



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO, (P), ASIKE-MAKHANDIA & KANTAL, J.A.)

CIVIL APPLICATION NO. E303 OF 2020

BETWEEN

BLAISE MUCHINA KAGO.....1ST APPLICANT

AND

GLADYS WAMBUI KAGO.....1ST RESPONDENT

ESTHER WANJIKU2ND RESPONDENT

MERCY NDUTA KAGO3RD RESPONDENT

(Being an application for stay of execution of the orders of the High Court of Kenya at Nairobi (A.O. Muchelule, J.) dated 27th February, 2020

in

HC. Succession Cause No. 2859 of 2012)

RULING OF THE COURT

The dispute before the Family Division of the High Court of Kenya, Nairobi involved division of the properties of the estate of the deceased, **Daniel Kago Macharia alias Daniel Kago alias Daniel Mukore alias Kaniel Kago Mukore**. In a Judgment delivered on 2nd March, 2020 **Muchelule, J.** ordered the mode of distribution of the estate to the houses of the deceased.

The applicant, **Blaise Muchina Kago**, is a son of the deceased from the house of **Jecinta Njoki** (the 3rd wife who was deceased when proceedings were taken before the High Court). By the Motion brought under various provisions of law he prays in the main that we stay the orders of the High Court pending lodging and hearing of the intended appeal; that we stay further proceedings at the High Court; that the applicant and his family be allowed to continue staying on parcels of land known as “**Githunguri/Kanjai/1439 (0.29 ha), 1208, 1211, 1213 and 1806**” and to have a share of the rental income pending hearing and determination of the application and the appeal. We are also asked to order the Officer Commanding Station, Githunguri Police Station, to supervise enforcement of our orders.

In grounds in support of the Motion and in a supporting affidavit of the applicant it is said that the Judge of the High Court interfered with the rights of the applicant as a beneficiary of the estate of the deceased; that there was no fair hearing; that the respondents have threatened to evict the applicant from the said parcels of land where he and his siblings reside; that the High Court did not make an equitable distribution of the estate as it overlooked the house of Jecinta Njoki; and that lands belonging to the estate have been given to strangers, amongst many other grounds. **Gladys Wambui Kago** (the 1st respondent), in a replying affidavit depones that she is one of the administratrix of the estate and had authority of the 2nd respondent (**Esther Wanjiku**) and their families to reply to the Motion. She depones, amongst other things that the applicant did not reside on any of the properties of the estate; that the applicant’s two siblings resided, one in Githunguri town while the other was in the United Kingdom; that there was no threat to evict the applicant from any land; and that there was equitable distribution of the estate by the Judge.

We heard the Motion on 8th February, 2021 through “Go-to-Meeting” platform when learned counsel **Miss Susan Juma** appeared for the applicant. We were satisfied that counsel for the respondents had been served with a hearing notice on 21st January, 2021 and we thus allowed Miss Juma to urge the Motion. Counsel referred us to the draft Memorandum of Appeal submitting that the matter at the High Court was heard through written submissions to which the applicant had not consented. According to counsel this was a breach of fair trial rights

and in breach of right to hearing. Finally, that the applicant occupied a house from which he was about to be evicted.

The principles that apply to applications of this nature are well known. For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the appeal is not frivolous. Such an applicant must, in addition, demonstrate that the appeal would be rendered nugatory absent stay – See **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2103] eKLR**.

We have perused the record of the Motion and the submissions made. One of the grounds set out in the draft Memorandum of Appeal is that the Judge erred in denying the applicant his constitutional right to a fair hearing. Another ground is that the Judge erred by changing the cause of arrangement of inheritance without any or any good reason against Kikuyu customary law as recognized by the Constitution of Kenya. We find these to be arguable grounds and it has been held by this Court that a single arguable point will suffice – See the case of **Damji Pragji Mandaria v Sara Lee Household and Body Care (K) Limited, Civil Application No. NAI 345 of 2004**. It has also been held that such a point is not one that must succeed but one which ought to be argued fully before the Court – **Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Limited & 2 Others, Civil Application No. 124 of 2008**.

What about the nugatory aspect that must also be satisfied for an application like this one to succeed?

The applicant has listed five properties where he says he resides – land parcel Nos. Githunguri/Kanjai/1439, 1208, 1211, 1213 and 1806. The 1st respondent has challenged this assertion stating, firstly, that the applicant resides in Githunguri town and, secondly, that there is no threat of eviction from any land at all. It is also stated that one of the applicant’s two siblings resides in Githunguri town while the other is abroad. It is difficult to understand how the applicant would be residing on five different properties from which he fears that he will be evicted.

In the premises where there is no threat of any nature against the applicant we are not satisfied that the applicant meets the threshold for grant of the application. In the premises the Motion fails and is dismissed with costs.

Dated and delivered at Nairobi this 16th day of April, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR