Okoth v Gachukia & 2 others (Civil Appeal E096 of 2024)
[2025] KEHC 6693 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEHC 6693 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL E096 OF 2024

A. ONG'INJO, J

APRIL 30, 2025

BETWEEN

FLORENCE AKINYI OKOTH ..... APPLICANT

AND

EDDAH MUSIMBI GACHUKIA ..... 1ST RESPONDENT

MARY ATIENO OTIENO ..... 2ND RESPONDENT

NOON OTIENO BWANA ..... 3RD RESPONDENT

RULING

1. By way of a Notice of motion application dated 16th January 2025 brought pursuant to the provisions of Article 165(6) of *the Constitution* of Kenya 2010, Rule 3(1) of High Court (Practice and procedure rules) Section 1A, 1B,3A of the *Civil Procedure Act* Cap 21 of the Laws of Kenya, Order 51 rule 1 of the Civil Procedure Rules, and all enabling provisions of the law the applicant seeks the following orders against Respondents: -

    1. Spent.
    2. That an order be issued staying execution of ruling delivered on 8th November 2024 and any subsequent order thereto issued pending inter parties hearing and determination of this appeal.
    3. That any other order that the Honourable Court deem just and fit in the dispensation of justice pending hearing and determination of the appeal.
    4. That the costs of this Application be awarded to the Applicant/Claimant.

2. The application is premised on the grounds on its face and supported by the sworn affidavit of FAO of even date. In the said affidavit she deposes that the Honourable Magistrate court delivered a ruling on 8th November 2024 directing parties to file summons for confirmation of grant premised on a non-

existent mediation agreement. Being dissatisfied with the ruling she filed this appeal seeking to have the said ruling set aside on the grounds contained in the memorandum of appeal as follows;

a. That the learned trial magistrate erred in law and in fact by failing to appreciate that the burden of rebutting the grounds of objection lay squarely on the Petitioners.

b. That the learned trial magistrate misdirected himself in finding that there was a partial agreement emanating from the Court Annexed mediation establishing that FAO & EMG Are Co-wives Of JOO(decesaed) as there was no such agreement from mediation.

c. That the learned trial magistrate erred in law, fact and misdirected himself by starting that what parties failed to agree upon was that FAO refused to stay in the same compound with EMG disregarding evidence to fact that the late JOO (deceased) was a monogamous man at the time of his death having solemnized Christian Marriage at ST. John Evangeslist Church-migori on 13th September 2013 upon which the he duly received a marriage certificate number XXXXXX.

d. That the learned trial magistrate erred in law by failing to appreciate that the introduction letter written by chief did not only introduce non-beneficiaries and strangers to the estate of late JOO(deceased) but left out 6 children who are the real beneficiaries to the estate of the late and who did not consent to the making of the grant.

e. That the learned trial magistrate erred in law and misdirected himself in making a ruling on provision of law of succession in regards to polygamous marriage which never existed as the 1st Petitioner/Respondent only surfaced after the death and burial of the late JOO (deceased).

3. She avers that upon delivery of the ruling, the court granted 30 days stay which has since lapsed and unless an injunction is issued pending hearing and determination of the appeal, the Respondents may seek to file confirmation of the grant of letter of administration intestate.

4. According to the Applicant, the appeal has high chances of success considering that the lower court avoided all facts raised on objection and misdirected itself to non-existent partial agreement which she never consented to during the said court annex mediation.

5. She deposed that the instant application has merit and deserving by this court in the interest of justice and fairness.

6. The Respondents did not file any response to the application despite having been served.

7. The application was canvassed by way of written submissions. The appellant's submissions are dated 20th February 2025 and there are no submissions filed on behalf of the Respondents.

Submissions

8. The applicant has reiterated the contents contained in her application and this court will not rehearse them. In addition, she submitted that the threshold for the grant of interlocutory injunctions were set out in National Bank of Kenya Ltd & 2 others vs Sam-Con Ltd (2003) eKLR with reference to Giella vs Cassman Brown Ltd (1973) EA 358 where the court stated that;-

> " The conditions for the granting of an interlocutory injunction are now well settled. In Giella v Cassman Brown & Co Ltd [1973] EA 358 at pg 360, it was stated as follows:-
>
> "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. (EA Industries v Trufoods, [1972] EA 420.)

