



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GATEMBU, MURGOR & SICHALE, JJ,A)

CIVIL APPLICATION NO. 159 OF 2019

BETWEEN

CHARLES ONDIEK AWUOR.....1ST APPLICANT

SOSPETER ONYANGO AWUOR.....2ND APPLICANT

AND

JACOB ODHIAMBO OTIENO.....RESPONDENT

(Application for stay of proceedings in the High Court of Kenya at Kisumu,

pending the hearing and determination of an Appeal from the decision of

(Hon. Justice T.W Cherere) dated 27th June, 2019

in

Succession Cause No. 807 of 2004)

RULING OF THE COURT

By a Notice of Motion dated 10th December 2019, **the applicants Charles Ondiek Awuor and Sospeter Onyango Awuor** sought an order staying all proceedings further to the judgment of the High Court (*Cherere, J*) dated 27th June, 2019 pending the hearing and determination of this application and the intended appeal. Also sought was an injunction to restrain the respondent either by himself, his servants 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 known as Kisumu/Wangaya 1/1954, Kisumu/Wangaya 1/1957 and Kisumu/Wangaya 1/2555 (*the suit properties*) pending the hearing and determination of this application and the intended appeal.

The application was premised on the grounds that the intended appeal will be rendered nugatory and that the applicants would suffer substantial loss if the application that they had brought without undue delay was not allowed; that conversely, the respondent would not be prejudiced in any way as he did not reside or carry on any work on the suit properties.

The application was supported by the affidavit and further affidavit of Charles Ondiek Awuor who deponed that as beneficiaries of the Estate of Ongweny Wayungu (deceased), they had petitioned for letters of administration which petition was objected to by **the respondent, Jacob Odhiambo Otieno**; that the trial court had wrongly upheld the objection on the basis of hearsay evidence that the respondent's father was the biological son of the deceased; that pursuant to the High Court's decision appointing the respondent and the applicants as administrators of the estate and the order that the confirmation of grant be filed within 30 days, the respondent had already filed for confirmation of grant, and had since advertised the suit properties for sale. The applicants asserted that they were living in abject and constant fear of being rendered homeless.

In a replying affidavit, the respondent deponed that he had utilized the parcel of land from the time his father was alive to date and therefore the claim that he intended to sell his inheritance was false; that the application was clear that the applicants were intent on prohibiting him from occupying or doing any act on suit properties which was a clear manifestation of their intention to dispossess him and his family from

occupation of the suit properties. The respondent instead urged the Court to maintain the status quo while the appeal was pending.

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***.

The applicants contend that the appeal is arguable because the trial court's decision was made against the weight of the evidence, in that, by wrongly relying on hearsay evidence that the respondent's father was the deceased's biological son, the learned judge misdirected herself and reached the wrong conclusion. If indeed the learned judge's conclusion was based on matters that the court ought not to have taken into account, then we are satisfied that the appeal is arguable and not frivolous.

On the second limb, that unless the stay of proceedings and the injunction orders are granted the intended appeal will be rendered nugatory, on the one hand, the applicants assert that that the orders sought herein should be granted to preserve the subject properties, since the respondent had advertised the suit properties for sale, and that once the grant is confirmed, there would be nothing to stop such sale. The respondent on the other hand argued that he is in occupation of the subject properties and that the main objective behind the applicants' application is to dispossess him of his home.

Our view is that preservation of the subject properties pending the hearing and determination of the intended appeal, is of paramount importance, as, were they 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 10th December 2019 is allowed in that the proceedings in the High Court are hereby stayed, and a temporary injunction is granted to a limited extent to restrain the respondent, his servants and agents or any other person from selling, transferring, alienating, charging, wasting, mortgaging, leasing, giving as security or in any way adversely dealing with the suit properties, pending the hearing and determination of the intended appeal.

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

It is so ordered.

Dated and delivered at Nairobi this 7th day of August, 2020.

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR