



IN THE COURT OF APPEAL

AT KISUMU

[CORAM: OKWENGU, KIAGE & SICHALE, JJ.A]

CIVIL APPLICATION NO. 47 OF 2019

BETWEEN

CHARLES OMERI KWANGOTO.....APPLICANT

AND

HALIMA WANGA NAMBWAYA.....RESPONDENT

(Application for stay of the ruling of the High Court of Kenya at Kakamega

(Njagi, J) dated 22nd November, 2018 in **Succession Cause No. 744 of 2014**)

RULING OF THE COURT

The applicant, **Charles Kwangoto** filed the Notice of Motion dated 5th April, 2019. He sought the following orders:

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1. Spent

2. That this Honourable Court be pleased to stay execution of the ruling of the High Court at Kakamega made in objection proceedings brought in Succession Cause No. 744 of 2014 at Kakamega, Charles Omery Kwangoto-Petitioner versus Halima Wanga Namwaya – Objector, and all consequential orders and proceedings [including objector’s bill of costs dated 10th December, 2018] emanating from the said ruling pending hearing and final determination of this application.

3. That this Honourable Court be pleased to stay execution of the ruling of the High Court at Kakamega made in objection proceedings brought in Succession Cause No. 744 of 2014 Kakamega, Charles Omery Kwangoto-Petitioner versus Halima Wanga Namwaya-Objector, and all consequential orders and proceedings [including objector’s bill of costs dated 10th December, 2018] emanating from the said ruling pending hearing and final determination of this appeal.

4. That the costs of this application be in the course”.

The motion was supported by the applicant’s affidavit sworn on 4th April, 2019 in which he deposed that the ruling in Succession Cause No. 744 of 2014 was delivered on 22nd November, 2018; that on 21st January, 2019, he was served with the respondent’s bill of costs filed on 13th December, 2018; that one of his prayers in the motion is to have “... **the taxation process and the entire ruling of the High Court be stayed pending appeal**”; that he stands to suffer “**irreparable loss**” if the order of stay is not granted.

The respondent resisted the motion vide a replying affidavit sworn on 20th August, 2019. She deposed that a similar application was determined by the late **Odek, JA** in a ruling delivered on 25th February, 2019; that she is already in possession of the suit land and that an order of status quo would best serve the ends of justice.

We have considered the motion, the supporting affidavit and the affidavit in opposition to the motion. Suffice to state that the applicant seeks an order of stay of the ruling of **Njagi, J** delivered on 22nd November, 2018. The position of the law as regards applications made under

Rule 5(2) (b) are now well settled. Firstly, an applicant has to demonstrate that he/she has an arguable appeal. Secondly, he /she must demonstrate that the appeal will be rendered nugatory, absent stay. See *Stanley Kang’ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR*.

The brief facts of this case indicate that the applicant purported to purchase land belonging to the respondent’s deceased husband from the deceased’s two sons. The applicant then applied for letters of administration as a “son” of the deceased and caused the land to be transferred to himself. The court subsequently found that the applicant’s actions were fraudulent and ordered that the land reverts to the deceased’s name and that the applicant do await distribution of the deceased’s estate so as to stake his claim. The applicant was aggrieved by the said outcome and hence the appeal upon which the instant motion is anchored.

Although the respondent resisted the motion on the basis that **Odek, JA** heard and determined the application for stay, we find that this is not true as the learned Judge merely directed that an application for stay is to be heard by a 3 judge bench as it is not a single Judge matter.

Be that as it may, the applicant’s main grievance seems to be on costs. However, his Memorandum of Appeal lodged on **25th March, 2019**, does not have the issue of costs as one of the grounds of appeal. If anything, the Memorandum of Appeal addresses what the applicant considers the demerits of the ruling. Secondly, **Njagi, J** directed that the suit land namely, **LR No. North Wanga/Kholera/861** reverts to the deceased; (**Asman Nambwaya Shibwobo**) and the applicant was ordered to stake his claim when the deceased’s estate is distributed, in a succession cause.

The second limb of the nugatory aspect was also not satisfied as the land is to remain in the name of the deceased and hence it is not in any danger of its character changing in any manner.

The upshot of the above is that we find no merit in this motion which we hereby dismiss with costs to the respondent.

It is so ordered.

Dated and Delivered at Nairobi this 19th Day of March, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR