Wambui & another v Kahungu (Civil Application E249 of 2024)
[2025] KECA 159 (KLR) (7 February 2025) (Ruling)

Neutral citation: [2025] KECA 159 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E249 OF 2024

F TUIYOTT, P NYAMWEYA & FA OCHIENG, JJA

FEBRUARY 7, 2025

BETWEEN

JOAN ANNITA WAMBUI ..... 1ST APPLICANT

PATRICIA NYAMBURA NJOROGE ..... 2ND APPLICANT

AND

POLLY NYAMBURA KAHUNGU ..... RESPONDENT

(Being an application for stay of execution from the Ruling of the High Court at Nairobi (Chemitei, J.) dated 11th April, 2024 in HC. Succession Cause No. 384 of 1984)

RULING

1. Forty-three (43) years on, the affairs of the Estate of Kimanu Kahungu are still restive. There is still a tussle over the distribution of the estate pitting Joan Annita Wambui (the 1st applicant) and Patricia Nyambura Njoronge (the 2nd applicant) on the one side against Polly Nyambura Kahungu (the respondent) on the other part.

2. The genesis of the matter before us is a ruling of the High Court at Nairobi dated 23rd April, 2024, in which M. Thande, J ordered as follows:

   "(i) Polly Nyambura Kahungu is entitled to the equivalent of half of Plot Dagoretti/Uthiru/504.

   ii. Given that Dagoretti/Uthiru/504 is no longer in existence having been subdivided, and portions sold out, Polly shall get her entitlement from Plot Dagoretti/Uthiru/1053, the remaining portion.

   ii. A government surveyor shall subdivide Plot Dagoretti/Uthiru/1053 to give effect to Polly Nyambura Kahungu's entitlement as indicated in (i) and (ii) above, ensuring as far as possible

that the parties and their families remain on the portions they currently occupy, and noting not to interfere with permanent buildings and graves on the parcel of land.

ii. This being a family matter, each party shall bear own costs."

3. It was expected that the ruling would resolve the long outstanding dispute but it was not to be. In support of an application for stay brought before us through a Notice of Motion dated 20th May, 2024, the 2nd applicant swore an affidavit explaining their current grievance.

4. So as to give effect to the order of the court, a government surveyor proceeded to subdivide land Dagoretti/Uthiru/1053 and came up with two sketch plans in annexure A and annexure B so that the High Court would decide which one would effectively implement the order. The surveyor, however, recommended implementation of annexure B, a subdivision, so it was said, that would neither erode the feasibility of the land nor diminish its value as well as economical potential. In an application dated 20th September, 2022, the respondent urged the High Court to adopt the surveyor's report and recommendations dated 7th July, 2022 as a court order and for enforcement.

5. In a ruling dated 11th April, 2024, Chemitei, J allowed the application and found that the subdivision proposed in annexure B to be plausible and adopted it. Unhappy with the ruling, the applicants have filed a notice of appeal dated 12th April, 2024 expressing their intention to challenge the ruling on appeal.

6. The applicants impugn the ruling of 11th April, 2024 arguing that: the subdivision in annexure B completely ignores and does not comply with the ruling dated 23rd April, 2021; that subdivision will lead to eviction of the applicants and their families, contrary to the express and clear intent of the ruling of 23rd April 2021; the adopted plan preserves the home of the respondent and her son's houses to the discrimination of those of the applicants; the plan disregarded the area with graves and has given that area to the respondent; and annexure B shows the respondent's portion to be 0.40 hectares instead of 0.45 hectares as per the certificate of confirmation dated 8th October, 2021.

7. We are urged to grant stay failing which the applicant's intended appeal will be rendered otiose and nugatory.

8. In opposing the motion, the respondent, through an affidavit sworn on 25th July, 2024 asserts that, given the long history of the dispute, granting a stay will lead to her continuing to languish and suffer in the hands of her late brother's family. She depones that whilst the proceedings were pending, and in an attempt to subvert the course of justice, the applicants built a house on the disputed land at their own peril and against a warning given by Kimaru, J (as he then was) on 13th May, 2013. The respondent deposes that the proposed plan assures the maintenance of the property and that its value does not depreciate in any way. On the issue of the graves, she states that she has no intention of interfering with the graves of the deceased nor of making any change that would interfere with them, avowing that "family is family after all."

