



**In re Estate of Abubakar Masoud (Deceased) (Civil Appeal
E091 of 2022) [2023] KEHC 21296 (KLR) (5 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 21296 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E091 OF 2022**

SM GITHINJI, J

JUNE 5, 2023

IN THE MATTER OF THE ESTATE OF ABUBAKAR MASOUD (DECEASED)

BETWEEN

KASSIM ABUBAKAR MASOUD 1ST APPELLANT

RAHMA ABUBAKAR MASOUD 2ND APPELLANT

AND

MUNIR ABUBAKAR MASOUD 1ST RESPONDENT

ALI MOHAMED ALI 2ND RESPONDENT

SULEKHA ABUBAKAR MASOUD 3RD RESPONDENT

*(Being an Appeal against the Judgment and decree of the Honourable DR. Julie Oseko,
Chief Magistrate delivered on 15.12.2021 in CMCC No. E104 of 2020- Malindi)*

RULING

1. For determination are two applications by the Appellants; the 1st application is dated November 8, 2022 and the other December 8, 2022. In the application dated November 8, 2022, the Appellants sought the following orders;
 1. Spent.
 2. That an order of injunction do issue against the Respondents, their representatives, assigns or agents or anybody whomever from interfering with portion No 599 Malindi or any portion thereof, by subdividing, erecting a fence or undertaking whatever developments or in any other way that can cause nuisance to the Appellants until the hearing and determination of this Application.



3. That an order of injunction do issue against the Respondents, their representatives, assigns or agents or anybody whomever from interfering with portion No 599 Malindi or any portion thereof, by subdividing, erecting a fence or undertaking whatever developments or in any other way that can cause nuisance to the Appellants until the hearing and determination of the Appeal.
 4. Costs.
2. The application was supported by the grounds on the face of it and the supporting affidavit of the 2nd Appellant, Rahma Abubakar Masoud sworn on the 8th day of November, 2022. She deposed that there is still pending before the Kadhi's court a succession matter, Succession Cause No 30 of 2014 and that parcel No 599 Malindi is one of the properties forming the subject of the succession case. She asserted that the Respondents herein have subdivided land parcel Number 599 Malindi and are in the process of issuance of titles to the subdivision despite there existing orders of stay against them prohibiting any dealings with the land. Further, that there is imminent danger that the Respondent may run to complete the exercise and hive off the disputed portion, fence or develop the same.

Response

3. In response to the said application, the 2nd and 3rd Respondents filed Grounds of Opposition dated November 21, 2022 on the following grounds;
 - a. That Judgment was entered in Succession Cause No 24 of 2019 on September 9, 2019 by the principal Kadhi Hon. Sheikh Salim S. Mohamed and the 2nd and 3rd Respondents herein were awarded a portion of Plot No 599 Malindi and that an order was reissued on September 16, 2019 vesting the said portion to the 2nd and 3rd Respondents.
 - b. That the Appellants never filed an Appeal against the said Order as is required by law.
 - c. That subdivision was carried out, the subplot number and the deed plan were issued on June 10, 2021 and that the order together with the Deed plan was registered on October 19, 2021 vesting Portion 18883 to the 2nd and 3rd Respondents respectively.
 - d. That at the time of registration of the Order, the same was still in force as the same had not been set aside and that the 2nd and 3rd Respondents now hold indefeasible title over the portion of land number 18883.
4. In the application dated December 8, 2022, the appellants/ applicants sought the following orders;
 1. Spent.
 2. Spent.
 3. That the Honourable Court be pleased to stay any further proceedings in Kadhi's succession Cause No 30 of 2014 at Malindi pending the hearing and determination of High Court Appeal No E91 of 2022 at Malindi.
 4. Costs be provided for.



5. The application is supported by the affidavit sworn by Rahma Abubakar Masoud on the 8th day of December, 2022. She contends that there is a pending succession matter in the Kadhi's court succession cause No 30 of 2014 in which portion number 599 Malindi is one of the properties forming the subject of the succession case herein. That the Petitioner Munir Abubakar Masoud filed succession cause No 30 of 2014 and succession cause No 24 of 2019 in respect to the estate of Abubakar Masoud. That succession cause No 24 of 2014 has been determined and the appellants have preferred an appeal against the said decision vide Appeal No E91 of 2022 at Malindi High Court. It is her further contention that the issue raised in the appeal would affect Succession Cause No 30 of 2014 and that there is need therefore that Succession Cause No 30 of 2014 be stayed pending the determination of the appeal.

Analysis And Determination

6. I have considered both applications, the response as well as the submissions by the parties and in the circumstances, I find that the issues for determination are whether the applicants are entitled to an order of injunction in the terms sought in prayer (2) and (3) of the Notice of Motion dated November 8, 2022 and whether this court should stay any further proceedings in Kadhi's succession cause No 30 of 2014 pending the hearing and determination of the Appeal No E91 of 2022 in terms of the prayer sought in the application dated December 8, 2022.

Order 40 Rule 1(a) of the [Civil Procedure Rules 2010](#) delineates the law on temporary injunctions thus:

“Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

7. The considerations for the grant of interlocutory injunctions were well stated in [Giella v Cassman Brown & Co. Ltd](#) [1973] EA 358 where the Court opined:

“The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

8. In [Nguruman Limited v Jane Bonde Nielsen and 2 Others](#) NRB CA Civil Appeal No 77 of 2012 [2014] eKLR the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in *Giella v Cassman Brown* (Supra) and further clarified that the conditions are to be applied as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially. Consequently, if the applicant does not establish *prima facie* case, then irreparable injury and balance of convenience do not require consideration. On the other hand, if a *prima facie* case is established, the court will consider the other conditions.



9. An analysis of the circumstances of this case directs this court to consider the question of whether the Applicants herein have established a *prima facie* case. Per Bosire, JA in [Mrao Ltd v First American Bank of Kenya Ltd & 2 Others](#) [2003] eKLR, a *prima facie* case is as follows:

“So what is a *prima facie* case? I would say that in civil cases it 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 as to call for an explanation or rebuttal from the latter.”

10. In the instant application, the applicants claim that the respondents have proceeded to subdivide land parcel Number 599 Malindi and are in the process of issuance of title to the subdivision despite their existing orders of stay against them prohibiting any dealings with the land. Further, that there is imminent danger that the Respondent may complete the exercise and hive off the disputed portion, fence or develop the disputed portion. In the instant application and as noted above, *prima facie*, the applicants have an arguable case considering that they are beneficiaries of the estate of the deceased and that the respondents are in the process of subdividing the suit property that forms part of the estate.
11. The next issue is whether irreparable injury, incapable of being assuaged by an award of damages, will be occasioned on the applicants should conservatory relief be denied. I wish to associate myself with the remarks on irreparable injury made in [Marple Brooks Projects Company Limited & another v I & M Bank Limited](#) [2019] eKLR:

“The next issue to address is whether the injury visited upon the Applicant should the conservatory orders not be granted could be compensated by way of damages. The principle generally is that where damages would suffice and the Respondent would be in a position to pay them, the court ought not to grant conservatory orders at an interlocutory stage. However, the position taken by Ringera J.A in the case of *Kanorero River Farm Ltd and 3 Others v National Bank of Kenya Ltd* 2002 2 KLR 207 was that “No party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages.”

12. In view of the events leading up to the present application, I am persuaded that the applicants have met the principles for granting injunctions as set out in the celebrated case of [Giella v Cassman Brown & Co. Ltd](#) 1973 (supra). In considering the pleadings, there does exist a serious issue to be tried, one that forms the subject matter of this suit and preserving it, would only culminate in meeting the ends of justice as sought by the parties.
13. On the second issue for determination regarding stay of proceedings in Succession Cause 30 of 2014, I rely on the case of [Kenya Wildlife Service v James Mutembei](#) (2019) eKLR, Gikonyo where it was held that:

“Stay of proceedings should not be confused with stay of Execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.

14. I have perused the Memorandum of Appeal dated October 25, 2022; the appellants raised this as one of the grounds of appeal;



15. That the Hon. Kadhi failed in law and facts by failing to appreciate that the Respondents were in contempt of court by proceeding to subdivide land portion No 599 Malindi and therefore any action taken in contempt of court is/was null and void.
16. After an analysis of the evidence, I am convinced that the proceedings in the Kadhi's court ought to be stayed in the interest of justice. In the instant case, it is my considered view that it would be in the interest of justice to exercise court's discretion and grant stay of proceedings as this is a succession matter that involves a number of persons expected to benefit from the estate. I am therefore satisfied that the Applicants have demonstrated that they have an arguable Appeal to warrant issuance of the orders being sought. Application is granted.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 5TH DAY OF JUNE, 2023.

.....

S.M. GITHINJI

JUDGE

In the Presence of; -

1. Ms Mona for the Respondent
2. Ms Marubu for the Applicant

