



**Mundu (Suing on behalf of Elly Mundu Olangi) v Miduri (Suing on behalf of Albert Miduri Olang) (Civil Appeal (Application) 46 of 2020) [2024] KECA 873 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KECA 873 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL (APPLICATION) 46 OF 2020  
HM OKWENGU, SG KAIRU & HA OMONDI, JJA  
JULY 19, 2024**

**BETWEEN**

**MOSES OKIYA MUNDU (SUING ON BEHALF OF ELLY MUNDU OLANGI) ..... APPELLANT**

**AND**

**POLYCARP ONYANGO MIDURI (SUING ON BEHALF OF ALBERT MIDURI OLANG) ..... RESPONDENT**

*(An application for stay pending the hearing and determination of the appeal against the judgment and decree of the High Court of Kenya at Kisumu (Cherere, J.) delivered on 31st October 2019 in High Court Succession Cause No. 214 of 2008)*

**RULING**

1. In his application before us dated 7<sup>th</sup> December 2023, the applicant, Moses Okiya Mundu, on behalf of the original appellant Elly Mundu Olang, seeks an order under Rule 5(2)(b) of the [Court of Appeal Rules](#) that pending the hearing and determination of the appeal herein, the “Court be pleased to stay execution of and the giving of effect to the judgment of Hon. Lady Justice T. W. Cherere delivered on the 31<sup>st</sup> of October 2019 at Kisumu in High Court Succession Cause 214 of 2008 in the matter of the estate of Manasse Olang Oriewo (Deceased) and any consequential orders arising therefrom.”
2. In that judgment the High Court confirmed the grant of letters of administration and distributed the estate of the deceased Manasse Olang Oriewo. In doing so, the High Court ordered the cancellation of the title in respect of the property known as Kisumu/Muhoroni/863 and all resultant titles Kisumu/Muhoroni/1314, 1315 and 1316 for the same to revert to the ownership of the deceased as well as the cancellation of Kisumu/Muhoroni/918 which was ordered should also revert to the name of the deceased.



3. Aggrieved, Elly Mundu Olang filed a notice of appeal and subsequently lodged a memorandum and record of appeal herein on 13<sup>th</sup> March 2020 on which the present application is hinged. Elly Mundu Olang died on 7<sup>th</sup> October 2020 during the pendency of this appeal. By operation of Rule 102(2) of the Court of Appeal Rules the appeal abated. However, based on an application dated 31<sup>st</sup> October 2022, the Court (Mumbi Ngugi, JA) in a ruling delivered on 27<sup>th</sup> October 2023 revived the appeal and Elly Mundu Olang substituted with the present applicant Moses Okiya Mundu.
4. Based on an affidavit of service on record, the present application was served on the advocates for the respondent on 11<sup>th</sup> December 2023, but no response was filed on behalf of the respondent. We heard the application on 4<sup>th</sup> March 2024 when learned counsel Mr. G. Odongo appeared for the applicant. There was no appearance for the respondent despite notice of hearing having been served and neither were submissions filed in opposition to the application.
5. Nonetheless, the applicant has a duty to satisfy the Court that the appeal is arguable and that should the Court decline the orders sought, and the appeal is ultimately successful, the same will be rendered nugatory. See Stanley Ng’ethe Kinyanjui vs. Tony Ketter and 5 others [2015] eKLR. In that regard Mr. Odongo relied on the grounds on the face of the application and on the memorandum of appeal in urging the Court to exercise its discretion in favour of the applicant and grant the orders sought.
6. The main grievance, it would appear, is that the learned Judge distributed property that did not comprise part of the estate of the deceased and that the trial court disregarded evidence in that regard. Mindful as we are that an arguable appeal is not one that will necessarily succeed, we do not think the appeal is frivolous. It is arguable.
7. On the nugatory aspect, the applicant states that the decree in respect of the impugned judgment has already been extracted and served on the relevant land registries resulting in cancellation of titles of third parties said to be bona fide purchasers for value; that the third parties are in occupation and have heavily invested on the properties having constructed permanent residencies thereon and buried loved one thereon.
8. In those circumstances, the order that commends itself to us, which we hereby make, is to order that the status quo obtaining as at the date of delivery of this ruling with regard to the properties known as Kisumu/Muhoroni/863, Kisumu/Muhoroni/1314, 1315 and 1316 and Kisumu/Muhoroni/918, shall be maintained pending the hearing and determination of the appeal.
9. Costs of the application shall be costs in the appeal.

**DATED AND DELIVERED AT KISUMU THIS 19<sup>TH</sup> DAY OF JULY, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**H.A. OMONDI**

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**JUDGE OF APPEAL**



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

Signed

**DEPUTY REGISTRAR**

