



REPUBLIC OF KENYA



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**Okogo v Omoroh & another (Civil Appeal E042 of 2022)
[2022] KECA 1098 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1098 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL E042 OF 2022
PO KIAGE, M NGUGI & F TUIYOTT, JJA
OCTOBER 7, 2022**

BETWEEN

MARY ADHIAMBO OKOGO APPELLANT

AND

FLORENCE ARACHI OMOROH 1ST RESPONDENT

SALLY ANYANGO OTIENO 2ND RESPONDENT

(Being an application for stay of execution of the Ruling and decree of the High Court of Kenya at Migori (A. Mrima J.) dated 31st August, 2020 in Succession Cause No. 425 of 2015)

RULING

1. The substantive order sought in the application dated March 31, 2022 is that this Court issues an order of stay of execution of the ruling and orders issued on August 31, 2020 in Succession Cause No. 425 of 2015 pending the hearing and determination of the applicant's appeal against the said ruling. The application is expressed to be brought, inter alia, under Rules 5(2)(b), 23 and 31 of the [Court of Appeal Rules](#), 2010 and all enabling provisions of the law.
2. The grounds on which the application is brought are set out on the face of the application and on the affidavit in support sworn by the applicant on March 31, 2022. The applicant states that the trial court had, in the said ruling, revoked a grant of letters of administration intestate issued to her on November 18, 2013. It had also revoked all the titles issued pursuant to the said grant of letters of administration. She is dissatisfied by the said decision and has preferred an appeal against it, which is still pending before this Court.
3. The respondents have, however, extracted a decree dated August 31, 2020 and have commenced the process of executing it, which will render her appeal nugatory. According to the applicant, the grant revoked in the said ruling had been issued in 2013 and has since been executed. Its revocation is likely to have adverse effects on some parties who are not parties to the present proceedings despite having



- benefited legally under a valid grant of letters of administration. Her appeal, which has high chances of success, will be rendered an academic exercise as it shall have been overtaken by events.
4. The ruling in question related to the estate of Tom Otieno Ngoe (deceased). The applicant had applied and been granted letters of administration intestate to the said estate on 13th January 2013. The grant had been confirmed on 18th November 2013. In their application dated 20th October 2015, the respondents sought revocation of the grant under section 76 of the Law of Succession Act on the grounds that they were unlawfully disinherited yet they were beneficiaries of the estate.
 5. The 1st respondent claimed that she was a widow of the deceased whom she had married under Luo customary law and with whom she had three daughters. She had met the deceased in 1994. The deceased had paid dowry for her and had built a matrimonial home for both the applicant and the 1st respondent in Migori County in line with Luo customary law.
 6. Upon the demise of the deceased, she was served with a letter from an Advocate instructed by the applicant informing her that she was a tenant in the house she had lived in with her children for over 10 years and that she was in rent arrears of over Kshs. 600,000 which she should pay or face eviction. Upon visiting the Rongo Law Courts and perusing Rongo Principal Magistrate's Succession Cause No. 298 of 2012, she learnt that the applicant had filed the succession cause in 2012 without her knowledge, and the estate of the deceased had been shared out.
 7. The applicant's case was that she was the sole widow of the deceased and the 1st respondent had never been married to the deceased. The applicant had married the deceased in 1983 and their marriage had been solemnized in a church ceremony in August 1991. She had four surviving children with the deceased. The deceased did not have another wife. She had first met the 1st respondent when she instituted eviction proceedings against her from one of the deceased's houses in Homa Bay.
 8. In its decision, the trial court revoked both the Grant of Letters of Administration Intestate and the Certificate of Confirmation. It issued a joint Grant of Letters of Administration Intestate to the applicant and the 1st respondent. The court further directed that in the event that any of the properties registered in the name of the deceased had been transferred to a third party, such transfer stood revoked or cancelled and the property would revert to the name of the deceased. It further directed that the administrators were at liberty to apply for confirmation of the joint grant within 45 days of the ruling.
 9. We have considered the application and submissions in this matter. The applicant seeks the exercise of this Court's discretion under Rule 5(2)(b) of the Court of Appeal Rules. To succeed under this Rule, an applicant must demonstrate that it has an arguable appeal and, secondly, that if the orders of stay are not granted, the appeal will be rendered nugatory- see Stanley Kangethe Kinyanjui vs. Tony Ketter & Others (2103) eKLR.
 10. The bar with respect to an arguable appeal is set fairly low. In the Stanley Kang'ethe Kinyanjui case (supra) this Court described an arguable appeal as follows:
 - vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
 - viii). 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."
 11. In her memorandum of appeal dated February 25, 2022, the applicant impugns the decision of the trial court on several grounds. It is her case that the court erred in law and fact in, among other findings, allowing the application for revocation of grant; allowing the respondents to call witnesses



