



Owano v Owano (Civil Application 9 of 2020) [2022] KECA 47 (KLR) (4 February 2022) (Ruling)

Neutral citation: [2022] KECA 47 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 9 OF 2020
PO KIAGE, J MOHAMMED & M NGUGI, JJA
FEBRUARY 4, 2022**

BETWEEN

PERES AUMA OWANO APPELLANT

AND

CHARLES OKELLO OWANO RESPONDENT

(n application for stay of execution of the judgment of the High Court of Kenya at Kisumu (Cherere, J) dated 31st October, 2019 in Kisumu Succession Cause No. 896 of 2007)

RULING

1. The application before us pertains to the estate of one Wilfrida Nyamori (deceased), who passed away on 4th April, 1971. The deceased's estate was alleged to comprise plot number 062-417 Songhor, which appears to be the suit property herein, now known as Ksm/Songhor/417. On 11th March, 2008, letters of administration intestate to the estate were granted to the applicant, Peres Auma Owano, who described herself as a sister of the deceased. The grant was subsequently confirmed in her favour and a Certificate of Confirmation of Grant issued on 21st May, 2010.
2. By an application dated 4th May, 2011 brought under section 76 of the *Law of Succession Act* and Rules 43 and 44 of the *Probate and Administration Rules*, one Dorina Atieno Owano (deceased) sought revocation of the Letters of Administration Intestate and the Certificate of Confirmation of Grant issued to the applicant. The application was made on the basis that the property belonged to her, and the letters of administration issued to the applicant had been obtained fraudulently. Dorina Atieno Owano passed away and was substituted with Charles Okello Owano, the respondent, by an order made on 7th February, 2018.
3. The application for revocation was heard by way of oral evidence. Briefly, the applicant's case before the trial court was that the deceased was her sister who was unmarried and had no child. The property in contention had been given to the deceased by her father and that upon the death of the deceased, it rightfully devolved to the applicant.



4. The respondent's response was that Plot No. 062-417 Songhor initially belonged to Wilfrida Nyamori but vide a letter dated 24th August, 1971 from the Director of Settlement, the suit property had been transferred to the respondent's grandfather, one Okelo Sidhe, after he purchased it from Wilfrida Nyamori. Subsequent to the death of Okelo Sidhe, the suit property was registered in the name of Dorina Atieno Owano.
5. In its decision, the High Court found that the property had been transferred from Wilfrida Nyamori to Okelo Sidhe to whom she had sold the land. Upon his demise, the property had been transferred to Dorina Atieno Owano. The property was therefore not part of the free property of Wilfrida Nyamori and was therefore not part of her estate. The court therefore proceeded to revoke both the Letters of Administration Intestate and the Certificate of Confirmation of Grant issued to the applicant on 11th March, 2008 and 21st May, 2010 respectively.
6. The applicant was dissatisfied with the decision of the High Court and it appears that she wishes to appeal against the said decision. She has filed the application before us dated 10th August, 2021 expressed to be brought under Rules 5, 45 and 47 of the *Court of Appeal Rules 2010* and Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules, 2010*. The latter provisions do not provide the procedural basis for an application such as is before us. She seeks the following substantive order from this Court:
 - “ 1....
 2. That pending the hearing and determination of the Appeal filed in this matter, there be a stay of execution of the orders of the judgment of the Honourable Chirere J dated 31/10/2021 in Succession Cause No.896 of 2007.”
7. The application is based on the grounds that in its decision, the trial court revoked the Confirmed Grant of Administration to the Estate of Wilfrida Nyamori issued to the applicant, the effect of which was to take away ownership of land parcel number Ksm/Songhor/417 belonging to the estate of the deceased. That following the revocation of the grant, the applicant has lodged a Notice of Appeal to this court intending to challenge the judgment of the High Court. The applicant avers that unless the orders sought herein are granted, the applicant stands to suffer substantial loss by way of losing the land that was bequeathed to her, and for which she completed the relevant loan repayments to the Settlement Trust Fund.
8. The applicant further contends that the question of ownership of the land was never canvassed before the trial court as it was not the proper forum but the court proceeded to make the impugned order. She avers that she has made the application on information that the respondent altered ownership of the subject land and is moving to transact on it, this appeal notwithstanding.
9. The respondent has filed grounds of opposition dated 14th October, 2021 in which he challenges the application primarily on the basis that the affidavit in support has been sworn by the applicant's Advocate instead of the respondent and the application is accordingly incompetent.
10. The provision of law under which applications for stay of execution should be lodged in this Court is Rule 5(2)(b) of the Court of Appeal Rules. The principles for grant of orders under the said rule were summarized in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR*. An applicant must show that he or she has an arguable appeal and that if stay is not granted, the same would be rendered nugatory. A fundamental jurisdictional prerequisite is that this Court becomes seized of an application under the said rule only after the Notice of Appeal has been filed under Rule 75 of the Court of Appeal Rules.



11. The applicant states in her affidavit in support of the application that she has filed an appeal against the decision of the High Court. We have however, perused the documents before us and have not found evidence of a Notice of Appeal having been filed.
12. In the absence of a Notice of Appeal filed in accordance with the requirements of Rule 75 of the Court of Appeal Rules, there is no competent application before us for consideration. Accordingly, we need not enter into an inquiry as to whether the applicant has an arguable appeal, and whether, if the order she seeks is not granted, the appeal will be rendered nugatory. We observe, however, that a cursory glance at the applicant's averments and submissions that she has filed before us shows that she has not in any event addressed herself to the requirements set out in Stanley Kangethe Kinyanjui v Tony Ketter & 5 others (supra). Instead, she has dealt with the question of substantial loss that a party is required to establish before the High Court in an application under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010, which, as we have stated, is inapplicable before us.
13. The application dated 8th August, 2021 is accordingly struck out with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF FEBRUARY, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

