



IN THE COURT OF APPEAL

AT NYERI

(CORAM: ASIKE-MAKHANDIA, MUSINGA & MURGOR J.J.A.)

CIVIL APPLICATION NO. 53 OF 2020

BETWEEN

PURITY KAMUNDA CILINDI..... APPLICANT

AND

ASENATH GATAKAA NTWIGA..... RESPONDENT

(An application for injunction and stay of execution against the judgment of the

High Court of Kenya at Chuka (Limo, J.)

dated 15th October 2018

in

Chuka HC. Succ No. 54 of 2016)

RULING OF THE COURT

This Notice of Motion dated 18th June 2020 made under *rules 5 (2) (b)* of the *Court of Appeal Rules*, the applicant, **Purity Kamunda Cilindi**, seeks orders of injunction against *the respondent, Asenath Gatakaa Ntwiga*, together with her employees and agents from interfering with and evicting her from the property known as LR Mwimbi/Chogoria/258 (*the suit property*), and further seeking a stay of execution of the judgment of the High Court of 15th October 2018 pending the hearing and determination of the application and appeal and that costs be provided for.

The applicant was aggrieved by the decision of the High Court (*Limo, J.*) that shared the suit property among the applicant, the respondent and her children, as well as to their other siblings, because in the applicant's view, the suit property which belonged to the late Gedion M'Murungi M'Muthare alias Njara alias Murungi Muthara, the father of her late husband, Samuel Kamundi Gedeion, should have been given to her exclusively since, his father had exclusively gifted his other son, Jose Riungu with LR Parcel No. Mwimbi/Chogoria/248 measuring 8 acres.

The motion which was supported by the applicant's affidavit was premised on grounds that the learned judge was wrong to find that the applicant and her children were not entitled to exclusive ownership of the suit property, as the wife and children of Samuel Kamundi Gedeion, also deceased, and that if the orders sought were not granted, the respondent would take over and misuse the properties of the estate. She further deponed that despite having resided on the suit property during her husband's lifetime, the respondent and her agents had resorted to threatening her with eviction therefrom.

In a replying affidavit sworn on 29th April 2019, the respondent deponed that as administratrix of the estate of the late Gedion M'Murungi M'Muthare she had undertaken her responsibility of distributing the properties with zeal in accordance with the court's orders, and in so doing had subdivided the suit property into 4 parcels namely; LR Mwimbi/Chogoria/6928, 6929, 6930 and 6931 which had since been distributed among the beneficiaries including the applicant; that therefore, the suit property had ceased to exist, and as a consequence there was nothing for this Court to restrain or to stay; that the applicant did not at any time prior to subdivision and distribution appeal or seek a review of the trial court's decision.

It was further deponed that, the allegations that she had threatened to evict the applicant are falsehoods, as there was no intention to interfere with the subdivided portion where the applicant's home is located, but that to the contrary, it is the applicant who has continued to interfere with the subdivision process, and occupation of the subdivided portions by the other beneficiaries.

In the submissions which they had filed, the respondent argued that the applicant's appeal was not arguable.

In determining an application under **rule 5 (2) (b)** of this Court's Rules, it is well established that, two principles guide the Court. Firstly, an applicant is required to demonstrate that the appeal or intended appeal is arguable, or in other words, that it is not frivolous. Secondly, that unless he is granted a stay of execution or injunction as the case may be, the appeal or intended appeal, if successful, will be rendered nugatory. See the case of ***Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others, Civil Application No. NAI. 31/2012***. We would also add that when determining applications under **rule 5 (2) (b)**, the Court exercises a distinct jurisdiction which exercise does not constitute an appeal from the trial judge's discretion to this Court. See ***Ruben & Others vs Nderitu & Another (1989) KLR 459***.

As to whether the applicant's appeal is arguable, it is clear that the basis of the appeal is whether the suit property that belonged to the applicant's father in law, the late Gedion M'Murungi M'Muthare, ought to have been given to the applicant alone to the exclusion of the respondent, her children and her siblings, by virtue of her having been wife to one of the late Gedion M'Muthare's sons, Samuel Kamundi Gedeion, and since their father had gifted his other son Jose Riungu with LR Parcel No. Mwimbi/Chogoria/248 exclusively. Having regard to the circumstances of the case, the appeal is arguable.

As to whether it would be rendered nugatory, the respondent has disclosed that following the court's decision, the suit property has undergone a process of subdivision, and the portions have been distributed to the beneficiaries including the applicant. Consequently, the suit property against which the orders are sought has ceased to exist. In effect, the orders sought have been overtaken by events, and are incapable of being issued against such property.

In sum, the second limb not having been satisfied, the motion dated 18th June 2020 fails, and is dismissed with costs to the respondent.

It is so ordered.

Dated and Delivered at Nairobi this 4th day of December, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signeg

DEPUTY REGISTRAR