



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO 103 OF 2019**

**IN THE MATTER OF THE ESTATE OF JOSEPHINE NJERI MBUGUA (DECEASED)**

**RACHEAL WANJIRU GATHURU.....APPELLANT/APPLICANT**

**VERSUS**

**PETER NDEERE TUMBO.....1<sup>ST</sup> RESPONDENT**

**ANNIE WAMBUI TUMBO.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Appellant /Applicant, **Rachael Wanjiru Gathuru** had filed a protest to the confirmation of grant issued in respect of the estate of her mother **Josephine Njeri Mbugua**, in **Githunguri SPM's Succession Cause No. 122 of 2017**. By a ruling delivered on 19<sup>th</sup> June 2019, the learned magistrate dismissed the protest and proceeded to confirm the grant.
2. Aggrieved with the outcome, the Appellant filed this appeal. On 25<sup>th</sup> July 2019 she filed a notice of motion seeking *inter alia* that a temporary injunction pending determination of the appeal be issued against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, namely, **Peter Ndeere Tumbo** and **Annie Wambui Tumbo** who are her siblings and the administrators of the estate of their deceased mother, to restrain them from wasting, damaging or alienating the land parcel **LR No. Komothai/Igi/110** or otherwise interfering with the Applicants' peaceful possession, use and occupation of the guest house and the portion of the land parcel **LR No. Komothai/Igi/110** where the Applicant resides and keeps dairy cattle. A further prayer (No.4) sought to restrain the Respondents from transferring the property described as **LR No. Komothai/Igi/110** to **Charles Wairagi Mbugua**, another sibling, pending determination of the appeal; and finally, an order to inhibit any dealings in respect of the said land parcel.
3. The application is expressed to be brought *inter alia* under Order 42 Rule 6 (6) of the Civil Procedure Rules. By her supporting affidavit and further affidavit, the Applicant makes the case that she has since 2010 been in occupation of the guest house standing on the land parcel **LR No. Komothai/Igi/110** (hereinafter the suit property) and has also utilized a portion thereof to carry on dairy farming, which occupation and activities the Respondents have by various actions, including blocking access, interfered with. And that the Respondents have evinced an intention to evict her from the suit property. She asserts that she stands to suffer "*colossal loss*" through loss of her livelihood and abode in such eventuality. She contends that her appeal raises serious questions of law.
4. By their Replying affidavit, **Peter Ndeere Tumbo** and **Anne Wambui Tumbo** (the 1<sup>st</sup> and 2<sup>nd</sup> Respondents) depose that the Applicant had hitherto been gratuitously allowed by the beneficial owner **Charles Wairagi Mbugua**, to occupy the suit property; that she does not operate a dairy farm thereon but merely keeps one cow; and that in any event the Applicant holds a share of 8 acres in her matrimonial home, namely, **LR No. Komothai/Komothai/260** where she practices commercial farming and also owns a share of 3 acres of land in **Gachoire** village, being inheritance received pursuant to the succession cause in respect of the estate of the siblings' late father **Bernard Mbugua Tumbo**. In their view, the Applicant's occupation of the suit land which properly devolved upon their brother **Charles Wairagi Mbugua** in the latter cause constitutes trespass.
5. In his replying affidavit, **Charles Wairagi Mbugua** reiterates some of the depositions in the Respondents' response and asserts that he is the beneficiary lawfully entitled to the suit property and that the Applicant has occupied the suit property not as a matter of right but by his permission and that she had previously defaulted on her promises to vacate the same and is therefore a trespasser.
6. The application was canvassed by way of written submissions. The Applicant submitted that her appeal has high chances of success, and that the same is based on the clear provisions of Section 91(2) of the Land Registration Act, is arguable and not frivolous; that the Applicant is at risk of eviction which would render her appeal nugatory as she would have lost her current residence and source of livelihood. Several authorities were cited, including **John Gachie Gichimu & 20 Others v Mukua Tutuma [2010]e KLR** and **In re HEA (a minor) (2019) e**

KLR.

7. The Respondents for their part argue that the application has been overtaken by events as transmission has already been effected; that the Applicant is a trespasser on the suit land which devolved upon **Charles Wairagi Mbugua** even though she has other property in her matrimonial home and shares of land inherited from the estate of her late father.

