



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 853 OF 1999

JULIUS KABUI MWANGI.....1ST PLAINTIFF

TERESIAH NJERI MWANGI.....2ND PLAINTIFF

(Suing as heirs and legal representatives of the *Estate of MWANGI CIGHUKA (Deceased)*)

-VERSUS-

WANGUI GATUNDU

JOHN WANJANGI GATUNDU

JAMES MWANGI GATUNDU (*All sued as legal Representative of the estate of*

***Gatundu Wanjangi (deceased) & 10 others*.....DEFENDANTS**

RULING

1) The plaintiffs herein, took out the motion dated 8th November 2019 and sought for the following orders:

i. THAT this application be certified urgent and heard ex-parte in the first instance for conservatory orders.

ii. THAT there be an order staying the order made by this court on 16th October, 2019 for the release of the funds held in the joint account of the advocates for the parties herein at National Bank of Kenya Limited, Kenyatta Avenue Branch, pending the hearing and determination of this application inter-partes.

iii. THAT this court be pleased to grant an order staying this court's order made on 16th October, 2019 for the release of the funds held in the joint account of the advocates for the parties at National Bank of Kenya Limited, Kenyatta Avenue Branch pending the hearing and determination of the intended appeal by the plaintiffs.

iv. THAT there be an order that the receivers/mangers appointed by this court on 14th October, 2004 and 19th May, 2010 do continue to manage the suit properties and to continue collecting rental income which should continue to be invested in the joint account in the names of the advocates for the parties pending hearing and determination of the intended appeal by the plaintiffs.

v. THAT such further or other order(s) be granted as this court may deem fit and just in the circumstances of this case and ordering the release of the funds invested in the joint account of the advocates for the parties to unnamed persons.

vi. THAT costs of this application be provided for.

2) The motion is supported by the affidavit of Julius Kabui Mwangi. When served, the 1st, 2nd, 4th and 9th defendants filed grounds of opposition while the 3rd, 5th and 8th defendants filed both grounds of preliminary objections and grounds of opposition to resist the motion.

3) This court gave directions to have the motion disposed of by written submissions but at the time of writing this ruling, none of the parties had filed their submissions.

- 4) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavit filed in support. I have also taken into account the preliminary objections and the grounds of opposition. It is the submission of the plaintiffs that they have filed a notice of appeal expressing their intention to challenge the judgment of this court delivered on 16th October 2019 in the Court of Appeal.
- 5) The plaintiff aver that their intended appeal has high chances of success. They argued that unless the orders sought are granted their appeal will be rendered nugatory since the properties and income derived therefrom are in danger of being wasted.
- 6) It was pointed out that all the partners whose names the suit properties are registered are now deceased. It was also stated that this court's order requiring the release of the funds held in the joint account of the advocates for the parties to unknown persons is susceptible to abuse since none of the partners are alive and that their legal representatives or dependants may engage in a scramble for the funds and other assets which the plaintiffs are entitled to a substantial share.
- 7) The plaintiffs further argued the other assets of the partnership may be alienated before the intended appeal is heard and determined.
- 8) Finally, the plaintiffs argued that unless the order for stay is granted they would suffer substantial loss in that the money invested in the joint account may be released to third parties.
- 9) The defendants/respondents strenuously opposed the application arguing that the same is fatally defective for want of election of relief. It is argued that the application is in breach of the equitable doctrine of election of the remedies in that it is a multiplicity and a muddle of a number of reliefs that are incongruous to each other. The respondents further argued that the deponent of the supporting affidavit has no authority to make the application before confirmation of grant of the estate of the late Mwangi Gichuka.
- 10) It is also argued that the applicants have not appealed against the order which is referred to as the subject of the application for stay, injunction and order for the appointment of receiver/manager.
- 11) The respondents further pointed out that the application is defective because there are no grounds on the face of the application for the reliefs sought. It is further argued the motion has no merit but is meant to procrastinate the conclusion of the matter.
- 12) It is also pointed out that the applicants have not provided any adequate security for the due performance of the decree. It is further argued that the applicants have not shown the substantial loss they would suffer if the order for stay is denied. The respondents are of the submission that the intended appeal has no chances of success.
- 13) Having considered the material placed before this court, it is not in dispute that the plaintiffs have initiated the process of filing an appeal in the Notice of Appeal to challenge the judgment of this court which was delivered on 16th October 2019. The respondents have argued that the application is fatally defective because of the multiplicity of reliefs sought in a single application.
- 14) I have carefully perused the motion and it is apparent that the applicants have sought multiple reliefs. However, the reliefs sought by the plaintiffs revolve around the prayer for stay of execution and for maintenance of the status quo which existed before judgment pending appeal. I therefore find the motion not defective. The same is therefore competently before this court.
- 15) The other preliminary issue which was raised by the respondents is that the motion is defective because it contains no grounds on the face to support the reliefs sought. A glance of the motion will show that the application contains the grounds it is based, therefore, the objection cannot be sustained.
- 16) The principles to be considered in determining an application for stay are well settled. **First**, the application for stay must be timeously filed. **Secondly**, an applicant must show the substantial loss it would suffer if the order for stay is denied. **Thirdly**, the provision for security for the due performance of decree.
- 17) This court delivered its judgment on 16th October 2019 and the application for stay was filed on 8th November 2019. I am satisfied that the motion was timeously filed.
- 18) The question as to whether the applicants have shown the substantial loss they would suffer if the order for stay is denied was substantively addressed by the parties in their pleadings. I am persuaded by the plaintiffs/ applicants' argument that if the order for stay is not granted they would suffer substantial loss in that the money invested in the joint interest would have been released to third parties and the possibility of recovering may turn out to be tedious or difficult in case the appeal succeeds. I am also convinced that the other assets of the partnership may be alienated before the appeal is heard and determined thus rendering the appeal nugatory.
- 19) The third and final issue is in respect of security for the due performance of the decree. In the circumstances of this case, the order sought by the plaintiffs basically seeks to have funds invested in a joint account to be maintained and for the receivers/managers to continue managing the suit properties pending appeal. In other words, the orders sought by the plaintiffs are intended to maintain the status quo pending appeal. In the circumstances of this case, the plaintiffs are not required to provide security for the due performance of the decree.
- 20) In the end the motion dated 8.11.2019 is allowed in terms of prayers (iii) and (iv). Costs of the application to abide the outcome of the intended appeal.

Dated, Signed and Delivered virtually via Microsoft Teams at Nairobi this 2nd day of July, 2020.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant