



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 807 OF 2004

IN THE MATTER OF THE ESTATE OF ONGWENY WAYUNGU (DECEASED)

BETWEEN

CHARLES ONDIEK AWUOR.....1ST PETITIONER/APPLICANT

SOSPETER ONYANGO AWUOR.....2ND PETITIONER/APPLICANT

AND

JACOB ODHIAMBO OTIENO.....OBJECTOR/ RESPONDENT

JUDGMENT

Introduction

1. On 27th June, 2019, this court after hearing an objection by **JACOB ODHIAMBO OTIENO (*Respondent*)** issued the following orders: **THAT**

a) Letters of administration issued on 3rd July, 2012 in favour of CHARLES ONDIEK OWUOR and SOSPETER ONYANGO OWUOR and the grant confirmed in favour of CHARLES AWUOR, FRED AWUOR, WILLIS AWUOR, PETER OMOLLO and SOSPETER ONYANGO on 14th April, 2015 are hereby revoked.

b) Any sub-division and transfer in respect of Land Parcel Nos. KISUMU/WANGAYA I/1954; KISUMU/WANGAYA I/1957 and KISUMU/WANGAYA I/2555 is hereby cancelled and it is ordered that ownership in respect thereof shall revert to the name of ONGWENY WAYUNGU (DECEASED).

c) CHARLES ONDIEK AWUOR and JACOB ODHIAMBO OTIENO are hereby appointed joint administrators of the deceased's estate

d) Upon issuance of the Letters of Administration, CHARLES ONDIEK AWUOR and JACOB ODHIAMBO OTIENO shall within 30 days from the date thereof proceed to apply for confirmation of the grant in accordance with the provisions of the law after ascertaining and determining all the beneficiaries and their respective beneficial entitlement to the estate

2. By a notice of motion dated 29th July, 2019 filed on even date, brought under Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act, Applicants pray for orders **THAT**:

1) There be a stay of orders and all proceedings further to the judgment dated 27th June, 2019 pending the hearing and determination of the appeal

2) An interim order of injunction do issue restraining the Respondent either by himself, his servants and or agents or anyone whomsoever claiming title or acting on his behalf from remaining in, occupying, continuing to occupy or doing any act on Land Parcel Nos. KISUMU/WANGAYA I/1954; KISUMU/WANGAYA I/1957 and KISUMU/WANGAYA I/2555 (*suit properties*) pending the hearing and determination of the appeal

3) Costs be in the cause

2. The application is based on the grounds among others that the application has been made without undue delay, that Applicants have

appealed against the judgment of this case which appeal will be rendered nugatory if the application is not allowed and that the Respondent does not stand to suffer any loss for he neither resides nor carries out any work on the *suit properties*.

3. The application is supported by an affidavit sworn on 25th July, 2019 by **CHARLES ONDIEK AWUOR (the 1st Applicant)** and filed on 29th July, 2019 in which he reiterates the grounds on the face of the application. Annexed to the affidavit is a notice of appeal and memorandum of appeal marked COA .

4. The application is opposed by of a replying affidavit sworn by the Respondent on 10th September, 2019 and filed on even date. He avers among other issues that he already surrendered land parcel **KISUMU/WANGAYA I/2555** to the Respondents and has no intention of selling **Land Parcel Nos. KISUMU/WANGAYA I/1954; KISUMU/WANGAYA I/1957** as alleged by the Applicants.

5. I have considered the application in the light of the affidavits on record, the submission by counsel and cited authorities.

6. The legal basis for grant of stay pending appeal is **Order 42 Rule 6 of the Civil Procedure Rules, 2010**. Basically, the Defendant/Applicant is required to demonstrate that: -

“Substantial loss may result unless the order is made. The application has been mad without unreasonable delay. Such security as the court orders for the due performance of the decree has been given before the applicant.”

7. The impugned judgment was delivered on 27th June, 2019. The notice of motion herein was filed on 29th July,2019 which is two days after the time allowed for filing of an appeal. The 2 days’ delay is not inordinate.

8. There are a myriad of cases on what constitutes substantial loss. In **Jason Ngumba Kagu & 2 others v Intra Africa Assurance Co. Limited [2014] eKLR** the Court cited **Bungoma Hc Misc Application No 42 Of 2011 James Wangalwa & Another V Agnes Naliaka Cheseto** where it stated that:

“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. This is what substantial loss would entail...”

9. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. I have considered the Applicant’s averments and he does not disclose what substantial loss the Applicants are likely to suffer is an order of stay is not granted. There being no evidence of substantial loss, it is unlikely that the Appeal would be rendered nugatory. (See **Civil Case No. 41 Of 1995 United Builders & Contractors (Africa) Limited –Vs- Standard Chartered Bank Ltd**).

10. In support of the application for an injunction, the Applicants have placed reliance on **Mrao Ltd Vs First American Bank of Kenya and 2 Others [2003] eKLR** where the court in considered what a prima facie case entails stated as follows:

"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case". It is a case which on the material presented to court; a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the other party as to call for an explanation or rebuttal from the latter."

11. No material has been placed before the court in support of the Applicants’ assertion that the Respondent intends to sell **Land Parcel Nos. KISUMU/WANGAYA I/1954** and **KISUMU/WANGAYA I/1957**. There is therefore no evidence that the Applicants are likely to suffer any loss substantial or otherwise.

DISPOSITION

12. In the end, I find that the Applicants have not raised any arguable point on which they would be entitled to this court’s exercise of discretion in their favor. In the end the notice of motion dated 29th July,2019 is dismissed with costs to the Respondent.

DATED AND DATED IN KISUMU THIS 21st DAY OF NOVEMBER, 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/ Okodoi

For the Applicants - Mr. Maua hb Mr Mwamu

For the Respondent - Mr. Manasses hb for Mr. Emukule