



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: KOOME, ASIKE-MAKHANDIA & MUSINGA, JJ.A)

CIVIL APPLICATION NO. 39 OF 2020

BETWEEN

PAUL KORIR SAWE.....1<sup>ST</sup> APPLICANT

HARRON KOECH SAWE.....2<sup>ND</sup> APPLICANT

AND

SALINA C. SAWE.....RESPONDENT

*(Being an application for stay of execution pending the hearing and determination of an appeal against the judgement and decree of the High Court at Eldoret (H. A. Omondi, J.) dated 14<sup>th</sup> August, 2019*

in

**Eld. H.C. Succ. Cause No 369 of 2004)**

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RULING OF THE COURT

[1] The notice of motion dated 12<sup>th</sup> May, 2020 was taken out by the applicants who intend to appeal against the decree of the High Court issued on 14<sup>th</sup> August, 2019 by **H. Omondi J., in Eld H.C. Succession Cause No 369 of 2004**. The dispute before the High Court involved the estate of the late **Gedion Sawe Kipkessio** (deceased). The applicants, who belonged to the deceased's 1<sup>st</sup> house, had petitioned for the grant of probate over the deceased's estate on the basis of a written will. The respondent, the 2<sup>nd</sup> wife and widow of the deceased, objected to the said grant, challenging the existence of the will. Upon hearing the matter, the learned Judge found for the respondent and distributed the deceased's estate in accordance with the provisions of **Section 40** of the Law of Succession Act.

[2] Aggrieved by the said outcome, the applicants filed a Notice of Appeal and the instant motion that seeks an order of stay of execution of the aforesaid judgment and decree. The application is supported by an affidavit sworn by the 1<sup>st</sup> applicant and the grounds listed in the motion. According to the applicants, the learned Judge distributed the deceased's parcels of land **No. 7739/8 SAROIYOT** and **NANDI/CHEPTIL/138** which are in the process of being subdivided and are likely to be disposed of unless an order of stay is granted as a surveyor has already visited the premises in the absence of the beneficiaries.

[3] On the appeal being arguable, the applicants state that the distribution of the deceased's parcels of land was contrary to his wishes and also ignored all the proposed modes of distribution put forward by the majority of the beneficiaries and that the distribution as ordered by the court will displace some beneficiaries who have settled on certain portions of the land. On the nugatory aspect, the applicants argue that if stay is not granted, the subdivisions will interfere with their occupation of the parcels of land which may lead to evictions and other untold sufferings including loss of livelihoods and violence, and that all the beneficiaries have been living on their respective parcels of land and if stay is granted none will suffer prejudice.

[4] The application was opposed, vide a replying affidavit sworn by **Salina Sawe** on behalf of the deceased's 2<sup>nd</sup> house. The respondent contends that there is no valid appeal to justify granting of orders of stay of execution. The applicants filed a record of appeal on 28<sup>th</sup> February, 2020 but the same was not served upon the respondent until the 28<sup>th</sup> May, 2020 which was outside the period provided by the rules. On the appeal being rendered nugatory, the respondent claims that the subdivision of the parcel of land known as **Nandi/Cheptil/138** measuring 37 acres was done pursuant to a mutual agreement by both houses whereby the house of the applicants was allocated 13 acres and the 2<sup>nd</sup> house 24 acres. The respondent termed the instant application an academic exercise and urged us to dismiss it with costs.

[5] Counsel for the respondent also filed written submissions but they tend to address another application that is dated 17<sup>th</sup> July, 2020 where the applicants are seeking leave to extend time within which to serve the record of appeal. As rightly pointed out by counsel for the respondent, that application is not before us. The motion before us is brought under **Rule 5 (2) (b)** of the Court of Appeal Rules which provides as follows: -

**“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may -**

**(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”**

What we want to emphasise is that the instant motion is founded on a Notice of Appeal which was duly filed on 21<sup>st</sup> August, 2019. The issue relating to late service of the record of appeal and the application for extension of time is not before us.

[6] That said, we have deliberated on the motion which was heard virtually vide ‘GO TO MEETING’ Platform pursuant to the Court Practice Directions to mitigate the spread of the COVID -19 Pandemic. We have done this against the background of established principles under **Rule 5 (2) (b)** of this Court’s Rules, that for the application to succeed, it must be demonstrated that; the appeal is arguable and not frivolous and that if the stay order sought is not granted the appeal will be rendered nugatory. See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai. 157 of 2006** (unreported). The principles to bring to bear on whether or not to grant an order of stay of execution were set out thus: -

**“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (See also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [198] KLR 838.)”**

[7] Is the appeal arguable? It would appear the dispute is over the distribution of the deceased’s estate between the two houses. Our cursory look at the issues of whether the deceased left a valid Will on how his estate was to be distributed and whether parties who were not beneficiaries were awarded the deceased’s parcel of land, appear not to be frivolous grounds. We however say this with the usual caution that an arguable point(s) is not one that may succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by the court. It is the mandate of the bench that will finally hear the appeal to make a conclusive determination of the merits of the appeal. As was stated in **Dennis Mogambi Mang’are vs. Attorney General & 3 Others, Civil Application No. NAI 265 of 2011 (UR 175/2011):-**

**“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”**

[8] On the nugatory aspect, the applicants state that the respondent has embarked on the subdivision of the parcels of land. On the part of the respondent she contends that the subdivision of one of the parcels of land was done by a surveyor in the presence of the members of the 1<sup>st</sup> house who signed a consent that it be distributed with the 1<sup>st</sup> house being allocated 13 acres and the 2<sup>nd</sup> house 24 acres. We have looked at the so-called consent, which to us appears like the report of the people who were present when the government surveyor surveyed parcel of land known as **Nandi/Cheptil/138**. There is also a dispute over **No. 7739/8 SAROIYOT** and there is no indication whether this was also settled. For these reasons, we are persuaded that if the subdivisions and transfers of the parcels are effected, the appeal may be rendered nugatory. It is also common ground that the parties are in occupation of various parcels of the land and therefore a delay until the appeal is heard or further orders are made, cannot cause them undue hardship.

[9] That being our view of the matter and considering the dispute is over parcels of land belonging to the deceased that pits his two houses against each other, the order that commends itself to us is one maintaining the current *status quo* as at the date of delivery of this Ruling until the appeal is heard and determined.

[10] Accordingly, the Notice of Motion dated 12<sup>th</sup> May, 2020 is allowed in the following terms: The parties are ordered to maintain the *status quo* currently obtaining in respect of **No. 7739/8 SAROIYOT** and **NANDI/CHEPTIL/138** until the appeal is heard and determined or further orders are made thereto. Costs of this application to abide the outcome of the appeal.

**Dated and delivered at Nairobi this 29<sup>th</sup> day of January, 2021.**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRA**