



REPUBLIC OF KENYA



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**In re Estate of Solomon M'tumbiri M'munyua (Civil Application
E080 of 2021) [2022] KECA 754 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KECA 754 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E080 OF 2021
HM OKWENGU, F SICHALE & A MBOGHOLI-MSAGHA, JJA
JUNE 24, 2022**

IN THE MATTER OF THE ESTATE OF SOLOMON M'TUMBIRI M'MUNYUA

BETWEEN

GEOFFREY MURIITHI M'ITUMBIRI APPLICANT

AND

CATHERINE KIENDE MBAYA RESPONDENT

(Being an application for stay of execution of the ruling of the High Court of Kenya sitting at Meru (Gikonyo, J) delivered on 21st May, 2018 in Meru Succ. Cause 286 of 2007)

RULING

1. What is before us is an application for stay of execution of a ruling delivered by the High Court (Gikonyo, J), in a succession matter. In order to put the application in proper perspective we set out the background in detail.
2. The applicant Geoffrey Muriithi M'Itumbiri (Geoffrey) and the respondent Catherine Kiende Mbaya are both children of the late Solomon M'Itumbiri M'Munyua (the deceased), who passed away in 2012. Geoffrey petitioned for grant of letters of administration for the estate of the deceased whose estate he indicated as comprised of two properties namely; Ntima/Igoki/2531 and Kirua/Ruiru/3198). The grant was issued to him and confirmed on 16th June, 2008, both properties being distributed in his favour.
3. Catherine, who termed herself as an "interested party," filed an application dated 23rd May 2013, under section 76 of the *Law of Succession Act* for revocation of the grant issued to Geoffrey on the grounds that Geoffrey had obtained the orders by concealing material information from the court, namely; leaving out a third property Plot No. 3B Makutano, which belonged to the deceased, and failing to disclose to the court that Catherine and her sister Jane Karwitha were also beneficiaries to the deceased's estate.



- Catherine denied allowing Geoffrey to deal with the deceased's estate on her behalf, and termed any documents in that regard as forgeries.
4. In response to the application Geoffrey contended that Plot No.3B Makutano was jointly owned by him and the deceased, and consequently, that the deceased's interest was extinguished through his death and the property vested in Geoffrey. He further stated that Plot No. 3B Makutano was no longer available as it was transferred to a company; and that Catherine and her sister were aware of the succession matter, and had given him the go ahead to pursue the matter as the deceased had already divided to each child a portion of the estate during his lifetime.
 5. Upon hearing the application, the learned Judge delivered a judgment on 18th April 2016 in which he found that Catherine was not notified of the succession proceedings nor did she give her consent for Geoffrey to obtain the grant. The learned Judge concluded that the grant issued to Geoffrey was obtained irregularly through fraud and contrary to the law. He therefore revoked the grant, set aside the confirmation, and issued a fresh grant in the joint names of Geoffrey and Catherine; and directed Geoffrey to file an inventory of the deceased's properties as well as an application for confirmation of the joint grant.
 6. Subsequently, Catherine filed an application for confirmation of the joint grant contending that Geoffrey had refused to cooperate. She proposed her own mode of distribution of the deceased's estate among the three siblings. The application came before the learned Judge who confirmed the grant on 23rd November 2016 and approved the distribution proposed by Catherine.
 7. Geoffrey being aggrieved filed an application dated 20th December 2016 in the High Court, primarily seeking to set aside the orders given on 23rd November 2016 on the grounds that the orders were made in his absence and that of his advocate as there was a communication breakdown between him and his advocate, and he was not aware of the application dated 20th June 2016 nor the hearing date of 23rd November 2016. Geoffrey stated that the advocate was served with the application for confirmation of grant but it was misplaced and not diarized.
 8. Catherine opposed the application maintaining that Geoffrey was dishonest, as he had failed to adhere to previous court orders, and this forced her to file the application for confirmation of the grant. She termed the applicant's motion as an abuse of the court process.
 9. Having heard the application, the learned Judge delivered a ruling on 21st May 2018 in which he dismissed the applicant's motion dated 20th June 2016 stating that the court's main concern is to do justice to the parties, and the court could not exercise its discretion in favour of a party who had deliberately attempted to delay the course of justice. The learned Judge also found that Geoffrey and his advocate were careless and negligent, and had given no good reason to justify the setting aside of the orders.
 10. By a notice of appeal dated 28th May 2018 Geoffrey moved to this Court. On 1st September 2021, Geoffrey filed a Notice of Motion seeking orders to stay execution of the ruling of the High Court said to be made on 23rd May 2018 and all consequential orders, and a further order restraining the respondent and her agents from alienating, subdividing and or disposing of Ntima/Igoki/2531 pending the hearing and determination of the intended appeal. This is the application now before us.
 11. The grounds posited by Geoffrey in the application are: that an application for stay at the High Court was denied; that the grant was confirmed at an ex parte hearing; that Catherine has obtained orders for the Deputy Registrar to sign transfer documents regarding parcel Ntima/Igoki/8395 which is the subject of the appeal with the intention of Catherine disposing of the same; and that the grant was unprocedurally confirmed ex parte. Geoffrey disputed service of the application for confirmation of



grant and pointed to anomalies in the dates reflected in the process server's affidavit. For instance, service is said to have been done on 9th January 2016, while the application is dated 20th June 2016. That the delay in making the application is not unreasonable as Geoffrey learnt of the dismissal of his application in the High Court on 13th August, 2021; and that Catherine will not be prejudiced if the orders sought are granted.

