



REPUBLIC OF KENYA



**KENYA LAW**  
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**Rokocho & another v Chepkuyeng & another (Civil Application  
E112 of 2021) [2022] KECA 115 (KLR) (11 February 2022) (Ruling)**

Neutral citation: [2022] KECA 115 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E112 OF 2021  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
FEBRUARY 11, 2022**

**BETWEEN**

**ESTHER KABON ROKOCHO ..... 1<sup>ST</sup> APPLICANT**

**WILSON KIPRONO ROKOCHO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**KOBILO CHEPKIYENG ..... 1<sup>ST</sup> RESPONDENT**

**ESTHER KIPSAT ..... 2<sup>ND</sup> RESPONDENT**

*(Application for stay of further proceedings pending the hearing and determination  
of an intended appeal from the ruling of the High Court at Eldoret (Omondi,  
J.) dated 10th July, 2019 in Probate & Administration Cause No. 304 of 2007)*

**RULING**

1. The applicants Esther Kabon Rokocho and Wilson Kiprono Rokocho, by the motion dated 29<sup>th</sup> July, 2021 under Rule 5(2)(b) of the [Court of Appeal Rules 2010](#) seek, in the main, an order that;  
  
“3. This Honourable Court be pleased to stay further proceedings in Eldoret High Court Succession Cause No. 304 of 2007, Re Estate of Teriki Rokocho (Deceased) pending the hearing and determination of the intended appeal by the applicants against the ruling and orders of the High Court given on 10<sup>th</sup> July 2019”.
2. The motion is premised on grounds appearing on the face of it and a supporting affidavit dated 29<sup>th</sup> July, 2021, sworn by the 2<sup>nd</sup> applicant on behalf of the 1<sup>st</sup> applicant and himself.
3. At the hearing, Learned Counsel Mr Kibii and Mr Magut appeared for the applicants and for the respondent respectively, and relied on their filed submissions.



4. The applicants' case is that on 10<sup>th</sup> July, 2019 the High Court dismissed their application seeking to strike out proceedings in Eldoret High Court Succession Cause No. 304 of 2007, Re Estate of Teriki Tapkigen Rokocho. They now seek to stay further proceedings in that matter pending the hearing and determination of the intended appeal against that decision. The proceedings sought to be stayed were scheduled for hearing on 4<sup>th</sup> October, 2021 hence the applicant contended that if stay was not granted the intended appeal would be rendered nugatory. The applicants further asserted that they have an arguable case being that, the deceased was not an absolute owner of the suit property. Rather, her registration was in trust for the 2<sup>nd</sup> applicant and therefore the suit property was not part of her estate and was not available for distribution.
5. The respondents countered the applicants' assertions submitting that they had failed to prove both guiding principles for stay applications, namely, arguability of the appeal and the nugatory aspect. They complained that after the filing of notice of appeal on 22<sup>nd</sup> July, 2019, no substantive appeal had been filed to date on the basis of which a stay could be issued. The respondents further argued that it was best for the hearing in the High Court to continue in order for the applicants to demonstrate their claim. Moreover, the respondents are aged over 80 years and any further delay may deny them the opportunity to testify in court as they may have gone senile.
6. An application such as is before us seeks the exercise of the Court's discretion. The principles upon which we exercise such discretion are well-settled. First, the applicant must persuade the Court that he has an arguable appeal, meaning one that raises a *bona fide* point worthy of judicial consideration, though it need not be one that must necessarily succeed. The applicant must also show that if the stay sought is not granted, the appeal will be rendered nugatory or trifling and of no effect, serving no purpose, by reason of the apprehended harm or loss having been suffered in the interim. It behoves an applicant to satisfy the Court on both limbs. See *Reliance Bank Limited -vs- Norlake Investments Limited [2002] 1 EA 227*.
7. Regarding arguability of the appeal, we have considered the grounds of appeal as outlined in the memorandum of appeal, and it seems the main issue of contention is the learned Judge's failure to hold that the suit land in the succession proceedings was held by the deceased in trust for the 2<sup>nd</sup> applicant, was not part of the deceased's estate. We think this being a core issue, it will fall for determination by the learned Judge upon the hearing of the matter substantively on its merits. It is obvious that the learned judge properly exercised her discretion in allowing the parties to ventilate their case as opposed to striking it out as she had been moved to. The intended appeal does not show how the learned Judge wrongly exercised her discretion.
8. As the applicants have failed to persuade us on the arguability of the intended appeal, we need not trouble ourselves on whether it would be rendered nugatory. Moreover, we note that the proceedings that the applicants sought to stay were scheduled for 4<sup>th</sup> October, 2021, meaning that, this application has been overtaken by events.
9. Ultimately, the motion is devoid of merit and accordingly fails. It is dismissed with costs to the applicants.

**DATED AND DELIVERED AT KISUMU THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2022**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**



.....  
**JUDGE OF APPEAL**  
**F. TUIYOTT**

.....  
**JUDGE OF APPEAL**

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

*SIGNED*

**DEPUTY REGISTRAR**

