



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Barua & another v Jerop (Civil Application E47 of 2021)
[2022] KECA 788 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KECA 788 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E47 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MAY 13, 2022**

BETWEEN

ELIZABETH BARUA 1ST APPLICANT

CHIWAI CHIRIBA AMANI 2ND APPLICANT

AND

MIRIAM JEROP RESPONDENT

(An application for stay of execution against the decision and orders of the High Court of Kenya at Malindi (Nyakundi, J.) delivered on 16th January 2020 in High Court Succession Cause No. 98 of 2016)

RULING

1. In a judgment delivered on 16th January 2020, pursuant to an application for revocation of grant of letters of administration, the High Court at Malindi (R. Nyakundi, J.) found that the respondent, Miriam Jerop and her son, DB, are dependants of the estate of George Chiwai Barua, deceased, pursuant to Section 29(a) of the *Law of Succession Act*; revoked the grant of letters of administration in respect of the estate of the deceased issued on 25th April 2017 in favour of the present applicants, Elizabeth Barua and Chiwai Chiriba Amani; ordered that a fresh grant of letters of administration in respect of the estate of the deceased be issued to the 1st applicant and the respondent; and issued a permanent injunction restraining dealings with the estate of the deceased pending the issue and confirmation of the grant of letters of administration in favour of 1st applicant and the respondent.
2. Having filed a notice of appeal dated 29th January 2020, the applicants, Elizabeth Barua and Chiwai Chiriba Amani, by their application before us dated 28th May 2021 seek an order, under Rule 5(2) (b) of the *Court of Appeal Rules*, for stay of execution of the said judgment, pending the hearing and determination of their intended appeal.



3. It was urged for the applicants, by learned counsel Mr. Odhiambo, that the intended appeal is arguable in that there is an issue whether the respondent, who was divorced by the deceased, is a dependant of the deceased with a right to inherit the deceased's property; that the intended appeal will be rendered nugatory as the respondent may take some of the properties of the deceased to the prejudice of the applicants; and that the respondent is not a person of means and would not be in a position to pay damages equivalent to the value of the properties she is likely to dispose of before the appeal is heard and determined.
4. Opposing the application, learned counsel for the respondent, Mr. Obaga referred to the respondent's replying affidavit in opposition to the application in which it is deposed that the application is overtaken by events as a grant of letters of administration in accordance with the impugned judgment was already issued and confirmed; and that a certificate of confirmation of grant was issued by the lower court on 10th August 2021 in which the respective shares of the estate as between the applicants and the respondent are already identified and that the application is made in bad faith.
5. Having considered the application, the affidavits and written submissions as orally highlighted by learned counsel against the applicable legal principles (see for instance *Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union (Kenya)* [2015] eKLR), and bearing in mind that an arguable appeal is not one that will necessarily succeed, we entertain doubt, in light of Section 29 of the *Law of Succession Act* which defines dependant to include "former wife", that the intended appeal is arguable. That, however, is for the Court to determine upon hearing of the appeal.
6. As to whether the intended appeal will be rendered nugatory if the orders of stay of execution are not granted, it has been demonstrated that the judgment has indeed been executed; that a joint grant of representation in respect of the estate of the deceased issued to the 1st applicant and the respondent was confirmed and the estate distributed between the named beneficiaries including the applicants and the respondent. In the circumstances, it would be in vain to order stay execution of the judgment. Moreover, based on the impugned judgment, no dealings in the estate could take place without involvement of the 1st applicant, a co-administrator, of the estate.
7. Consequently, the application dated 28th May 2021 fails and is hereby dismissed with no orders as to costs.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MAY 2022.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR

