



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: MWILU, KIAGE & J. MOHAMMED JJ.A)**

**CIVIL APPLICATION NO. 281 OF 2014 (UR 209/2014)**

**BETWEEN**

**JIM WACHIRA KABIRU (Suing as an Administrator of the estate of**

**Joseph Wachira Kabiro .....APPLICANT**

**AND**

**SUSAN WANGUI KARANJA .....1<sup>ST</sup> RESPONDENT**

**STEPHEN ANTONY MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**REGISTRAR OF TITLES, NAIROBI ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for injunction pending the lodging hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nakuru (Waithaka, J.) dated 19<sup>th</sup> September 2014*

**in**

***E.L.C. CASE NO. 441 OF 2013)***

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**RULING OF THE COURT**

By a motion on notice dated 24<sup>th</sup> October 2014, and brought under **Rules 1(2) and 5 (2) (b)** of the Court of Appeal Rules, the applicant, who is an administrator of the estate of Joseph Wachira Kabiro (deceased), seeks orders of injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> respondents from selling, charging, transferring, leasing or otherwise alienating or dealing with Land Reference No. 3777/279/116 pending appeal. He also seeks to restrain the 3<sup>rd</sup> respondent from interfering with the applicant's interest in the suit property and in particular from registering any transfer documents, leases, charges or other documents adverse to such interest.

The grounds on which the application is premised appear on the face of it as follows;

**“A. THAT the applicant has an arguable appeal for the reasons inter alia that:-**

**(a) THAT the learned judge erred in law and in fact in finding that a transfer document purportedly signed by a deceased person after his death can pass a good title.**

- (b) THAT the learned judge erred in law in her interpretation of sections 23,24,25 and 80 of the Land Registration Act 2012, in complete isolation of Section 26(1) (b) thereof.
- (c) THAT the learned judge erred in law and in fact in failing to find that the appellant had a prima facie case with overwhelming chances of success.
- (d) THAT the learned judge erred in law and in fact in failing to find that when the subject matter pertains to an undissolved estate, an award of damages cannot suffice.
- (e) THAT the learned judge erred in interpreting the balance of convenience in favour of furthering an illegality.
- (f) THAT the learned judge erred in fact in finding that a trespasser is in “occupation” *vis- a - vis* the legal title holder being in possession.
- (g) THAT learned judge erred in law and in fact in acknowledging that the sale transaction was incomplete at the time of the deceased’s death and then went on to validate the same as complete.
- (h) THAT the learned judge erred in law in upholding the subject matter as being part of the deceased’s property (1<sup>st</sup> respondents husband) without due observance of the law of succession.
- (i) THAT the learned judge erred in law in failing to uphold the object of clause 32 of the practice directions on proceedings in the Environment and Land Court (Gazette Notice No. 5178 of 28<sup>th</sup> July 2014).
- (j) THAT the learned judge erred in fact in failing to appreciate the dismissal of the 1<sup>st</sup> respondent’s suit against the appellant in H.C.C. No. 1555 of 2000.
- (k) THAT the learned judge erred in law and in fact in failing to find that the respondent has been duly charged in a criminal case over forgery pertaining to the title to the subject matter.
- (l) THAT the learned judge erred in law and in fact in dismissing the notice of motion in issue by considering matters which are to be conversed (sic) at the trial and thereby prematurely deciding the suit.

**B. The appeal will be rendered nugatory if an injunction is not granted for the reasons inter alia that:**

- (i) The respondents will upon reliance on the ruling sell, transfer, charge and/or deal with the property and render the intended appeal nugatory.”**

By way of evidence the application is supported by the affidavit of the applicant expressed as sworn on 24<sup>th</sup> October 2014. In it the applicant expounds on the grounds on the motion and attaches documentary proofs of some of the matters including, significantly, a death certificate showing that the deceased died on 25<sup>th</sup> April 1996 and a transfer dated 29<sup>th</sup> December 2010 purported to be executed by the same deceased.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the application by way of replying affidavits. The 1<sup>st</sup> respondent, who is the widow and administrator of the estate of one David Karanja Kagima swore that her late husband had entered into a legally binding agreement with the deceased whereunder he purchased the suit property from the deceased and paid the purchase price in full. She swore further that she presented the

transfer documents for registration and averred that she passed a clean title to the 2<sup>nd</sup> respondent.

On his part the 2<sup>nd</sup> respondent, Stephen Antony Mwangi, swore an affidavit on 9<sup>th</sup> December 2014 in which he stated that he purchased the suit property from the 1<sup>st</sup> respondent, paid the sale price in full and proceeded to invest and develop the property to the tune of over Kshs. 4 million. He described himself as an innocent purchaser for value who had no knowledge of the fraud alleged to have been perpetrated by the 1<sup>st</sup> respondent. He characterized the application for injunction as an attempt to relieve the estate of the deceased of its contractual obligations which should not be given judicial sanction. He therefore prayed that the application be dismissed.

At the hearing of the application Mr. Nzamba Kitonga learned, senior counsel appeared with Mr. Ngugi for the applicant, while Mr. Kamunde held brief for Ms. Wangari for the 1<sup>st</sup> respondent. Mr. P.K. Murimi learned counsel appeared for the 2<sup>nd</sup> respondent. Mr. Kitonga lampooned the entire transaction by which the 1<sup>st</sup> respondent became owner and subsequently transferred the suit property to the 2<sup>nd</sup> respondent as fraudulent for being founded on fraud in lent or forged documents. The identity card presented with the transfer bore a picture that was not the deceased's and the PIN certificate presented as the deceased's was not his. These acts of forgery states Senior Counsel, were the subject of Criminal Proceedings against the 1<sup>st</sup> respondent being Nairobi Criminal Case No. 230 of 2013. He therefore posited that the learned judge of the High Court ought to have granted the injunction the applicant sought as the title documents that the respondents put reliance on were obtained through an illegal scheme and could not avail much. So stating, Senior Counsel concluded that the applicant does have a patently arguable appeal and unless the injunction sought is granted, the same is likely to be rendered nugatory.

Opposing the application, Mr. Kamunde submitted that the application ought to fail as the applicant had not shown what danger there was that the suit property may be disposed of. This had not happened notwithstanding that there were no interim orders granted by the High Court. Counsel further argued that the applicant's appeal is not arguable, dismissing it as an academic exercise and urging us to dismiss it with costs.

As for Mr. Murimi, he pitched his case on the fact that the 2<sup>nd</sup> respondent was a *bona fide* purchaser for value who had done a search on the title as part of due diligence and had no way of knowing that there was any defect in the 1<sup>st</sup> respondents title. He urged us to give effect to his property rights under the Constitution and hold the title he acquired as good and effectual. He submitted further that the appeal would not be rendered nugatory in any event since the suit property is quantifiable and the applicant can be compensated in damages.

In a brief rejoinder, Mr. Kitonga submitted that he 2<sup>nd</sup> respondent's arguments hold no water as the Land Registration Act at **Section 80(2)** does empower the court to order rectification of the register and that under **Section 26(1)**, a party need not have been a party to the fraud, illegality or corrupt scheme in order for his title to be defeated if those elements are established.

The principles upon which an application under **Rule 5 (2) (b)** for interim relief pending appeal is determined are old hat. As stated in cases too many to mention, an applicant must first show that he has an arguable appeal. The appeal does not have to be one that necessarily succeeds. It is enough that it raises a *bona fide* point or issue to be urged and which needs to be answered on appeal. A single such point, which shows that the appeal is not a hollow or frivolous one, is enough. See **STANLEY KANGETHE KINYANJUI Vs. TONNY KETTER & 2 OTHERS** [2013]e KLR. **DAVID MORTON SILVERSTEIN Vs. ATSANGO CHESONI** [2002] 1 KLR 867.

The second aspect that an applicant must satisfy, and he must satisfy both, is that if the stay or injunction sought is not granted, the appeal is likely to be rendered nugatory. The term 'nugatory' has to be given its full meaning. (See **RELIANCE BANK LTD Vs. NORLANE INVESTMENTS LTD**) [2002] 1 EA 227) and it means an appeal that is likely to become a mere academic exercise, its success empty and of no practical use by reason of the harm feared having already occurred in the intervening period.

It is also to be remembered that the Court decides each case on its own merits with due consideration for its peculiar facts the object always being the doing of substantial justice in the Court's exercise of its discretion which is free, wide and unfettered but to be exercised judiciously on the basis of sound principle, not capriciously at a whim.

Bearing all of those principles in mind, we harbor no doubt whatsoever that this application is for granting. There can be no question at all about the arguability of the intended appeal. The grievances captured in the memorandum of appeal and in the face of the motion are not insubstantial. It cannot seriously be contended that a challenge to documents purporting to have been executed by a person long after he departed this life is an idle one. It is not frivolous. The allegations of fraud and forgery leading to the arrest and prosecution of the 1<sup>st</sup> respondent cannot be ignored as amounting to nothing. These and several others are arguable points easily discernible from the material placed before us.

As to the second principle, that the appeal could be rendered nugatory, we stand equally satisfied. The applicant is full of valid apprehension that the property could, unless this Court intervenes, be sold, transferred, conveyed or otherwise dealt with to the applicant's detriment. Were such a fear to materialize, the property would be beyond the reach of the applicant and the appeal would be a mere going-through-the-motions. Such a result should not be countenanced by a court of law and equity which ought to preserve the substratum of its proceedings. The possibility of such alienation is not remote nor its fear far-fetched given the manner in which transfer documents are alleged to have been executed in the matter.

In all the circumstances of this case, we consider it to conduce to the doing of justice that the property should be preserved inviolate and the *status quo* maintained for that purpose. The application is accordingly granted in terms of prayers 1 and 2. The intended appeal shall be filed within Sixty (60) days of the date hereof failing which the orders will automatically lapse.

Costs shall be in the intended appeal.

***Dated and delivered at Nairobi this 13<sup>th</sup> day of March, 2015.***

**P.M. MWILU**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**