12. Geoffrey filed submissions dated 17th September 2021, in support of the motion, in which he urged the Court to allow his application. He argued that if the suit property is subdivided and disposed of, his appeal will be rendered nugatory.

13. Catherine filed a replying affidavit sworn on 20th September, 2021 in which she opposed the motion and termed it a waste of the court's valuable time. She argued that Geoffrey had already received property from their father and that the suit property had already been subdivided. Catherine submitted that service of the summons for confirmation of the grant was properly done, and was not challenged in the earlier application that sought to set aside the confirmed grant. She accused Geoffrey of trying to mislead the Court and urged that he was not deserving of the orders sought.

She argued that litigation must come to an end, and therefore the applicant's motion should be dismissed.

14. We have carefully considered Geoffrey's motion, the contending submissions filed by the parties, and the oral highlights. The issue is whether under Rule 5(2)(b) of the *Court of Appeal Rules* Geoffrey has met the threshold for grant of the orders of stay of execution and temporary injunction that he seeks.

15. In *Attorney General vs Okiya Omtatah Okoiti & Another* [2019] eKLR, this Court (Okwengu, Sichale & J. Mohammed JJ.A), reiterated the threshold for grant of stay of execution under Rule 5(2)(b) of the Court Rules as follows:

“The principles for our consideration in the exercise of our unfettered discretion under Rule 5(2)(b) to grant an order of stay are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory.

...

Further, in *Gitirau Peter Munya vs. Dickson Mwenda Kithiji & 2 Others* [2014] eKLR (a decision cited by the applicant), the Supreme Court of

Kenya added a third consideration, this being whether it is in the public interest that the order of stay be granted.”

16. In *Stanley Kangethe Kinyanjui v Tony Ketter & Others* [2103] eKLR, the Court (W. Karanja, Ouko & Kiage JJ. A) explained that:

“vii In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.

viii. An applicant must satisfy the Court on both the twin principles.

viii. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.



- xi. In considering an application brought under Rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.
 - xi. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - xi. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”
17. With the above principles in mind, we note that Geoffrey contends that he has an arguable appeal against the Ruling intended to be appealed against. As per the notice of appeal filed by Geoffrey, the impugned Ruling is dated 21st May 2018. This is the Ruling in which the learned Judge dismissed Geoffrey’s motion dated 20th December 2016. However, as per the motion dated 1st September 2021 (subject of this ruling) at prayer 3, Geoffrey seeks to stay the orders made on 23rd May 2018, while in prayer 4 Geoffrey seeks to stay orders made on 23rd November 2018. There is no notice of appeal exhibited either against the order of 23rd May 2018 or 23rd November 2018. Our perusal of the record reveals no orders made on 23rd May 2018 or 23rd November 2018 but there was an order made on 23rd November 2016 in which the learned Judge confirmed the joint grant, but this is not the order sought to be stayed nor is there a notice of appeal against this order.
18. We find that Geoffrey has not properly invoked the jurisdiction of this Court as there is no appeal upon which the orders he seeks can be anchored. Secondly, even if we were to accept that the orders sought are anchored on the intended appeal against the ruling of 21st May 2018, the learned Judge declined in that ruling to exercise his discretion to set aside the ex parte orders, and Geoffrey has not demonstrated how the learned Judge erred in exercising his discretion so as to render his intended appeal arguable.
19. Moreover, Geoffrey does not deny that he did not comply with the court orders of 18th April 2016 to file accounts and an inventory of the suit property or liaise with the interested party to file a joint application for confirmation of the grant. This prompted Catherine to file an application for confirmation of the grant on her own. Therefore, Geoffrey is before the Court with unclean hands, having failed to obey a court order. He cannot blame the court for taking action at the instance of Catherine. We are not therefore persuaded that Geoffrey has an arguable appeal.
20. With regard to the nugatory aspect, Geoffrey states that if the orders are not granted, the deceased property known as Ntima/ Igoki/2531 will be sub-divided and the appeal will be rendered nugatory. We are not convinced that the applicant’s appeal will be rendered nugatory or that Geoffrey stands to suffer any prejudice, as he was allocated portions of the deceased’s property in the mode of distribution adopted by the court. It is not clear what hardship he will suffer or how he will be prejudiced if Ntima/ Igoki/2531 is divided in the manner adopted by the court. The proposal of the applicant that the dispute be subjected to court annexed mediation is coming very late in the day and appears to be a gimmick to further delay the distribution of the estate.
21. For the above reasons, we find that Geoffrey has failed to meet the threshold for granting orders of stay of execution under Rule 5(2)(b) of the Court of Appeal Rules. Accordingly, we dismiss Geoffrey’s motion dated 1st September 2021. The dispute being a family dispute, we do not find it appropriate to award costs. Each party shall therefore meet their own costs.

Those shall be the orders of this Court.



DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

