IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & MURGOR, JJ.A)

CIVIL APPLICATION NO. NAI. 277 OF 2018

BETWEEN

JULIUS GICHUKI GICHUHI

(by substitution and being a legal representative

***of the estate of the late* GICHUHI KIMIRA).....APPLICANT**

VERSUS

SAMUEL NGUNU KIMOTHO.....1ST RESPONDENT

LOISE WAIRIMU MUGWERU

RUTH WANJIRU MUGWERU

WINIIE WANGU MUGWERU

(by substitution and being the administrators

***of the estate of the late* MAAKA MUKUHI MUGWERU).....2ND RESPONDENT**

(Being an application for injunction pending the hearing and determination

of an appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (Sergon, J.) dated 4th May, 2018

in

HCCC NO. 880 OF 1977

(Consolidated with HCCC No. 908 of 1977))

****

RULING OF THE COURT

This is a notice of motion dated 26th September, 2018, brought under the provisions of **Rules 5(2) (b)** and **42** of the rules of this Court. The application has been brought by the intended appellant, **JULIUS GICHUKI GICHUHI** (the applicant) against **SAMUEL NGUNU KIMOTHO** (the 1st respondent) and **LOISE WAIRIMU, MUGWERU RUTH WANJIRU MUGWERU** and **WINIIE WANGU MUGWERU,** who are the administrators of the estate of the late **MAAKA MUKUHI MUGWERU** (the 2nd respondent). The application seeks an injunction against the respondents restraining them from in any way interfering with all that parcel of land known as L.R. Number 13041 (suit property) pending the hearing and final determination of an intended appeal. The application is premised on eight grounds set out on the face of the application and is supported by an affidavit sworn by the applicant. The 2nd respondent filed a relying affidavit in response to the application.

A brief background of this application is that on 26th September, 2017, the 2nd respondent filed an application before the High Court

seeking *inter alia* review, setting aside and/or vacation of the orders of the court made on 20th March, 2014. The said orders of 20th March, 2014, which were made pursuant to an application dated 17th December, 2013 by the applicant herein, were to the effect that the suit had abated and the applicant was awarded the costs of the suit which were to be recovered from the estate of **MAAKA MUKUHI MUGWERU.** The High Court (Sergon, J) upon hearing the application allowed it after making a finding that by the time the order for abatement of the suit was made, there was no suit in existence capable of abating because the suit had already long been heard and determined and the resultant decree issued and executed. According to the learned judge the applicant had failed in his application to disclose to the court this important and material fact.

It is that ruling that provoked the present application now before us. The parties filed written submissions which they highlighted before us. In his written submissions the applicant reiterated the reasons he believed the appeal was arguable and why it would be rendered nugatory if not granted as contained in his affidavit in support of the application. Whilst appearing before us Mr. Ngatia for the appellant submitted that it was common ground that the original L.R. No. 13041was sub-divided into three portions and the 2nd respondent was entitled to a portion. Counsel however pointed out to us that a letter from the defunct Nairobi City Council confirmed that no sub-division took place. Learned counsel argued that the whole transaction was shrouded in mystery because the property had even been charged to Agricultural Finance Corporation and there was no discharge of the said charge before the subdivision. Counsel contended that the applicant's father had been on the suit property for 40 years and that on the strength of the orders by Sergon, J the 2nd respondent has moved into the suit property and that there is an imminent sale, destruction and/or disposal of the suit property.

On its part the 2nd respondent questioned the jurisdiction of this court to hear the application. The 2nd respondent argued that the suit property had already been subdivided into three portions and that Maaka Mukuhi Mugweru had already been issued with a title for one of the subdivisions and therefore an order cannot be issued against a non-existent land. The 2nd respondent however submitted that, even if this court has jurisdiction to entertain this application, the applicant has not met the threshold for grant of the orders issued by demonstrating that the appeal is arguable and would be rendered nugatory if the orders sought are not granted. On whether the appeal is arguable the 2nd respondent argued that the suit before the trial court was heard and determined and the decree therein duly executed. The 2nd respondent further argued that the intended appeal is not against the executed decree but it is against an order for dismissal for abatement of a suit. On the nugatory aspect the 2nd respondent argued that the subject matter of the appeal is a property with known value and that the estate of Maaka Mukuhi Mugweru which is valued at hundreds of millions is in a position to refund the value in the unlikely event that the appeal succeeds.

We have considered the application, grounds in support and all documents, authorities and submissions filed by the parties herein. Admittedly, the application seeks an order of injunction pending hearing and determination of the intended appeal. This is an application under rule 5 (2) (b) as we have previously stated the principles, which govern the exercise of our jurisdiction under that rule, are first, the applicant must show that the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, that the appeal, if successful, should not be rendered nugatory. The applicant must also demonstrate that both limbs exist before it can obtain relief under rule 5(2) (b), (See ***Githunguri vs. Jimba Corporation Limited (1988) KLR 838).***

In ***Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others*** ***[2013] eKLR*** it was held that an arguable appeal is any appeal that raises at least one bona fide issue that deserves the consideration of this Court. The applicant argued that the learned judge erred in not appreciating that the suit had abated; the applicant also contended that the learned judge erred in not appreciating that since accounts had not been taken so as to ascertain contribution by the parties no lawful sub-division of the suit property could take place. The sub-division of the suit property had also been disowned by the defunct Nairobi City Council vide various letters and it is therefore not clear whether in deed subdivision was carried out or not. In our view, the foregoing are arguable points which can only be determined in the appeal. As we are not expected to inquire into the merits of the arguments and whether they will succeed or not we are satisfied that the applicant has met the requisite threshold as the existence of only one arguable point is satisfactory.

On the nugatory aspect the applicant argued that the 2nd respondent is destroying the property and might dispose of the suit property before the appeal is heard and determined. The 2nd respondent on their part argued that the subject of the appeal is a property with known value and that the estate of the late Maaka Mukuhi Mugweru is capable of refunding the value of the estate. The 2nd respondent further argued that the applicant is in possession of subdivision LR. No. 13041/3 and the 2nd respondent is in possession of L.R. No. 13041/2 whose title had already been issued in favour of the late Maaka Mukuhi Mugweru. We have perused the record and indeed we have seen a search for title for L.R. No. 13041/2 which indicates that Maaka Mukuhi Mugweru is the registered owner. Admittedly, the 2nd respondent is entitled to a portion of the property. The applicant did not dispute the submission that the estate of Maaka Mukuhi Mugweru is capable of refunding the value of the estate if the appeal is successful and in any event the 2nd respondent cannot dispose the entire suit property but only the portion registered in the name of the late Maaka Mukuhi Mugweru. We are therefore of the view that the applicant has not satisfied the second limb for grant of relief under Rule 5 (2) (b).

The result of the foregoing is that we do not find merit in the application dated the 5th June, 2017 and we accordingly dismiss it. However, we order that the respondents shall not interfere in any way with L.R. Number 13041/3.

Dated and Delivered at Nairobi this 22nd day of February, 2019.

P. N. WAKI

…….

JUDGE OF APPEAL

M. WARSAME

…….

JUDGE OF APPEAL

K. MURGOR

……...…

JUDGE OF APPEAL

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

DEPUTY REGISRAR