while rejecting her application to call further witnesses; in failing to appreciate and apply the authorities relied on by the applicant relating to the issue of the validity of the marriage between the deceased and the 1st respondent; and in not appreciating the fact that the 1st respondent had not obtained a decree nisi or absolute after her divorce cause in Butere Resident Magistrate's Court Divorce Cause No. 2 of 1994. It may therefore be argued that the validity or otherwise of the 1st respondent's marriage to the deceased is an arguable issue that ought to be fully ventilated before this Court.

12. The applicant, however, has to satisfy this Court on the second limb in a Rule 5(2)(b) application: that her appeal will be rendered nugatory should the orders of stay not be granted. The applicant argues in her written submissions dated 11th April, 2022 that her appeal will be rendered nugatory as the letters of administration issued to her would have been revoked and the transfers effected as a result of the revoked grant cancelled. Further, the respondent, whose relationship with the deceased is in question, would have been made an administrator of the deceased's estate. She contends that the letters of administration have been in force since 2013 and she has faithfully administered the estate until 2020 when the impugned orders were issued. Should the orders of stay not be granted, the implementation of the impugned order is likely to be prejudicial to her, while the respondents will suffer no prejudice.
13. We reiterate that a key condition under Rule 5(2)(b) is that an applicant must satisfy the court that the intended appeal will be rendered nugatory. The fact that the letters of administration had been issued in 2013 and revoked in 2020, and that the revocation may be prejudicial to the applicant, is not tantamount to rendering the appeal nugatory.
14. Regarding the cancellation of such titles as may have been issued following the confirmation of the grant in favour of the applicant, it was conceded at the hearing by her learned Counsel, Mr. Oronga, that the alleged third parties to whom the properties had been allegedly transferred by the applicant did not participate in the proceedings. Indeed, order number (b) in the ruling of the trial court suggests that there was no evidence before the court that there had been transfers to third parties of any part of the deceased's estate.
15. However, as was observed by this Court in *Masai & another v Masai & another* (Civil Application 148 of 2020) [2021] KECA 170 (KLR) (19 November 2021) (Ruling):

“On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others this Court stated that

 - ix). ...
 - x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
16. We have not been able to find anything in the pleadings before us that shows that there is imminent danger of the execution of the orders of the trial court. In any event, since both the applicant and the 1st respondent were made joint administrators of the estate of the deceased, any action taken with respect to the estate would require their joint action. In the circumstances, we are not satisfied that the applicant has met the condition requiring a demonstration that her appeal will be rendered nugatory should orders of stay not be granted. We accordingly find no merit in the application dated March 31, 2022.
17. However, noting that this is a matter pertaining to the estate of a deceased person in which the identity of beneficiaries is in contestation, we find that the ends of justice require the maintenance of the status



quo as at March 31, 2022 pending the hearing and determination of the applicant's appeal. In this way the estate of the deceased will not suffer further or any disposal be made to the disadvantage of any party.

18. Since the respondents did not actively participate in this appeal save for filing submissions outside the time lines directed by the Court, there shall be no order as to costs.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF OCTOBER, 2022

P.O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

