



**In re Estate of Mbogo Njeru (Deceased) (Succession Cause  
35 of 2013) [2023] KEHC 20565 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20565 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
SUCCESSION CAUSE 35 OF 2013  
LM NJUGUNA, J  
JULY 19, 2023**

**BETWEEN**

**NJERU M'CHINI ..... APPLICANT**

**AND**

**JANE KANYIRI KANYI ..... RESPONDENT**

**RULING**

1. The applicant moved this court vide summons general dated 07 February 2023 filed under certificate of urgency, premised on the grounds appearing on the face of the said application and its supporting affidavit. The applicant sought the following orders:
  - a. Spent;
  - b. Spent;
  - c. Stay of execution of the grant and all subsequent orders pending the hearing and determination of the summons for revocation of grant;
  - d. A temporary injunction barring the respondents, her agents, servants or any other person from entering, working, remaining or interfering with parcel no Ngandori/kiriari/1269 and any resultant subdivision pending hearing of this application and the application for revocation of grant filed herein; and
  - e. Costs of the application to be borne by the respondent.
2. In response, the respondent filed her replying affidavit terming the application as ill-conceived for the reason that the court granted a certificate of confirmation of grant to the respondent following revocation of the earlier grant that had been issued to the applicant. That following these events, the court further ordered that the sole estate of the deceased, that is Ngandori/kiriari/1269, revert back to the name of the deceased and be awarded in equal share between the applicant and the respondent.



That the respondent proceeded to subdivide the property into 2 equal portions, a move that the applicant has continually opposed albeit using criminal tactics, forcing the respondent to report to the police. The respondent further avers that the applicant has even attempted to sell a portion of the land to unsuspecting third parties in the past. For these reasons, the respondent asked the court to dismiss the application with costs.

3. The court directed that the application be disposed of by way of written submissions.
4. The applicant submitted that he has met the threshold to be granted the orders sought. He avers that the grant issued to the respondent was issued without due regard to procedure as provided under section 76 of the Law of Succession Act, in particular that the respondent did not file summons for revocation of grant in the proper court and/or cause. To further make his case, he relied on the case of Macfoy v. United Africa co. (1961) 3 ALL ER 1169 at page 1172.
5. As to the prayer for temporary injunction, the applicant relied on the sequential limbs for the court to consider before granting the relief. These are; firstly, the applicant ought to have demonstrated a prima facie case with an overwhelming likelihood of success, secondly, if the court fails to grant this relief then the applicant will suffer irreparable harm which cannot be compensated by damages and thirdly, if the court remains in doubt then it can grant the relief on a balance of convenience (Giella v Cassman Brown (1973) EA 358). For this argument he relied on the case of Mrao Ltd v. American Bank of Kenya Ltd & 2 others (2003) KLR 123.
6. According to the respondent's submissions, the application for temporary injunction cannot be granted with respect to parcel no Ngandori/kiriari/1269 as the same ceased to exist upon subdivision. Further, that even if the temporary injunction were to issue regarding the new numbers Ngandori/kiriari/8704 and Ngandori/kiriari/8705, the two titles have since been issued in the name of the respondent, the latter being in the process of being transferred to the applicant by transmission. She also averred that the requirements as laid down in Giella v Cassman Brown (supra) cannot be satisfied and so a temporary injunction should not be issued.
7. I have considered the arguments of both parties as well as the submissions and note that first, the respondent has proceeded to execute the certificate of confirmation of grant issued in her name by subdividing the suit land, thereby rendering the suit land non-existent.
8. However, the jurisdiction of this court allows it to make the orders sought herein as the courts have considered previously, for instance in the case of In re Estate of Gideon Kibitok Tarus (Deceased) [2021] eKLR the court granted an injunction in a succession cause while stating as follows:

