



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWERA & OUKO, J.J.A)

CIVIL APPLICATION NO. 263 OF 2013 (UR 191/2013)

BETWEEN

HARRISON WAMBUA MUSYOKA APPLICANT

AND

JOHN NJUGUNA MURUGI 1ST RESPONDENT

EMELIA ANNE MBAIRE MURATHE 2ND RESPONDENT

HOUSING FINACNE COMPANY OF KENYA 3RD RESPONDENT

THE REGISTRAR OF TITLES 4TH RESPONDENT

(Being an application for injunction and stay of execution of the Ruling and Order of the High Court of Kenya at Nairobi, (G.B.M. Kariuki, J as he then was) delivered on 29th November, 2012

in

H.C. SUCCESSION CAUSE NO. 1940 OF 1998)

RULING OF THE COURT

On 29th November, 2012 the High Court (G.B.M. Kariuki, J. as he then was) delivered a ruling in which he allowed the 1st respondent's application for revocation of the grant of letters of administration intestate made to the 1st and 2nd respondents in respect of the estate of their mother, the late of Mary Murugi John. The learned Judge also ordered that the registration of the revoked grant of letters of administration, the transfer of L.R. No. 12149/30 to the applicant, the charge and further charge to Barclays Bank of Kenya all be cancelled by the Registrar of Titles, Nairobi. Finally, the court ordered that the suit property be restored to the name of the deceased, Mary Murugi John. The charge in favour of Housing Finance Company of Kenya, the 3rd respondent was, however, not affected.

The background to this dispute may be outlined briefly as follows:-

The deceased, Mary Murugi John died on 20th April 1998 and was survived by a daughter, the 2nd

respondent and a son, the 1st respondent. Among her properties was LR. No. 12149/30, the subject matter of the dispute. Following her death, it is alleged that the respondents obtained a grant of probate in Nbi. H.C. Succession Cause No. 1940 of 1998 which was subsequently confirmed on 28th September, 2000. In the certificate of confirmation, the suit property was to be held jointly by the respondents in equal shares.

The respondents contended that upon the death of the deceased, the applicant who was the late Mary Murugi John's estate agent and with whom the 2nd respondent lived as man and wife, took advantage of his position as an estate agent, the cohabitation with the 2nd respondent and the latter's naivety to cause the property to be transferred to himself, after obtaining a grant of letters of administration in the names of the two respondents; that the applicant has charged the property to Housing Finance Company of Kenya (the 3rd respondent). Initially, the 1st respondent filed an action in the High Court being Milimani Commercial Courts HCCC No. 439 of 2010 against the applicant, the 2nd, 3rd and 4th respondents claiming that the grant of probate was fraudulently obtained as he (the 1st respondent) was only 12 years of age at the time; that his signature on the statutory declarations and other documents were forgeries; that the grant was obtained by concealment of a material fact, that the deceased had left a written will; that through collusion and connivance the applicant and the 2nd respondent transferred the suit property to the former. In the result, the 1st respondent asked, among other things, that the applicant be permanently restrained by an order of injunction from transferring or dealing with the suit property; that it be declared that the transfer of the property to the applicant was fraudulent, null and void; that the applicant be ordered to effect a retransfer to the 1st and 2nd respondents.

At the same time, the 1st respondent applied by summons in H.C. Succession Cause No. 1940 of 1998 that the grant issued to him and the 2nd respondent be revoked and the Registrar of Titles be directed to rectify the register.

We have said that Nbi. H.C. Succession Cause No. 1940 of 1998 and HCCC No. 439 of 2010 were consolidated. In considering the application for revocation of the grant, now in the consolidated action, the High Court (GBM Kariuki, J, as he then was) found that the 1st respondent had established the grounds for revocation of the grant in terms of **section 76** of the Law of Succession Act and proceeded to issue the orders alluded to earlier.

The applicant intends to challenge the decision of the High Court to this Court as evinced by a notice of appeal and a draft memorandum of appeal annexed to this application.

In the meantime, he brings the present application invoking the powers of this Court under **Rule 5 (2) (b)** of its Rules for orders that pending the hearing and determination of the intended appeal, this Court orders that execution of the orders arising from the impugned decision of the High Court be stayed and further that this Court restrains the 1st and 2nd respondents by an order of temporary injunction from charging, selling or in any other manner interfering with the suit property.

In opposing the application, Mr. Ongicho, learned counsel for the 1st respondent maintained that the application is belated and has been brought after an inordinately long delay; that the intended appeal is not arguable and that the applicant can be compensated in damages. The 2nd respondent supported this application.

Arguing the application before us, Mr. Ombwayo, learned counsel for the applicant drew our attention to the fact that the prayer for stay of execution has been overtaken by events as the title to the suit property has reverted to the estate of the late Mary Murugi John and the register rectified. Accordingly and quite properly, in view of those events, he asked us to consider only the prayer for an order of temporary injunction.

An injunction is a discretionary relief and the twin principles upon which this Court will exercise that discretion in favour of an applicant are well known but bears repeating; that the appeal or intended appeal

must be arguable and not frivolous and secondly, that unless the order of injunction or stay is granted the appeal or intended appeal will be rendered nugatory. See **Ishmael Kagunyi Thande V. HFCK Ltd** Civil Application No. 157 of 2006.

To satisfy the first ground, learned counsel for applicant cited four points that in his view make the intended appeal arguable. First, he submitted that the identity of the 1st respondent was not conclusively determined since he is variously referred to in the proceedings before the High Court as John Njuguna Mwatha, John Njuguna Mbaire and John Njuguna Murugi; that this is a matter that could not, as the learned Judge of the High Court did, be determined on affidavit evidence. This is an important point in considering the issue of the 1st respondent's age at the time of the transaction leading to the transfer of the suit property.

Secondly, learned counsel argued that there was no basis for the finding that there was undue influence exerted by the applicant on the 2nd respondent. Next, that the High Court failed to consider that the applicant had protection under the provisions of **Section 93 (1)** of the Law of Succession Act and his title to the suit property could not be impeached. Finally, it was contended that the suit was caught up by the Limitation of Actions Act.

The applicant was not obligated to cite more than one arguable point in order to discharge the burden under the first principle. We, for our part are satisfied that the points enumerated above meet the requirement of the first principle under of **Rule 5 (2) (b)** of the rules. The applicant is required, in addition to satisfy the second limb.

The applicant has asked us to consider the development he has undertaken on the property whose current value he has given as Kshs. 47,000,000/-; that the property is charged to the 3rd respondent; that the property having reverted to the estate of the late Mary Murugi John, the 1st and 2nd respondents as her only heirs may as soon as they obtain a grant of representation, dispose of the property to his detriment.

Once more, we are persuaded that if an injunction is not issued in the terms sought, the appeal, for the reasons advanced by the applicant, will be rendered nugatory. We, in the circumstances grant an order of injunction in terms of prayer 4 of the motion dated 17th September 2013.

Costs will be costs in the appeal.

Dated at Nairobi this 21st day of March 2014.

E.M. GITHINJI

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

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

REGISTRAR

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