9. The respondent complained, further, that the applicants have refused to cooperate in the implementation of the impugned ruling, forcing her to file an application dated 14th May, 2024 before the High Court in which she seeks the help of the court to authorize the Deputy Registrar to sign the sub-division plan.

10. At the plenary hearing of the motion, learned counsel Mr. Thomas Kimani for the applicants and learned counsel Mr. Gachie Mwanzia appearing for the respondent highlighted the written submissions filed on behalf of their clients which substantially followed their positions as we have just set out.

11. The objective of the power granted to this Court by Rule 5(2)(b) of the Court of Appeal Rules to stay execution is to preserve the subject matter of an appeal, when not to do so may render the outcome of the appeal nugatory, worthless or simply a paper victory. The principles upon which this Court considers whether or not to grant stay is a well beaten path with the decision in Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR comprehensively beaconing them as follows:

    "i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See Ruben & 9 Others v Nderitu & Another (1989) KLR 459.

    ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.

    iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75 Halai & Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365.

    iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001*.

    v. An applicant must satisfy the court on both of the twin principles.

    vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.

    vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.

    viii. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. Damji Pragji (supra).

    ix. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.

    x. 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 reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

    xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403."

12. It seems to us that the rival parties agree that the ruling of Thande, J of 23rd April, 2021 would break the impasse that has long detained the division of the estate of the deceased. That ruling had three limbs of equal importance: a declaration that the respondent is entitled to the equivalent of half of Plot Dagoretti/Uthiru/504; an observation that since Plot 504 no longer existed having been subdivided and sold out, the respondent would get her entitlement from Plot Dagoretti/Uthiru/1053; and to give effect to the entitlement of the respondent, a Government Surveyor would subdivide Plot 1053

ensuring however that the parties and their families remain on the portions they currently occupy and not to interfere with permanent buildings and graves on the parcel of land.

13. The complaint by the applicants, which will be at the core of the intended appeal, is that the decision of Chemitei, J made on 11th April, 2024 that endorsed the recommendation of the Government Surveyor was at variance with the decision of Thande, J, in various ways we have set out earlier. Of course, the respondent is of a contrary view. While the argument by the respondent that it would never have been the intention of the ruling of Thande, J to preserve structures that were built in disregard of a court order is no doubt forceful, the question as to whether the plan endorsed in the impugned ruling does not preserve the existing graves is one worthy of consideration by the Court that shall hear the intended appeal.

14. It is averred by the applicants, and not controverted by the respondent, that the plan proposes to give to the respondent the portion of land which has the graves of the 2nd applicant's mother, grandmother, grandfather, uncles, the 1st applicant's husband and stepmother. The answer by the respondent is that she does not intend to interfere with the graves as "family is family after all". A debate that will arise from the appeal is whether the proposed plan balances the need not to interfere with the applicants' connection with the graves against the need to achieve a subdivision that preserves the value and economic potential of the subdivided portions. This to our mind is an arguable matter.

15. On the nugatory limb, while the respondent stated, on oath, that she does not intend to interfere with the graves of the deceased or to make any changes that would interfere with them, it may not be possible to predict how permanent developments or changes that may be made on the proposed subdivisions would impact on the graves now or in the future. We think that it is more prudent to hold matters as they are until the appeal is determined one way or other than to allow a situation where irreversible changes may be made. In essence we lean towards granting stay.

16. This outcome will no doubt disgruntle the respondent who has been left out for far too long from accessing her right to the estate of the deceased, and this is understandable. The solution to the two intractable positions that the protagonists find themselves may lie in a quick resolution of the appeal and we shall be making orders towards that end.

17. Before penning off, we observe, as we did at the plenary hearing of the motion, that a more fulfilling and lasting resolution to this dispute may be found in the parties submitting themselves to an alternative justice mechanism. The parties are family members and the implementation of the order of Thande, J may require a give and take resolution that a formal court adjudication may not satisfactorily yield.

18. Ultimately, we allow the Notice of Motion dated May 20, 2024 with the result that the further execution of the ruling and order of Honourable Justice Chemitei Hilary Kiplagat delivered on April 11, 2024 in Succession Cause No. 384 of 1984 is hereby stayed pending the hearing and determination of the intended appeal against the said ruling. We make further orders that the applicants shall, without breaching the timelines set out in the Court of Appeal Rules, file the intended Appeal within 60 days hereof, when after the appeal will be accorded priority hearing. Costs of the application shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY 2025.

F. TUIYOTT

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

F. A. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.