Iriga (Suing in her Capacity as the Administrator of the Estate of Ignatius Iriga Nderi) v Kirugu & another (Environment and Land Appeal 5 of 2023) [2023] KEELC 19247 (KLR) (11 August 2023) (Ruling)

Neutral citation: [2023] KEELC 19247 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT AND LAND APPEAL 5 OF 2023

LN GACHERU, J

AUGUST 11, 2023

BETWEEN

JANE WANJIRU IRIGA (SUING IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF IGNATIUS IRIGA NDERI) ..... APPELLANT

AND

PATRICK FREDRICK KIRUGU ..... 1ST RESPONDENT

ALOISIUS IRIGA NDERI (SUING IN HIS CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF IGNATIUS IRIGA NDERI) ..... 2ND RESPONDENT

RULING

1. The Appellant was sued jointly with the 2nd Respondent, by the 1st Respondent in Murang'a CMELC No 41 of 2020. The 1st Respondent had sought Orders against the Appellant and the 2nd Respondent over Makuyu/Makuyu/Block IV/102, which he claimed beneficial interest. The 1st Respondent claimed to have bought the suit land from the parties therein, but the Sale was frustrated by the vendors necessitating the said suit. The Appellant and the 2nd Respondent filed a joint Statement of Defence in opposing the suit at the lower Court, and blamed the 1st Respondent for the failure to execute the Sale Agreement.

   The trial Court vide its judgment of January 30, 2023,found that the 1st Respondent had proved his case on a balance of probabilities as against the Defendants therein and entered judgment as per the decree issued on February 16, 2023.

   Being dissatisfied with the judgment of the trial Court, the Appellant preferred the instant appeal, based on the Grounds set out in the Memorandum of Appeal dated February 8, 2023.

The Appellant had sought for stay orders before the trial Court, but which orders were not granted. Subsequently, the Appellant filed the instant Notice of Motion Application** dated February 17, 2023, for orders:

1. Spent

2. Spent

3. That this Honourable Court be pleased to grant a stay of execution of any orders and/ or decree emanating from the proceedings in Murang'a Chief Magistrate ELC Case No 41 of 2020 Patrick Kirugu versus Aloisius Iriga Nderi & Jane Wanjiru Iregi (Being sued in their capacity as administrators of the Estate of Ignatius Iriga Nderi) pending the hearing and determination of the present appeal.

4. That this Honourable Court be pleased to issue stay of execution of any orders and/ or decree emanating from the judgment issued by Hon. Susan Mwangi, Senior Resident Magistrate, on January 30, 2023 in Murang'a Chief Magistrate ELC Case No 41 of 2020, Patrick Kirugu versus Aloisius Iriga Nderi & Jane Wanjiru Iregi (Being sued in their capacity as administrators of the Estate of Ignatius Iriga Nderi) pending the hearing and determination of the present appeal.

5. That the Honourable Court do issue an order of inhibition, stopping further dealings, registration and transactions over that parcel of land registered as Makuyu/ Makuyu/ Block Iv/102,pending the hearing and determination of the present appeal.

6. That the Honourable Court be pleased to issue orders preserving and maintaining the status quo of parcel of land registered as Makuyu/makuyu/block IV/102, pending the hearing and determination of the present Appeal

7. That the Honourable Court be pleased to give any such other and/ or further orders(s) as it may deem fit.

8. That the costs of this application be in the cause.

2. The application is premised on the Nine Grounds stated on its face and on the Supporting Affidavit of the Appellant, sworn on the February 16, 2023. The Appellant argued that she is apprehensive that the 1st Respondent would cause the suit land to be transferred in his name, and thereafter sell the land to third parties, thereby taking away her proprietary rights over the suit property. The Appellant further averred that she has appealed against the judgment and decree of the trial Court, and should the 1st Respondent proceed for execution, her Appeal will be rendered nugatory.

   The Appellant further deponed that her right to fair trial will be prejudiced should the orders sought not be granted. That the application has been filed without any undue delay and that she is willing to abide by any Orders as may be directed by the Court.

3. The 1st Respondent opposed the application via his Replying Affidavit sworn on the March 3, 2023. The 1st Respondent deponed that he commenced the execution process and the instant application has since been overtaken by events. He further deponed that the Appellant has not demonstrated any threat alleged and added that the execution process has not been concluded to warrant any alleged threat. It was his further disposition that the Appellant has not established a case warranting the grant of orders sought. That he should thus be allowed to enjoy the fruits of his judgment. He implored the Court to consider granting conditional stay, should it exercise discretion in favour of the Appellant.

The application was canvassed by way of written submissions. The Appellant filed her submissions through the Law Firm of James Rimui & Co. Advocates, and reiterated the facts founding the application. The Appellant invited this Court to the principles for grant of stay of execution as set out in the case of *Amal Hauliers Limited v Abdulnasir Abukar Hassan* {2017} eKLR, where the Court highlighted the principles for grant of stay to wit; inter alia proof of substantial loss, unreasonable delay and security for performance of decree.

4. The Appellant further submitted that she has an arguable Appeal, and it is only fair that stay be granted. He relied on the case of *Kenya Revenue Authority v Sidney Keitany Changole & 3 others* {2015} eKLR.

She further submitted that if the execution process has already occurred, the Court does issue an order for inhibition or status quo. She invited this Court to the pronouncement in the case of The Chairman Business Premises Tribunal at Mombasa Expate Baobab Beach Resort Ltd, (UR), where the Court expressed that an Order for status quo seeks to preserve the situation as it exists. Further reliance was placed on the provisions of Section 68 of the *Land Act*, which lays down the power of Court to issue an order of inhibition. In the end, she submitted that even though it is not mandatory that the Appellant pays for security, she is ready to give security in due performance of the decree.

The 1st Respondent filed his submissions on March 27, 2023, through the Law Firm of Mbue Ndegwa & Co. Advocates, and sought to demonstrate that the application ought to be dismissed. The 1st Respondent invited this Court to consider the principles for grant of orders of stay of execution as highlighted in the case of *Masisi Mwitga v Damaris Wanjiku Njeri* {2016} eKLR, where the Court took cognizance of the principles enunciated under Order 42 rule 6(1) of the *Civil Procedure Rules*.

It was the 1st Respondent's submissions that the Appellant has not established any substantial loss that she will suffer or demonstrate how the appeal will be rendered nugatory.

5. He further submitted that he acted in compliance with the orders of the trial Court, and as such, the instant application has been overtaken by events. He also submitted that the provision for security is mandatory, as was expressed by the Court in the case of *Equity Bank Ltd v Taiga Adams Company Ltd*. It was also submitted on the failure by the Appellant to demonstrate that she had the authority of the 2nd Respondent, who was a Co-administrator. He invited this Court to the pronouncement in the case of *In Re Estate of Makokha Idris Khasabuli* {2019} eKLR, where the Court expressed itself that where administrators have been appointed, they ought to act jointly unless there is a delegation of responsibility.

It was the 1st Respondent's further submissions that the Appellant has not demonstrated that she is deserving of the orders of inhibition. He relied on the case of *Margaret W Muchina v Eunice Njeri & Another* {2017} eKLR,where the Court observed that an order of inhibition should not be granted lightly unless an Applicant demonstrates a prima facie case with a probability of success.

He urged the Court to allow him to enjoy the fruit of the judgment, and that land is a valuable commodity which the Appellant can be compensated in the event the appeal succeeds.

The Court has carefully considered the pleadings herein and the rival written submissions together with the relevant provisions of law and finds as follows;

> It is clear to this Court that the Appellant and the 2nd Respondent were jointly sued as the administrators of the Estate of Ignatius Iriga Nderi. A perusal of the Record of Appeal, informs this Court that despite filing a joint Statement of Defence, the administrators were later represented by different advocates. The 2nd Respondent did not file any response to the application.

6. As per the judgment of the trial Court, the 1st Respondent was to deposit a sum of Kshs 200,000/=, to the Appellant and 2nd Respondent's Account within 14 days of the judgment. That in default of bank details being availed, the money was to be deposited in Court. The 1st Respondent attached a copy of a receipt showing a sum of Kshs 200,000/= was deposited in Court on February 15, 2023, in compliance with the Orders of Court. What is apparent is that the process of execution has already begun, and it would appear to this Court that the Appellant filed the instant application in a rebuttal.

   While the Appellant filed her Appeal within the prescribed timelines, it is trite law that an Appeal cannot operate as stay. The Appellant has moved this Court seeking several orders, but the bottom line is that the Appellant wants this Court to prevent any further dealings of the suit land in realisation of the decree and judgment of the trial Court.

   Having analyzed the application and the response thereto, together with the rival written submissions and the authorities attached, the issues for determination are;

   i. Whether the Appellant has locus to file the instant application

   ii. Whether an order for stay, inhibition or status quo can be issued

   iii. Who should pay cost for the application

I. Whether the Appellant has locus to file the instant application

7. The 1st Respondent has raised an issue with the Appellant's locus to file the instant application on the premise that she has no authority from her co-administrator. Locus standi is technically the right to appear in Court. The issue of locus was heavily discussed by the Supreme Court in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR, though the facts therein are different, the Court observed that the issue of locus extended after the promulgation of the *Constitution* and had this to say:

> It is proper to note that the evaluation of locus ought to be based upon the constitutional considerations of capacity (Articles 3, 22 and 258), the nature of the suit and the enforceability of the Orders sought. These three considerations inform the enforcement mechanisms and the coherent clarity of the following inquiries: Who will the Orders be enforced against? Who bears the costs of litigation, if at all? Who represents the party(ies) in Court?"

8. The 1st Respondent submitted that the Appellant ought to have demonstrated that she had the authority of her co-administrator. Section 83(a) of the *Law of Succession Act* provides:

> Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—
>
> (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative"

9. Similarly, Section 79 of the *Law of Succession Act*, makes provision that the property of a deceased person shall vest on the Personal Representatives. With this in mind, it is anticipated that the properties of the deceased shall vest on both the Appellant and the 2nd Respondent. The Appellant has filed the application in her capacity as the administrator of the estate of Ignatius Iriga Nderi. not in her personal capacity.

It is noteworthy that there is no law that prevents an administrator from doing such an act to preserve the estate of a deceased person at the exclusion of other co-administrators. In the case of Re Estate of Makokhga Idris, supra, as quoted by the 1st Respondent, the facts therein are distinguishable since one of the co-administrator was collecting rent therein. This Court agrees with the pronouncement in the case of *Paul Mwendwa Chanda v George Wambua Ivuti* [2020] eKLR, where the Court when met with an almost similar account had this to say

> The next argument of the respondent is that the suit was incompetent because the appellant did not enjoin his co-administrator as co-plaintiff in the suit..... Be that as it may, it is not disputed that the appellant is one of the administrators of the estate of the deceased. Counsel for the respondent did not refer me to any law that says that if there are two administrators, a suit cannot be brought up by one administrator, if there is no objection from the other administrator. Mrs. Syanda, the other co-administrator, did not come to court to say that she had not sanctioned the filing of the case, and in fact from her evidence, she was in full support of the case. I will not say anymore on this point, for I see no problem with the fact that the appellant filed this suit in order to protect the estate of the deceased. That is indeed his responsibility as administrator."

10. Taking cue from the above and alive to the principles set out in the Mumo Matemu Case, supra, this Court finds that there is nothing that barred the Appellant from filing the instant appeal. The Appellant has filed the Appeal on behalf of the estate and not in her individual capacity. The Court holds that she has the duty to preserve the estate in her capacity as an administrator.

II. Whether an Order for stay, inhibition or status quo can be issued

11. It is common knowledge that once judgment has been delivered and Decree issued, execution is likely to happen anytime, and as such a judgment debtor if dissatisfied, has the responsibility to, at the soonest, seek stay of execution of the judgment. The application was filed at least Seventeen Days from the date of judgment and Eleven Days from the date the Memorandum of Appeal was filed.

    The law on stay of execution is well settled under Order 42 rule 6 of the *Civil Procedure Rules*. The principles that must be satisfied are set out under Rule 6(2) which provides:

    (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.

    (3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

12. The foregoing principles have been echoed by many Courts. In the case of *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR, the Court had this to say on tying the above principles with the provisions of Section 1A and 1B of the *Civil Procedure Act*, when considering whether to allow an application for stay

> To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding

objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions."

13. In the advent of the 2010 Constitution, Supreme Court in Application No 5 of 2014 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, when determining an issue of stay held:

Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

(i) the appeal or intended appeal is arguable and not frivolous; and that

(ii) Unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

(88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

(iii) That it is in the public interest that the order of stay be granted Applying the foregoing principles in the present application, the Appellant must demonstrate that:

i. The application has been made without unreasonable delay.

ii. She will suffer substantial loss.

iii. The appeal is not frivolous.

iv. The appeal will be rendered nugatory.

v. Security of costs for due performance.

14. As already stated above, this instant application was filed at least seventeen days, from the date of judgment. This Court does not need to overemphasize on the need to file an application for stay of execution at the earliest. In Eldoret ELC No 200 of 2012: *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR, the Court observed that a delay even for a day is delay. In the above case, the applicant filed an application for stay of execution pending an Appeal, and the Court considered that a delay for four days was inordinate.

The 1st Respondent submitted that the Appellant was guilty of inordinate delay, by filing the application after execution had begun. What amounts to inordinate delay was best explained by the Court in Nairobi Civ No 32 of 2010, *Utalii Transport Company Limited & 3 others v Nic Bank Limited & another* [2014] eKLR, the Court in considering what amounted to inordinate delay had this to say,

> Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable"

15. The Appellant did not give any reason for the delay of Seventeen Days, before filing the Appeal. It is evident that the Appellant was jolted to action by the 1st Respondent's move of executing the decree. The 1st Respondent attached a copy of a letter dated February 6, 2023, which was addressed to the

Appellant's Advocate of his intentions to realize the Decree. It was not until the 1st Respondent realized a part of the decree by depositing the sum in Court on February 15, 2023, that the Appellant filed the application.

The Court of Appeal in the case of *Tamil Enterprises Ltd v Official Receiver and Provisional & another* [2010] eKLR, agreed with the learned judge that an application for extension of time to file an appeal filed after seventeen days, amounted to inordinate delay. Time began to run when judgment was entered on 30th January, 2023, and nothing stopped it. Time only stops running within the provisions of Order 50 Rule 4 of the *Civil Procedure Rules* or as directed by Court; However, this was not the case herein. Once Judgment is delivered, there is anticipation that execution can ensure anytime, and even though the Applicant might have filed the Notice of Appeal on time, there is no reason advanced for not filing the application at the earliest. Having been denied the application for stay by the trial Court, the Appellant had a duty to file for the same at the earliest, but thwarted this option. With no reason advanced for the delay of about two weeks, this Court finds that there was unreasonable delay.

On the second principle of substantial loss, the Appellant maintained that her proprietary rights would be taken away if the 1st Respondent is allowed to realize the decree. She was apprehensive that the 1st Respondent would sell the land to other parties. Substantial loss was defined by the Court in *Tropical Commodities Suppliers Ltd and Others v International Credit Bank Limited (in liquidation)* (2004) E.A. LR 331, to mean

> Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal..."

16. The Appellant did not demonstrate the loss she will suffer and this is in consideration of the fact that there was a sale agreement entered into, and there was an admission that some monies had been paid by the 1st Respondent. The least the Appellant would have demonstrated is that the 1st Respondent had already entered into some sale agreement or that he was in the process of causing transfer of the suit land. A mere apprehension cannot be the basis upon which this Court will grant an order for stay.

In the case of *Samvir Trustee Limited v Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 the Court rightly held:

> It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss."

17. Undoubtedly, the Appellant has not demonstrated the substantial loss she will suffer.

As to whether this Appeal is frivolous or not, this Court will determine whether the appeal is arguable or not. What constitutes an arguable appeal was determined in *Kiu & another v Khaemba & 3 others* (Civil Appeal (Application) E270 of 2021) [2021] KECA 318 (KLR), where the Court held

> In law, an arguable appeal/intended appeal is one that need not succeed but one that warrants the court's interrogation on the one hand and the courts invitation to the opposite party to respond thereto"

18. Similarly, the Supreme Court in the case of *Kampala International University v Housing Finance Company Limited* (Petition (Application) 34 (E035) of 2022) [2023], when considering whether to grant conservatory Orders pending Appeal held:

> On the arguability of the appeal, this question does not call for the interrogation of the merit of the appeal and the court, at this stage, must not make any definitive findings of either fact or law. An arguable Appeal is not one which necessarily must succeed but one which ought to be argued fully by the court."

19. As per the Memorandum of Appeal filed on the February 9, 2023, the Appellant seeks to challenge the enforceability and validity of the Sale Agreement, which the 1st Respondent hinges his proprietary interest on. These are issues which ought to be determined by this Court. It is thus safe to conclude that the appeal is not frivolous.

On the nugatory aspect, the Appellant ought to demonstrate that the Appeal if successful will be rendered nugatory. Preserving the subject matter of the intended appeal is important as not to render an appeal nugatory. The onus is on the Appellant to demonstrate that the appeal will be rendered nugatory. The Court of Appeal in the case of when determining an application for stay held:

> On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others (supra) this Court stated that:

"ix). The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

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.

11) In determining whether or not an appeal will be rendered nugatory the Court has to consider the conflicting claims of both parties and each case has to be considered on its merits."

20. This Court is alive to the case of Amla Hauliers Limited, supra as cited by the Appellant. The Appellant submits that if the 1st Respondent is not barred from transferring the suit to his name, the appeal will be rendered nugatory. The Appellant makes reference to an order of the trial Court that allowed the 1st Respondent to seek the assistance of a Court Administrator to execute the relevant transfer documents.

This Court deduced from the proceedings that the 1st Respondent is in occupation of the suit property. Even so, there is no evidence that the 1st Respondent intends to interfere with the substratum of the Appeal which is the suit property. Additionally, the Appellant has not demonstrated that, should there be any interference, that the damage will not be reversible or that no amount of damages can compensate her. There is therefore no evidence that the appeal will be rendered nugatory. Having failed to satisfy the foregoing principles, an order for security for costs cannot be issued at this point.

21. The Appellant sought for an order of inhibition, seeking to preserve the suit property. The power of this Court to grant an order for inhibition is provided for under Section 68 of the *Land Registration Act*, and not the *Land Act*, as submitted by the Appellant. Section 68(1) provides:

> The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge."

22. The 1st Respondent led evidence that the process of execution has already begun. It is not certain whether the same has been actualized or not. In the case of Margaret W Muchina, supra, as quoted by the 1st Respondent, the Court observed that an order for inhibition should not be granted freely. In the case of *Japhet Kaimenyi M'ndatho v M'ndatho M'mbwiria* [2012] eKLR, the Court highlighted three conditions for consideration before granting an application for injunction which this Court agrees with. They include:

    a) That the suit property is at risk of being disposed of or alienated or transferred to the detriment of the applicant, unless preservatory Orders of inhibition are issued

    b) That the refusal to grant orders of inhibition would render the applicant's suit nugatory.

    c) That the applicant has an arguable case."

23. As already established above, the Appellant failed to demonstrate that the suit property is at a risk of being disposed of, or the substratum of the appeal will be interfered with. There is no evidence that failure to grant the order of inhibition, would render the appeal nugatory. This Court has established above, that the appeal is not frivolous. The foregoing principles cannot be applied in isolation; the Appellant must demonstrate that he/she satisfies the foregoing. It follows therefore that the Appellant has not satisfied the foregoing principles, and the Order for inhibition is denied.

    On preservation of status quo, the Appellant has urged this Court to preserve the status quo, pending the hearing and determination of this appeal. There is an admission that the 1st Respondent has already commenced the execution process; what is not certain is whether the process of registration of the suit land in his name has been done. However, the 1st Respondent in paragraph 10 of the Replying Affidavit deponed that there is no threat of execution.

24. A Court cannot issue status quo orders without being sure as to the state of things. This was observed by the Court in the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR, where it held:

> Status quo" in normal English parlance means the present situation, the way things stand as at the time the order is made, the existing state of things. It cannot therefore relate to the past or future occurrences or events. We fail to see what can be ambiguous about that order. All it meant was that everything was to remain as it was as at the time that order was given. If there was any transaction of whatever nature that was going on in respect of the land in question, it had to freeze and await the discharging of the Court order."

25. The essence of the status quo order is to preserve the subject matter of the Appeal. In the interest of justice, this Court directs that status quo as at the time of delivery of this Ruling, be maintained pending the hearing and determination of the Appeal herein. The Appellant should set down the instant Appeal for hearing within 60 Days, from the date hereof. Failure to which the Order for *status quo* issued herein will be lifted automatically.

III. Who should pay cost for the application

26. To award costs, is an exercise of discretionary power, which power this Court enjoys. The Appellant's application partially succeeds against the Respondents. However, this Court directs each party to bear his/her own costs.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA THIS 11TH DAY OF AUGUST, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of: -

No Appearance for Appellant/Applicant

Mr. Mbue Ndegwa for 1st Respondent

No Appearance for 2nd Respondent

Joel Njonjo - Court Assistant.