



**In re Estate of Joseph Gititu Mukui (Deceased) (Succession Cause 1706 of 2012)
[2024] KEHC 16173 (KLR) (Family) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16173 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1706 OF 2012
EKO OGOLA, J
DECEMBER 20, 2024
IN THE MATTER OF THE ESTATE OF JOSEPH GITITU MUKUI (DECEASED)**

BETWEEN

SCHOLASTICA WAHITO WANJEHIA APPLICANT

AND

DAMARIS WANGUI GITITU 1ST RESPONDENT

SILVA WANJIRU GITITU 2ND RESPONDENT

BENARD MUKUI GITITU 3RD RESPONDENT

RULING

1. The application before this court is dated 17th January 2023. The applicant prayed for the following orders:-
 - a. Spent;
 - b. Spent;
 - c. That pending the hearing and final determination of the intended Appeal, this honorable court be pleased to order for the stay of its judgment of 23rd December 2022.
 - d. Spent;
 - e. That pending the hearing and determination of the intended Appeal this honorable court be pleased to order for status quo obtained before the judgment.
 - f. Spent;



- g. That pending the hearing and determination of the intended appeal this honorable court be pleased to issue orders of temporary injunction restraining the respondents whether by themselves, servants and or agents from interfering with the applicant's occupation of all that property known as Title No. Thika/Municipality Block 20/1136.
 - h. That the objector/applicant be at liberty to apply.
 - i. That this honourable court be pleased to grant any other relief it deems fit to in the circumstances.
2. The application was based on the grounds set out therein and the applicant's supporting affidavit.
 3. The applicant deposed that, being aggrieved with the court's judgment dated 23rd December 2022, she lodged a Notice of Appeal to appeal the said judgment. Hence, she is apprehensive that if the orders sought are not granted, the respondents may distribute the deceased estate, thereby disinheriting her and her child. The applicant deposed that she has been in occupation of land known as Title No. Thika/Municipality Block 20/1136 before and after the deceased died in 2012.
 4. According to the applicant, the appeal has a high chance of success, and if the orders sought are not granted, she stands to suffer substantial loss. Also, the appeal will stand nugatory.
 5. In response to the application, the 2nd respondent filed a replying affidavit where she deposed that she was the only surviving widow of the deceased and that their marriage was blessed with five children. The 2nd respondent averred that this application is meant to prevent the respondents from administering the deceased estate as per the Certificate of Confirmation of grant dated 10th November 2015. Also, the cause has been in court for eleven years. Hence, the deceased estate has not been administered.
 6. According to the 2nd respondent, this application for stay does not meet the requirements set out in Order 42 Rule 6(2) of the *Civil Procedure Rules*.
 7. Furthermore, the 2nd respondent deposed that the applicant does not live on the parcel of land as claimed. This has led to its dereliction. She added that the applicant failed to pay the electricity and water bill, which accrued to a significant amount that she was forced to pay.
 8. The 2nd respondent further deposed that the applicant has not met the threshold for issuance of injunctive orders.
 9. The parties canvassed the application by way of written submissions which I have read and considered.

Determination

10. I have considered the application, the rival affidavits and submissions, as well as the entire court record.
11. The applicant's main prayer is a stay of execution of the judgment. Whereas Rule 63 (1) of the *Probate and Administration Rules* has not cited Order 42 Rule 6 of the *Civil Procedure Rules* as one of the orders of the *Civil Procedure Rules* which apply to Succession causes, Rule 49 in my view is wide enough to cover the present application and entertain a remedy of stay of execution of a judgment or decree in succession proceedings. Rule 49 of the *Probate and Administration Rules* provides that:

“A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported, if necessary, by affidavit.”



12. In addition, the court may draw upon the wide powers under Article 159 of the *Constitution*, Section 47 of the *Law of Succession Act* and Rule 73 of the *Rules* to entertain any application and to determine any dispute under the *Law of Succession Act*. As such the application is properly before the court.
13. So, has the applicant met the threshold for issuance of a stay of execution of the court's ruling? The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-
- “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.
- 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 1st 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.
14. Thus, under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an Applicant should satisfy the court that: Substantial loss may result to him unless the order is made; that the application has been made without unreasonable delay; and the applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
15. In *Butt vs Rent Restriction Tribunal* [1979]) the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-
- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
 - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put the security of costs as ordered will cause the order for stay of execution to lapse.
16. So, has the applicant proved that she will suffer substantial loss? Under this head, an applicant must clearly state what loss, if any, they stand to suffer. A claim of substantial loss is required since it



is uncommon for an appeal to be rendered nugatory by some other event. The onus of proving substantial loss rests upon and must be discharged accordingly by the applicant. It is not enough to state that loss is likely to be suffered, but that loss will be suffered. In this case, the applicant states that she will suffer substantial loss because she and her daughter will be disinherited and rendered destitute. If the deceased estate is fully administered and property transferred to the beneficiaries, the applicant may not be in a position to exercise their rights of appeal

17. Consequently, I am of the view that because of the nature of the matter and the deposition of the applicant they may be disinherited, and substantial loss has been demonstrated.
18. Has the application been made without delay? The ruling was delivered on 23rd December 2022 and the application for a stay of execution was filed on 17th January 2023. I am satisfied that the applicant filed this application within a reasonable time.
19. Should the applicant provide for security of costs? The objective of the legal provisions on security was never intended to fetter the right of appeal. It was put in place to ensure that courts do not assist litigants in delaying the execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine.
20. So, has the applicant met the prerequisite for the grant of stay of execution pending appeal? It is trite law that whether or not to issue an order for stay of proceedings is a matter of the court's discretion exercised after due consideration of the merits of the case and the likely effect on the ends of justice. The exercise of that discretion should be premised on a conscientious and judicious decision based on defined principles. In my considered view, I find that the applicant has shown sufficient cause for the grant of orders for stay of any further proceedings in this cause.
21. The applicant also prayed for an order of temporary injunction on Title No. Thika/Municipality Block 20/1136. It is common ground that for an injunction to be issued, the applicant must satisfy the three requirements settled in *Giella v Cassman Brown* [1973] EA 348 where the court held that an applicant must demonstrate that they have a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt, show that the balance of convenience is in their favour.
22. Furthermore, in *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in *Giella v Cassman Brown* (supra) and further clarified that the conditions are to be applied as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially. Consequently, if the applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.
23. What then constitutes a prima facie case? The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained that it 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.”
24. Therefore, a prima facie case is not frivolous but one which is easily discernable from the pleadings even before the party is heard as it will show a right exists which may be infringed if an injunction is not issued and the onus of establishing the existence of a prima facie case lies with the applicant.



25. In the instant application, the applicant has deposed that she is in occupation of Title No. Thika/ Municipality Block 20/1136 and if an order of injunction is not issued, she and her child may be rendered homeless.
26. According to this court's ruling dated 23rd December 2022, the court held that the applicant was not the deceased wife, nor was there tangible proof that the applicant's child was the deceased biological child. This is what is on appeal.
27. I am satisfied that the applicant has established a prima facie case that if the orders sought are not granted, she is likely to suffer harm and loss that cannot be compensated by damages.
28. I reach the conclusion that this application has merit and it is hereby allowed on the following conditions:-
 - a. There be a stay of execution of the ruling dated 23rd December 2022 for 60 days from the date of this Ruling.
 - b. The administrators are hereby restrained from disposing of, leasing, or adversely dealing with Title No. Thika/Municipality Block 20/1136 until the determination of the appeal.
 - c. The administrators are at liberty to distribute the deceased estate save for Title No. Thika/ Municipality Block 20/1136.
 - d. If the applicant does not properly lodge the appeal in the Court of Appeal within 60 days from the date of this Ruling, Order (c) will be automatically vacated.
 - e. Costs are in the cause.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2024

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E.K. OGOLA

JUDGE

In the presence of:

Ms. Mungai for the Applicant

N/A for the Respondent

Gisiele Muthoni Court Assistant

