



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OKWENGU, MUSINGA & MURGOR, JJA)

CIVIL APPLICATION NO. 30 OF 2020

JURGEN RICHARD QUANDT.....APPLICANT

AND

CINDY TERRY SHEPARD.....1ST RESPONDENT

KEN TADAYO.....2ND RESPONDENT

MARGARET JEBET LAGAT (alias) MAGGY JEBET.....3RD RESPONDENT

JOHANNE CHEPKELION.....4TH RESPONDENT

(An Application for temporary injunction pending the hearing and determination of the intended appeal against the ruling of the High Court at Eldoret delivered by the Honourable Mr. Justice S. M. Githinji, J on the 9th day of October, 2019

in

Eldoret HCCA No. 13 of 2013)

RULING OF THE COURT

In this application brought under **rule 5(2) (b)** of the **Court of Appeal Rules**, the applicant seeks a temporary injunction restraining the respondents their servants and agents or any other person from selling, transferring, alienating, charging, wasting, mortgaging, leasing, letting, giving as security, taking possession or in any way dealing with Land Parcel No. 9723 (*the subject land*) following a judgment delivered by the trial court delivered on 31st July 2017 which distributed the subject land to the applicant and other beneficiaries, pending hearing and determination of the application herein and the intended appeal.

The background to this application is that **Guandt Achim Hurbetus (the deceased)**, died intestate on 22nd August 2015, and following his demise, **Jurgen Richard Quandt (the applicant)** filed for letters of administration in respect of the deceased's estate in the Chief Magistrates' court in *Succession Cause No. 26 of 2017*, in his capacity as his brother. The 1st, 2nd 3, and 4th respondents objected to issuance of the letters of administration to the applicant, and to the manner in which the assets of the estate, particularly the subject land, were purposed to be distributed. In its ruling the trial court distributed the assets as follows: -

“River farm L.R No. 9723/28 (Sergoit) measuring 5 acres purchased from Japhet Kipkemboi Magut vide sale agreement dated 3.7.91

Will be shared as follows: -

- 1. Cindy Terry Shepard and Ken Tadayo Shepard 2 acres*
- 2. Jurgen Quandt 2 acres*

3. Margaret Jebet Lagat (alias) Maggy Jebet and Johanne Chepkelio 1 acre

Money at African Banking Cooperation A/C No. [...] will be shared as follows: -

1. Cindy Terry Sheperd and Ken Tadayo 50%

2. Jurgen Quandt 25%

3. Margaret Jebet Lagat (alias) Maggy Jebet and Johanne Chepkelio 25%

Motor Vehicle Registration number KAT 580Q will be given to Cindy Terry Shepard and Ken Tadayo Shepard.

The said transactions will be effected by the advocates on record on behalf of there (sic) clients.”

The applicant was aggrieved by the ruling and filed an appeal in the High Court seeking to have it set aside, the main grounds being that the trial court erred in finding that the 1st respondent was an adopted child of the deceased without taking into account that the 1st respondent had her own father who maintained her; in holding that the 3rd and 4th respondents who were workers of the deceased were dependants within the meaning of **section 39** of the **Law of Succession** and failing to find that the Power of Attorney issued to the applicant was properly registered.

So as to preserve the subject matter, the applicant filed an application in the trial court seeking to stay execution of that decision. The application was dismissed by the trial court prompting the applicant to seek similar orders in the High Court. The High Court similarly dismissed the application on 9th October 2019, for the reasons, *inter alia*, that the application was brought after undue delay, and further that no elaboration was provided on how the applicant would suffer substantial loss.

The applicant was aggrieved by that decision, and has preferred an appeal to this Court, having filed a Notice of appeal on 18th October 2019.

Anxious because the respondents have obtained a decree from the trial court in their favour and are likely to execute it at any time, the applicant filed this Notice of Motion dated 6th February, 2020, seeking temporary injunction orders. In the affidavits in support sworn by the applicant on 22nd November 2019 and Alfred King’oina Nyairo, the applicant’s advocate on 2nd February 2020, and the written submissions filed by Nyairo and Company Advocates, the applicant contends that the appeal is arguable as the learned judge did not take into account that execution had commenced, or that the orders of stay of execution sought were *res judicata*; and erred in finding that the applicant’s appeal should have been against the trial court’s decision dismissing his application for stay of execution. The applicant further urged this Court to find that the intended appeal would be rendered nugatory unless the orders sought were granted as there will be dealing in the subject land, adverse to the applicant’s interest and which would effectively remove it from the remit of this Court.

The 1st and 2nd respondents did not file any replying affidavit or submissions while, the 3rd and 4th respondents filed a replying affidavit sworn on 25th May 2020. Robia Omboto Advocates also filed written submissions on their behalf. Their objection was that the intended appeal was not arguable as it had been brought belatedly and no order or decree was included in the application; that the orders sought to evict them from the subject land of which they and their families are in possession, and finally that the applicant has not demonstrated that the intended appeal would be rendered nugatory in the event it eventually succeeds.

The twin principles that an applicant must satisfy in a **rule 5(2)(b)** application are well known. Briefly stated, the applicant must show that the appeal or intended appeal is arguable; and that the appeal, if successful, shall be rendered nugatory unless the orders sought are granted; see ***Stanley Kangethe Kinyanjui vs Tony Keter & 5 Others [2013] eKLR***.

Upon considering the motion, we are satisfied that the appeal is arguable, since a question arises as to whether the learned judge rightly declined to grant the stay of execution orders on the basis that the orders sought were *res judicata*, since a similar application was dealt with by the trial court, notwithstanding the stipulations of **Order 42 rule (6) (1)** of the **Civil Procedure Rules, 2010** entitled “*Stay in cases of appeal*”.

On the second limb, as to whether the appeal would be rendered nugatory, the 3rd and 4th respondent’s contend that they are in possession of the subject land, and in the event the orders sought are granted, there is every likelihood that they will be evicted.

A review of the orders sought show that they seek to restrain the respondents, their servants and agents or any other person from selling, transferring, alienating, charging, wasting, mortgaging, leasing, letting, giving as security, taking possession or in any way dealing with subject land lest it be removed from the jurisdiction of this Court. Our view is that save for the aspect of possession of which the 3rd and 4th respondent contend they currently maintain, what the applicant primarily seeks are orders prohibiting any sale, transfer, disposal or dealings with the subject land that could render the appeal nugatory as the substratum would be lost or removed from the remit of this Court. According to the applicant the respondents have extracted the orders of the trial court and have commenced execution. In effect, were the subject land to be compromised in any way, we are persuaded that the intended appeal would indeed be rendered nugatory.

As such, the twin principles having been satisfied, the Notice of Motion dated 6th February 2020 is allowed to the limited extent that a temporary injunction is hereby ordered to restrain the respondents, their servants and agents or any other person from selling, transferring, alienating, charging, wasting, mortgaging, leasing, letting, giving as security or in any way dealing with the subject land pending the determination of the intended appeal.

The costs of this application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 24th day of July, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR