a judgment that couldn't possibly be executed given the knots the two courts had tied themselves.
9. The Respondent deponed in her further affidavit that the court was *functus officio*, save only when considering review or stay applications and that her appeal is arguable. She reiterated that no prejudice will be suffered by any party if the application she has filed is allowed. She therefore prayed that it be allowed.
10. Daphine Ibrahim Memia also swore Further Affidavit in response to the Replying Affidavit dated March 14, 2023. As the two affidavits are broadly similar I will not dwell in the second affidavit at length.

The Applicable Law

11. Order 42 Rule 6(1) & (2) of the [Civil Procedure Rules](#), 2010 provides that as follows: -

“6.

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”

12. The High Court has wide powers under the *Law of Succession Act*. Section 47 of the said Act states 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 may be expedient: Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

Issues for Consideration by the Court

13. I will consider the applications filed herein together and thereafter make my finding in this consolidated ruling. I do this as I am required by section 1A of the *Civil Procedure Act* to deliver just, expeditious, proportionate and affordable resolution of disputes that are placed before me by making the best use of the judicial time. To undertake this duty I must determine what the issues are in this matter so that I can determine them. Having considered this matter at length it is my opinion that these are the issues that call for my determination: -

- a. Will the Respondent suffer substantial loss?
- b. Has the stay application been made without undue delay?
- c. Has a security for the due performance of the appeal been given?
- d. Do the Applicants deserve the prayers that they seek?

14. I will look at each issue in turn.

Will the Respondent suffer substantial loss unless the stay is granted?

15. I have looked at the proposed appeal I have also looked at the ruling of the Kadhi. I note that the appeal filed is not frivolous. It raises weighty legal issues which the court of Appeal shall determine. The position of a Christian spouse who outlives her/his husband/wife is particularly germane. In this case, depending on how the court above rules, the Applicants may be deprived of what this court had given them. What would happen if they are allowed to distribute the estate at this time, in the ratios proposed by this court? Will Respondent be able to recover what the Court of Appeals will have determined to be her fair share? I am of the opinion that courts should as much as possible permit litigants who are successful on appeal to enjoy the fruits of judgments in their favour. I seek refuge in the celebrated case of *Butt versus Rent Restriction Tribunal* [1982] KLR 417 where the court observed as follows: -

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in



Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

Megarry J, as he then was, followed Wilson (*supra*) in *Erinford Properties Limited v Cheshire County Council* [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision being rendered nugatory should that court reverse the judge’s decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the *Attorney General v Emerson and Others* 24 QBD (1889) 56 at p 59. The special circumstances in this case are that there is a large amount of rent in dispute between the parties and the appellant has an undoubted right of appeal.”

I agree wholeheartedly with the eminent jurist.

Has the application for stay been made without unreasonable delay?

16. Although the delay on the part of the Respondent would appear to be inordinate the circumstances of this case are such that the interest of justice calls for stay of execution pending appeal be allowed.

Has the security for due performance of the appeal been given?

17. In my view the proper security that should issue is having 50% of the rental income deposited in court with the balance remaining with the Respondent. Such order will subsist until the Appeal is heard and determined by the Court of Appeal.

Has the Respondent made a case for grant of injunction pending appeal?

18. The Respondent seeks injunction pending appeal. The conditions under which such injunction is given was set out in the case of *Patricia Njeri & 3 Others vs National Museum of Kenya* [2004] eKLR where the court stated as follows: -

- (a) “an order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.
- (b) the discretion should be refused where it would inflict greater hardship that it would avoid.
- (c) the applicant must show that to refuse the injunction would render the appeal nugatory.
- (d) the court should also be guided by the principles in *Giella vs Cassman Brown* [1973] EA 358.”

In this case the Respondent hasn’t convinced me that to refuse to grant an injunction would cause her severe hardship. The Respondent has already obtained a stay pending appeal. To give her an injunction pending appeal would create a severe hardship to the Applicants.

Do the Applicants deserve the orders they seek?

19. From the foregoing part of what is sought in the Applicant’s application dated March 9, 2023 has been allowed. I however decline to grant prayers 2 and 3 as these may be determined once the Court of Appeal renders its judgment. Having the rent proceeds audited now will not facilitate the fair,



expeditious and proportionate determination of the appeal as the parties will be bogged down in the High Court.

Disposition

20. The upshot of the forgoing is that

1. I allow the Notice of Motion application dated February 24, 2023 in terms of prayer No 3 and order that there be a stay of execution of the judgment delivered on June 30, 2022 and any other orders arising therefrom pending the hearing and determination of the Court of Appeal Civil Appeal No 95 of 2022 filed on October 3, 2022;
2. I decline to issue any injunctive relief;
3. I allow in part prayer No 1 of the Applicant's Notice of Motion application dated March 9, 2023 (filed on March 14, 2023) and order that forthwith upon the issuance of this order half the rental income in respect of Plot No Subdivision 2105/I/MN and Plot No Subdivision 2095/I/MN be deposited in court with the other half being given to the Respondent Daphine Ibrahim Memia for her own upkeep; and
4. Each party shall bear own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 17TH DAY OF MAY 2023 AT MOMBASA VIA MICROSOFT TEAMS

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GREGORY MUTAI

JUDGE

In the presence of :-

Mr. Lianza for the Applicant

Mr. Matheka for the Respondent

Ms. Winnie Migot – Court Assistant

