



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 19 OF 2020

HELLENA WAGUTHII NYAGA....APPELLANT

VERSUS

WACHIRA KANGERI.....RESPONDENT

(Being an appeal from original Succession Cause No. 262 of 2018 of Honourable E. O Wambo Senior Resident Magistrate by a Judgment delivered on 30th May, 2020 in Kerugoya Chief Magistrate's Court.

RULING

1. The appellant Hellenaga Waguthii Nyaga filed the application before me on the 21/7/2020, seeking **orders**:-

a. Spent.

b. That the Respondent, his servants and/or agents be restrained by way of temporary injunction from disposing, alienating, subdividing or in any other way dealing with land parcel Mutira/Kathare/128 pending hearing and determination of this appeal.

c. That a prohibitory order be placed, on any land parcel that may have arisen as a result of subdivision of Mutira/Kathare/128.

2. The application is based on the supporting affidavit sworn by the applicant on the 21/7/2020. In opposing the application, the Respondent Wachira Kangeri swore and filed a Replying Affidavit on the 28/7/2020.

3. The application/Applicant was dissatisfied with the trial court's judgment delivered on the 30/4/2020 in Kerugoya C.M's Succession Cause No. 262 of 2018, on numerous grounds stated in the Memorandum of Appeal.

4. An application for stay of execution of the Judgment and decree filed before the trial court was dismissed on the 11/6/2020. On the 23/6/2020, pursuant to an application dated 15/6/2020 the trial Magistrate made orders that:-

1. That the Executive Officer of the court to sign all necessary papers to facilitate the transmission of land parcel Mutira/Kathare/128 to the beneficiaries.

2. Production of copies of beneficiaries identity cards, Passport photos, PIN Certificates together with production of the old title deed for the land parcel be dispensed with at the Lands Office at the time of the transmission documents.

5. Order 40 rule 1 Civil Procedure Rules states:-

a. That any property in a dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongful sold in execution of a decree; or

b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that maybe passed against the defendant in the suit, the court may order grant a temporary injunction to restrain such acts, or make such 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.

6. The applicant and the Respondent are sister and brother, and beneficiaries with the others, of their father's estate. The applicant was dissatisfied with the mode of distribution of the land parcel by the court and has preferred an appeal, and therefore seeks an order that the suit property be preserved as subdivision will render the property damaged before the appeal is heard and determined, and may render the appeal nugatory.

7. In his Replying Affidavit, the respondent denies that he is in a hurry to subdivide and sell the suit land. He further avers that with his brothers, they have done extensive developments on the portions given to them by their father.

8. I have considered the applicant's apprehension as well as the respondent's averments that he is not preparing to sell the suit property. By the respondent applying for, and having been granted, by the trial court, on the 23/6/2020 orders that the Executive Officer of the court do sign all necessary documents to facilitate subdivision and transmission of the suit property to the beneficiaries is enough apprehension that if that is done, there will be no reason as to why the beneficiaries including the respondent would not proceed to sell the portions given to them.

9. By so doing, the property will be damaged, and by the time the appeal is heard and determined, there would be no property to call the suit land. The appeal would thus be rendered nugatory. A temporary order of injunction, would, in my view preserve the suit property pending the hearing and determination of the Appeal.

For the foregoing, I find the appellant's application dated 21/7/2020 to be merited. I grant prayer No. 2. As the sub divisions have not been done, prayer No. 3 is pre-mature. It is not granted.

Costs shall be costs in the cause.

Dated, Delivered and Signed this 22nd day of October, 2020.

J. N. MULWA

JUDGE