“ 13. I consider the decision in Floris Piezzo & Another v Giancarlo Falasconi (2014) eKLR, the Court of Appeal while considering whether an injunction can issue in a Succession Cause expressed itself as follows; “We have carefully considered the grounds of appeal, rival written and oral submissions, and the law. The application before the high Court was for temporary injunction to restrain the appellants from dealing with the suit premises in a manner inimical to the estate of the deceased. The question which arose and had to be determined first was whether the Court had jurisdiction to grant an injunction in a Succession Cause. The appellants took the position that the Court had no such jurisdiction whereas the Respondent took the contrary position. However, the High Court was persuaded that Rule 73 of the Probate and Administration Rules reserved the Court's inherent jurisdiction to allow for the grant of injunctions in deserving cases. We are in total agreement with



this conclusion. We have no doubt at all that the Law of Succession Act gives the Court wide jurisdiction in dealing with testamentary and administration issues of an estate. Indeed Section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunction orders. In other words, we are of the same view that Section 47 of the Act gives the Court all-embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased's estate. This section must be read together with Rule 73 of the Probate and Administration Rules which further emboldens Court's jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders.”

9. With regard to the parameters set in the case of *Giella v Cassman Brown* (supra) and with reference to the above decision, also noting that the relief of a temporary injunction is to be granted on the basis of discretion, I find that the relief can and should be granted only when the court is satisfied in all the three parameters at the same time. However, the court in the case of *Joel Kipkurui arap Koech v Alice Wambui Magandu & 3 others* [2018] eKLR stated:

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“12. In the case of *Suleiman v Amboseli Resort Ltd* (2004) KLR 589, Ojwang AgJ (as he then was) stated thus: “Counsel for the Defendant urged that the shape of the Law governing the grant of injunctive relief was long ago, in *Giella v Cassman Brown*, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. .... Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in *Giella v Cassman Brown*, the court has to consider the following questions before granting injunctive relief:

- i. Is there a prima facie case.....
- ii. Does the applicant stand to suffer irreparable harm....
- iii. On which side does the balance of convenience lie.....

Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief should always opt the lower rather than the higher risk of injustice... if granting the applicant's prayers will support the motion towards full hearing, then should grant those prayers. I am unable to say at this point in time that the Applicant has a prima facie case with a probability of success, and this matter will depend on the progress of the main suit. Lastly there would be a much larger risk of injustice if I found in favour of the Defendant than if I determined this application in favour of the applicant.”

10. In my view, the summons for revocation of grant presents a prima facie case whose credits will be determined by way of hearing of the same. The damage caused to the applicant has been assessed and a report of pecuniary loss has been provided as evidence. Therefore, in my view, the loss may be



compensated by damages awarded by the court. However, I consider the evidence provided regarding destruction of a house, and I am not satisfied that the same can be recovered to its original state through damages. Further, on the limb of convenience, I shall be guided by a previous decision of the court in the case of *Bryan Chebii Kipkoech v Barnabas Tuitok Bargoria & another* [2019] eKLR (as cited in the case of *Margaret Njambi Kamau v John Mwatba Kamau & another* [2019] eKLR) where the court held;

“The court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused 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....”

11. Article 50 of *the Constitution of Kenya 2010* provides for the right to fair hearing. The application herein also seeks orders of stay of execution pending hearing and determination of the summons for revocation of grant. The applicant’s right to fair hearing prevails despite the circumstances. For as long as there is still a matter pending adjudication by this court, this court owes the parties herein the right to make their case.
12. In light of the above and having considered the law, and the arguments by both parties, I do find the application to be meritorious and make the following orders;
  - i. A stay of further execution of the grant and subsequent orders pending the hearing and determination of the application for revocation of the grant.
  - ii. The status quo on the ground to remain pending the hearing and determination of the summons for revocation of the grant.
  - iii. The summons for revocation of the grant to be prosecuted within 120 days failing which it shall stand dismissed.
  - iv. Each party to bear its own costs of the application.
13. It is so ordered.

**Delivered, dated and signed at Embu this 19<sup>th</sup> day of July, 2023.**

**L. NJUGUNA**

**JUDGE**

.....Applicant

.....Respondent

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