



IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, KIAGE & MURGOR, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 147 OF 2019

BETWEEN

ABDIKADIR GUBO DARCHE.....APPELLANT/ APPLICANT

ABDI GUBO DARCHE.....APPELLANT/ APPLICANT

FATUMA GUBO DARCHE.....APPELLANT/ APPLICANT

AND

KHADIJA GUBO DARCHE.....1ST RESPONDENT

MUMINA GUBO DARCHE.....2ND RESPONDENT

HABIBA GUBO DARCHE.....3RD RESPONDENT

(Application for stay of execution pending the hearing and determination of the appeal against the judgment of the High

Court of Kenya at Marsabit (S.Chitembwe, J.) dated 24th July, 2019

in

HCCA. No. 8 of 2018)

RULING OF THE COURT

By the motion dated 11th September 2019 the applicants seek an order of stay of execution of the judgment issued against them by the High Court at **Marsabit** in **HCCA No. 8 of 2018** on 24th July 2019, pending the hearing and determination of their appeal against the same. By that decision the court referred the matter back to the Kadhi's court to have the deceased's estate valued and distributed to his heirs.

The motion is predicated on grounds on its face to the effect that the respondents are in the process of executing the judgment and if allowed to do so the appeal will be rendered nugatory. Further, the intended appeal touches on the estate of the deceased who is a Muslim and unless the orders herein are granted the applicants will suffer irreparable loss and damage which cannot be compensated by damages.

The Motion is supported by the affidavit of **Abdikadir Gubo Darche**, the 1st applicant, sworn on 11th September 2019. He deposes that he has the authority of his co-applicants to swear the affidavit and that they have an arguable appeal with high chances of success.

The applicants also filed written submissions dated 3rd September 2020, where they contend that despite serving the respondents with the application, the respondents have not responded to the application. Indeed, as at the time of hearing of this application, there was no response on record from the respondents.

We have given due consideration to the application. This being a **Rule 5(2)(b)** application, it is trite that an applicant needs to demonstrate that he has an arguable appeal. This merely means an appeal that raises at least one *bona fide* issue worthy of the Court's consideration on appeal or, put another way, the appeal should not be frivolous. It does not, however, mean an appeal that must necessarily succeed. The

second matter which the applicant must show is that the appeal would be rendered nugatory without the Court's intervention in the interim. An appeal would be rendered nugatory if damage of a great or irreversible character, prejudicial or probably destructive of the substratum of the appeal, would have occurred in the intervening period. A full discussion of these principles and the notable jurisprudence on them is found in this Court's decision in **STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 2 OTHERS [2013] eKLR.**

The applicants contend in the memorandum of appeal, among other grounds, that the learned judge erred in law by referring the matter back to the Kadhi's court yet the same court had heard the witnesses and parties to the proceedings and had returned a verdict contrary to **section 6(iii)** of the **Kadhis' Courts Act**. The said provision states that:

“The law and rules of evidence to be applied in a Kadhi's Court shall be those applicable under Muslim law:

Provided that -

no finding, decree or order of the Court shall be reversed or altered on appeal or revision on account of the application of the law or rules of evidence applicable in the High Court, unless such application has in fact occasioned a failure of justice.”

We are unable to discern how the learned Judge erred for having referred the matter back to the Kadhi to have the estate of the deceased valued and distributed to deceased's heirs in accordance with Islamic law. It is thus doubtful that the applicant's contention is arguable.

Assuming it were arguable, we now consider the nugatory aspect. The applicants argue that the respondents are in the process of executing the judgment and if allowed to do so the appeal will be rendered nugatory. The court's orders in **Marsabit HCCA No. 8 of 2018** were *inter alia* that the applicants and the respondents (children of the deceased) and any other beneficiary left out of the case should share the deceased's estate in accordance with Islamic law, following valuation and distribution as directed by the Kadhi. We therefore find that none of the parties will be prejudiced in the intervening period and the nugatory aspect is unsatisfied.

The upshot is that the Motion is without merit and is accordingly dismissed.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR