



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A.)**

**CIVIL APPLICATION NO. 46 OF 2013**

**BETWEEN**

**SELINA MECCA WEKESA ..... APPLICANT**

**AND**

**KENNEDY ELLAM WEKESA (sued as the Personal**

**Representative of the Estate of**

**GEORGE ELLAM WEKESA (DECEASED) .....1ST RESPONDENT**

**PROTUS MAKENZI .....2ND RESPONDENT**

**JARED WANJALA MMASABA ..... 3RD RESPONDENT**

**SHIKANGA BENJAMIN WAMBUYA ..... 4TH RESPONDENT**

**ATTORNEY GENERAL (sued on behalf of the**

**LAND REGISTRAR BUNGOMA DISTRICT ..... 5TH RESPONDENT**

***(An Application for restraining Orders against the Respondent from disposing, fencing***

***of the suit land parcels***

**in**

**H.C.C.C NO. 54 OF 2006)**

**\*\*\*\*\***

**RULING OF THE COURT**

Although the record before us is scanty as apparently several documents such as pleadings before the High Court at Bungoma in *Civil Case No. 54 of 2006* which the applicant in this Notice of Motion intends to appeal against, are not in the record before us, it is clear to us that the case that is still before Mombasa High Court *Civil Case No. 454 of 2002 (Originating Summons)* and the case that was before Bungoma High Court Civil Case No. 54 of 2006 involve members of one family and other people who allege to

have bought land from the original head of that family **George Ellam Wekesa** who had since passed on and was represented in the matter that was before Bungoma Court by his son **Kennedy Ellam Wekesa**.

Briefly, the applicant in the Notice of Motion dated 17th June, 2014 **Sellina Mecca Wekesa** was the wife of **George Ellam Wekesa**. They hailed from what is now Bungoma County, and had a piece of land there registered as **L.R. No. NDIVISI/MUCHI/1086** situated at or near Webuye. It was registered in the name of George Ellam Wekesa. The applicant and George were working in Mombasa where two other pieces of land were also acquired and were also registered in the name of the deceased.

The record shows, and it is not disputed, according to the record before us, that for some reasons there developed some cold feet between the applicant and her husband and that necessitated the applicant taking out Originating Summons against her husband George Ellam Wekesa in Mombasa Civil Case No. 454 (O.S.) of 2002, in which she sought *inter alia*:

*“That the Honourable court be pleased to make a declaration to the effect that all the property purchased or acquired by and registered in the name of George Ellam Wekesa during the period commencing January 1964 to date, and in particular, but without prejudice to the generality hereinbefore, the following:*

*(a) All that piece or parcel of land known or registered as MOMBASA BLOCK X/SECTION 97 MOMBASA ISLAND, situate at Tudor area of Mombasa.*

*(b) All that piece or parcel of land known or registered as LR No. NDIVISI/ MUCHI/1086 situated at or near Webuye in Bungoma District.*

*(c) All that piece or parcel of land known or registered as PLOT NO. 1140 MAINLAND NORTH, MOMBASA, situated at Port Reitz area of Mombasa.*

*(d) ..... (not relevant) were jointly so purchased and or acquired by the plaintiff and the defendant herein and are therefore the property of the plaintiff and the defendant jointly in equal shares.”*

That case is not finalised as yet but the applicant says and it is not challenged that she obtained orders of inhibition against the Land Registrar, Bungoma which were registered on 8th January, 2003, against title number NDIVISI/ MUCHI/1086. In her mind that order should have stopped the Land Registrar at Bungoma District from allowing and registering any transaction against that land parcel NDIVISI/MUCHI/1086. However, she says that was not to be. She was surprised to discover later, that without any lawful excuse or jurisdiction, that order of inhibition issued against the Land Registrar, Bungoma was removed from the Register and that land NDIVISI/MUCHI/1086 was subsequently subdivided into parcel numbers NDIVISI/MUCHI 6454, 6455, 6456, 6457, 6458, 6459, 6460, 6461, 6462 and 6463 and allocated to various parties some of whom are the respondents. She read fraud in that transaction and therefore moved to the High Court at Bungoma and filed Civil Case No. 54 of 2008 by way of a plaint which, according to the High Court judgment, was amended twice with the last amendment being made on 13th July, 2007. In that amendment, again from what appears in the judgment, the applicant sought judgment against the defendants jointly and severally for:

*“(i) A declaration that the subdivision of L.R. No. Ndivisi/Muchi/1086 into Nos. Ndivisi/Muchi/6454, 6455, 6456, 6457, 6458, 6459, 6460, 6461, 6462, 6463 plus their subsequent transfers to the Defendants is null and void.*

*(ii) Nullification or cancellation of the subdivision of L.R. No. Ndivisi/Muchi/1086 into Ndivisi/Muchi/6454, 6455, 6456, 6457, 6458, 6459, 6460, 6461, 6462, 6463 and the subsequent transfers plus title deeds thereto and restoration of the original L.R. Ndivisi/Muchi/1086.*

*iii. Eviction orders to remove the 4th defendant's structures from land parcel No. Ndivisi/Muchi/6457, 6458, and 6459.”*

This suit was brought against **Kennedy Ellam Wekesa** who was sued as personal representative of the estate of **George Ellam Wekesa** – deceased, **Sarah Chahayo, Protus Makenzi, Jared Wanjala Mmasaba, Richard Ochieng**, sued as **chairman and/or official of Church of Christ in Africa, Shikanga Benjamin Wambuya, Land Registrar, Bungoma District, Attorney General** on behalf of the **Land Registrar Bungoma District, first, second, third, fourth, fifth, sixth, seventh and eighth** respondents respectively. Before the hearing commenced, the record shows that the second and the fifth defendants in that case namely Sarah Chahayo and Richard Ochieng sued as Chairman and/or official of the Church of Christ in Africa respectively entered into a consent order with the applicant and thus the learned Judge did not consider the case against them. Second defendant was registered as the owner of L.R. No. Ndivisi/Muchi/6455 and the fifth defendant was registered as the owner of Ndivisi/Muchi/6456. Thus the case in the High Court proceeded against Kennedy Ellam Wekesa as the personal representative of his late father George, Protus Makenzi, Jared Wanjala Mmasaba, Shikanga Benjamin Wambuya and the Attorney General sued on behalf of the Land Registrar, Bungoma District.

After full hearing, the learned trial Judge, Omolo, J. in a lengthy judgment dated and delivered on 6th July 2014, dismissed the applicant's claim as against the 3rd, 4th and 6th respondents. These were Protus Makenzi, Jared Wanjala Mmasaba and Shikanga Benjamin Wambuya who are in this application the second, third and fourth respondents.

The applicant felt aggrieved by that judgment. She intends to appeal against it and has filed Notice of Appeal dated 9th June, 2014. In the meanwhile, the applicant has also filed this Notice of Motion dated 17th June, 2014 against Kennedy Ellam Wekesa, in his representative capacity, Protus Makenzi, Jared Wanjala Mmasaba, Shikanga Benjamin Wambuya and the Attorney General, being 1st, 2nd, 3rd, 4th and 5th respondents respectively in which she is seeking six orders. However before us, Miss Mumalasi, the learned counsel for the applicant in her address to us sought only orders in respect of three prayers which she identified as prayers (d) (e) and (f) in the Notice of Motion. We will therefore confine ourselves to these three prayers which were:

*“(d) That the Respondents be restrained jointly and severally by themselves, their servants, agents, workers and or anyone claiming through them from disposing off, fencing off, developing, alienating and or in any other way dealing with the suit lands registration numbers Ndivisi/Muchi/6457, 6458, 6459, 6460, 6461, 6462 and 6463 to the detriment of the applicant, pending hearing and determination of the intended appeal.*

*(e) That, an inhibition order do issue inhibiting the Land Registrar, Bungoma from registering any transfer, charge, dealings or any transactions on land parcel numbers Ndivisi/Muchi/6457, 6458, 6459, 6460, 6461, 6462 and 6463 pending the hearing and determination of the intended appeal.*

*(f) That costs of this application be provided for.”*

The brief grounds in support of that application as can be deciphered from the grounds annexed to it and the affidavit in support sworn by the applicant, are that the applicant claims ownership of the original suit land parcel No. NDIVISI/ MUCHI/1086 by contribution; that the applicant in her intended appeal will raise arguable appeal as that parcel of land was fraudulently subdivided and shared out to the respondents in disobedience of a court order issued in Mombasa court which had made an order inhibiting Land Registrar Bungoma from registering any transaction against that land parcel. She therefore felt her intended appeal is not frivolous. Further she fears that if the orders sought are not granted, the respondents or any of them may dispose of their parcels to third parties and thus the success of the intended appeal will be rendered nugatory.

In her address to us Miss Mumalasi in effect highlighted the same grounds. She referred us to the annexed Memorandum of Appeal and submitted that the trial court did not direct its mind to the provisions of **Sections 26 and 80** of the Land Registration Act. She also referred us to this Court's decision in the case of **Lawrence P. Mukiri Mungai as Attorney of Francis Muroki Mwaura vs Attorney General & others** and asked us to apply the same principles in the matter before us.

The first, second, and fourth respondents, though served with the hearing notice for the hearing of the application on 23rd July, 2014, and there was affidavit of service to that effect, were absent on the date of hearing. They and for that matter, none of the respondents filed any replying affidavit opposing the application. Mr. Wakoli, the learned counsel for the third respondent and Mr. Maroro for the fifth respondent, did not oppose the application.

We have anxiously considered this application, the affidavit in support, the record, submissions and the law. It is brought under Rule 5 (2) (b) of this Court's Rules. The court, in considering such an application, exercises original jurisdiction and in doing so, has unfettered discretionary powers. But like all judicial discretionary powers, the same must be exercised judiciously and not on the whims of the court or capriciously. For an applicant in such an application to succeed he must demonstrate to the court that the appeal or the intended appeal as is the case here, is not frivolous, that is that the intended appeal is arguable and secondly and in addition to that, he must satisfy the court that were the intended appeal to succeed, the success would be rendered nugatory unless the injunction sought is granted. Both limbs must be demonstrated to the satisfaction of the court before the orders sought can issue – see the cases of **Ishmael Kagunyi Thande vs. HFCK** – Civil Application NAI No. 157 of 2006 and **Reliance Bank Ltd vs. Norlake Investments Ltd (2002) 1 EA 227**. In the case of *Ishmael Kagunyi Thande vs Housing Finance Company of Kenya Ltd, (supra)*, this Court stated as follows:-

**“The jurisdiction of the court under Rule 5 (2) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”**

We have perused the judgment annexed. We have read the draft grounds of appeal annexed which are erroneously referred to as Memorandum of Appeal, as no appeal has as yet been filed. We have considered the lengthy history of the matter as appears in the sketchy record before us. In our view whether fraud was proved by the appellant against all respondents and the effect of the learned Judge's finding on the same upon her final judgment are arguable matters that this Court should ventilate when the intended appeal is filed and comes up for hearing.

Thus we have no doubt in our minds that the intended appeal is arguable as in any event even if only one arguable point is shown, the proof required for that purpose is satisfied.

What about the issue as to whether the appeal, if it succeeds, the success would be rendered nugatory were we to decline to grant the orders sought in this Notice of Motion? In our view, and having considered the history of the matter, we cannot rule out the fear entertained by the applicant that were we to refuse this application, the respondents or some of them may be tempted to dispose of the suit property or properties to third parties such that by the time the intended appeal is filed and heard, the same subject property or properties may be out of the applicant's reach and thus the success of the intended appeal were it to succeed will most likely be rendered nugatory.

In the result, the two limbs are satisfied and the applicant is entitled to the orders sought in prayers (d) and (e). The respondents are each restrained jointly and severally by themselves, their servants, agents, workers and/or anyone claiming through them from disposing off, fencing off, developing, alienating and/or in any other way dealing with the suit lands registration numbers **NDIVISI/ MUCHI/6457, 6458, 6459, 6460, 6461, 6462** and **6463** to the detriment of the applicant, pending the hearing and determination of the intended appeal and further an inhibition be and is hereby issued inhibiting the Land Registrar, Bungoma County from registering any transfer, charge, dealings or any transactions on land parcel Nos. **NDIVISI/ MUCHI/6457, 6458, 6459, 6460, 6461, 6462** and **6463** pending the hearing and determination of the intended appeal. The first, second, and third respondents to pay costs of the Notice of Motion. Orders accordingly.

**Dated and Delivered at Kisumu this 19th day of September, 2014.**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**