8. The court has considered the material canvassed in respect of this application. The basic facts of the case are not in dispute. The Applicant and the Respondents are together with other siblings, namely **Charles Wairagi Mbugua, Stephen Mbugua Tumbo David Kairo Mbugua, Lawrence Ngigi Mbugua** and **Virginia Wanjiku Mbugua** the children of the late **Bernard Mbugua Tumbo** and **Josephine Njeri Mbugua** (the latter being the deceased herein). Upon the demise of the former, succession proceedings were taken out. The estate of the deceased father was distributed among all his children including the Applicant and the deceased herein. Among the assets was the land parcel in contest herein which, according to the confirmed grant devolved upon **Josephine Njeri Mbugua** (deceased) and **Charles Wairagi Mbugua** jointly.

9. On 20<sup>th</sup> January 2015 a title deed in respect of the suit property issued in the joint names of the said beneficiaries. Upon the death of **Josephine Njeri Mbugua**, the **Succession Cause no. 122 of 2017** was filed in the lower court. Included among the assets of her estate was the suit property. The Applicant is married and has a matrimonial home elsewhere ,but it would appear that she had in 2010 returned to her parents' home and occupied the guesthouse erected on the suit property and was residing there at the time of the demise of the deceased herein.

10. It was proposed in the application to confirm the grant that the suit property devolves upon **Charles Wairagi Mbugua** absolutely but the Applicant herein protested, arguing that on the basis of the provisions of Section 91(2) of the Land Registration Act, a half share of the suit property fell to be shared equally by all beneficiaries who had survived the deceased herein. The court was not persuaded and dismissed the protest confirming the grant in the terms proposed in the summons to confirm grant, thereby awarding the absolute proprietorship of the suit property to **Charles Wairagi Mbugua**. This outcome prompted the present appeal.

11. Rule 63 of the Probate and Administration Rules applies the provisions of Order 40 of the Civil Procedure Rules to probate causes. Further Order 42 Rule 6(6) of the Civil Procedure Rules provides that:

**“6. Notwithstanding anything contained in sub rule 1 of this rule (providing for stay pending appeal) the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from the Subordinate Court or tribunal has been complied with.”**

12. This Court also has wide discretion under Section 47 of the Law of Succession Act to “*entertain any application and determine any dispute under this Act.*”. For the purposes of considering the prayers in the instant motion, the granting of interlocutory injunctions is governed by the provisions of Order 40 Rule 1 of the Civil Procedure Rules which provides in part that:

**“Where in any suit it is proved by affidavit or otherwise –**

**a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**

**b) .....**

**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.”**

13. The principles governing the grant of an interlocutory injunction are settled. For the purposes of the instant motion, the court must determine whether the Applicant has brought her application within the required threshold for the granting of an interlocutory injunction.

14. What are the applicable principles? The decision of the Court of Appeal in **Nguruman Limited vs Jan Bonde Nielsen & 2 Others (2014) e KLR** is particularly illuminating as to the principles to be considered with respect to the granting of interlocutory injunctions. The Court described the role of the judge in such application to be merely to consider whether the principles for the grant of the interlocutory injunction were met. The court further observed that:

**“...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already ..... by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:**

**In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:**

**a) establish his case only at a *prima facie* level**

**b) demonstrate irreparable injury if a temporary injunction is not granted.**

**c) allay any doubts as to (b) by showing that the balance of convenience is in his favor.”**

15. The Court further stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. Such that, it is not enough that the Applicant establishes a *prima facie* case, he must further successfully establish irreparable injury, that is, injury for which damages recoverable at law could not be an adequate remedy. And where there is doubt as to the adequacy of damages, the court will consider the balance of convenience. Conversely, where no *prima facie* case is established, the court need not consider irreparable injury or balance of convenience. The Court of Appeal emphasized that the standard of proof is to *prima facie* standard.

16. Regarding the definition of a "*prima facie* case" the Court stated:

**"Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for "*prima facie* case" in civil cases in the following words:**

**"In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.**

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. **We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.** (emphasis added)

17. A *prima facie* case is built upon evidence and the applicable law. Evidently, the present Applicant was in occupation of a part of the suit property at the time of the death of the deceased herein, even though there is no firm proof that she is running a dairy farm as she asserted in her affidavits. It appears that the Applicant believes that she is entitled to remain in occupation of the guest house and a portion of the suit property on the basis that a half of the said property belonged to the deceased herein and ought to be distributed among all her eight surviving children. Interestingly, it seems that other siblings including the 2<sup>nd</sup> Respondent who resides on the same parcel are not of the same mind. The question of the proper application of Section 91(2) of the Land Registration Act to the joint ownership of the suit property by the deceased and **Charles Wairagi Mbugua** arising from the succession cause in respect of **Bernard Tumbo Mbugua** is no doubt an arguable point. But a *prima facie* case is not merely an arguable case. There must be evidence of infringement of a right and the probability of success.

18. Although the Applicant claims that the Respondents have interfered with her occupation and use of the suit property, and indeed the Respondents assert that she is a trespasser, there is no firm evidence that the Respondents have attempted to evict her or have otherwise interfered with her activities. Or that they intend to dispose of the suit property. Even if that were the case, the Respondents have demonstrated, and this is not rebutted, that the Applicant is also a beneficiary of other allotments under the estate of her father and is engaged in commercial farming activities on other property which is matrimonial. Her assertion therefore that the loss of her 'farm' on the suit property would result in loss of her sole source of livelihood and abode appears exaggerated.

19. Besides, even if she has a good claim, the Applicant does not have a right superior to her other siblings to continue to occupy and farm the so called "distinct" part of the suit property. There is no evidence that the Applicant is or will be more entitled to this particular portion and guest house than any other sibling in the event that the asset is to be shared equally by the eight siblings. In other words, there is no basis for assuming that she would be entitled to occupy the said guest house and utilize the said portion even if the court were eventually to find that a half share of the suit property ought to devolve upon the children of the deceased herein.

20. It appeared to me that the Applicant, having previously ensconced herself in the family guest house and so-called "distinct" portion of the suit property is determined to cement her claim specifically to that particular portion as against other siblings. This appears to be a key motivation driving the present application, but in any event an order to stay further dealings in the land would suffice to protect the Applicant's general interest in the suit property. The Court is not satisfied that the Applicant has demonstrated **"a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained"** so far as her occupation of the suit property is concerned.

21. In **George Gathura Karanja v George Gathuru Thuo & 2 Others** [2019] e KLR, the Court of Appeal stated that:

**"[A]n appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible. See the case of Stanley Kangethe Kinyanjui versus Tony Ketter & 5 Others, Civil Appeal No. 31 of 2012 where this Court stated *inter alia* thus;**

**"Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is irreversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party."**

22. What the Applicant is seeking is to continue occupying and using the portion of the suit property and to stop any transmissions thereof to

**Charles Wairagi Mbugua.** If her appeal succeeds and a definite portion of the suit property is allocated to her, then she will be able to resume her occupation and farming activities on her share of the suit property ; or better still on the current portion and guest house which she appears to lay a claim to. Any transmission to **Charles Wairagi Mbugua** of the entire parcel can be revised upon the appellate court finding merit in the Applicant's appeal. Moreover, damages could be awarded in compensation.

23. In other words, there is no demonstration that the Applicant stands to suffer irreparably or that the appeal will be rendered nugatory if the orders sought are denied. In the circumstances of this case it is my considered view that the balance of convenience is not in the Applicant's favour.

24. Consequently, the court is not satisfied that the Applicant is deserving of the orders sought in prayers 3 and 4 of the application. However, in the interest of justice, the court directs that pending the determination of this appeal, there be no further dealings in respect of the land parcel **LR No. Komothai/Igi/110**.

25. As the record of appeal has now been filed, the court directs that the Applicant proceeds to set down the appeal for directions to pave way for the hearing thereof. Parties will bear own costs.

**DELIVERED AND SIGNED ELECTRONICALLY THIS 2<sup>ND</sup> DAY OF JULY 2020**

**C. MEOLI**

**JUDGE**