Furthermore, the learned judge considered other circumstances on an equitable basis and the balance of convenience. He held:-

"The court however acknowledges that the plaintiff has come to it praying for the discretionary and prerogative relief of injunction – an equitable remedy. The court will consider and grant or refuse such a remedy after carefully considering all the circumstances obtaining including the conduct of the parties and especially the applicant. The interests and rights of the respondent shall not be overlooked or ignored in any way. This beckons the balance of convenience to come into play...".

9. The applicant submitted that the application satisfies the threshold set in Giella vs Cassman Brown case as it brings out prima facie case with chances of success of the pending appeal and should therefore be allowed with costs.

Analysis and determination

10. I have considered the notice of motion application together with the Applicant's submissions alongside the cited authorities. I find the following sole issue relevant for determination;

Whether the applicant has met the threshold for granting an order of stay of execution pending appeal.

11. The Applicant filed this appeal vide a memorandum of appeal dated 22nd November 2024 seeking to challenge a ruling delivered on 8th November 2024. The trial magistrate issued orders that FAO and EMG being the wives of JOO (Deceased) agreed to equally share the property of the Deceased and EMG to live in the same compound with her co wife FAO and that the compound shall be divided in equal shares between both parties. It is as a result of the said orders that the Applicant moved this court for stay of execution.

12. The Applicant submitted that the late JOO (deceased) was a monogamous man at the time of his death having solemnized Christian Marriage at St. John Evangeslist Church-migori on 13th September 2013 upon which the he duly received a marriage certificate number XXXXXXX but the same was absolutely disregarded by the trial magistrate.

13. It was further submitted that the introduction letter written by Chief did not only introduce non-beneficiaries and strangers to the estate of late JOO (deceased) but left out 6 children who are the real beneficiaries to the estate of the late and who did not consent to the making of the grant but the same was equally disregarded by trial magistrate.

14. The law on stay of execution is anchored under Order 42 rule 6 of the Civil Procedure Rules, 2010 which provides that -

    1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 orders set aside.

2. No order for stay of execution shall be made under sub-rule (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.

15. From the provisions of Order 42 rule 6 of the Civil Procedure Rules, 2010 an application for stay of execution the Applicant must satisfy substantial loss, the application must be made without unreasonable delay and security for due performance of the decree.

16. The first requirement on substantial loss was espoused in the case of James Wangalwa & another vs Agnes Naliaka Cheseto (2012) eKLR,

> " No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

17. The Applicant has submitted that if the stay of the ruling and proceedings thereof is not granted the appeal herein might be rendered nugatory and reduced to an academic exercise. I have perused the application and the supporting affidavit and noted that the same seeks to challenge a ruling delivered on 8th November 2024 whereas the attached judgment is dated 30th October 2024.

18. The second requirement is that the application must be made without unreasonable delay. The impugned ruling subject of this appeal was delivered on 8th November 2024 and the present application is dated 16th January 2025. It was therefore brought timeously and without unreasonable delay.

19. On the third requirement for security for costs, I am guided by the decision in Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated: -

> " The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."

20. The Application herein involves dispute amongst persons claiming from the estate of the deceased and therefore the issue of deposit of security may not arise in the real sense of the word. The Applicant's claim that she was the only legal wife of the deceased is a valid question that needs to be interrogated

before the estate is distributed fully and therefore she has made out a prima facie case to warrant grant of orders being sought and the appeal has chances of success.

21. The Applicant has demonstrated that she will suffer substantial loss which is the cornerstone for granting of orders of stay of execution pending appeal. I have perused the memorandum of appeal and noted that it raises triable issues and so as not to render the appeal nugatory, and in the interest of justice I grant stay of execution in terms of prayer (2) of the notice of motion dated 16th January 2025. Costs shall abide by the outcome of the appeal.

Orders accordingly.

DELIVERED DATED AND SIGNED IN MIGORI THIS 30TH DAY OF APRIL, 2025.

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A. ONGINJO

JUDGE