



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, ASIKE-MAKHANDIA & MURGOR JJA)

CIVIL APPLICATION NO. 40 OF 2018

BETWEEN

HASSAN ABDI ADEN.....APPLICANT

AND

AHMED ABASS EDIN.....1ST RESPONDENT

ABDINASIR ADAN EDIN.....2ND RESPONDENT

(An application for stay of execution against the judgment orders of the

High Court at Marsabit (Chitembwe, J) delivered on 18th April 2018

in

HC Civil Appeal No 4 of 2016

RULING OF THE COURT

The notice of motion dated 23rd April 2018 is brought seeking orders of stay of execution of the judgment (*Chitembwe, J*) delivered on 18th April 2018 pending the hearing and determination of an intended appeal. The application is brought on grounds that the learned judge reduced the applicant's share in the estate of Fatuma Abdi (*the deceased*) to 18.8% which was contrary to the ruling of Hon. Wako, Senior Resident Kadhi at Moyale, who had ruled that the applicant was entitled to 72.73% of the deceased's property as the deceased had held the property on trust for him; that therefore the respondents and other siblings were only entitled to 27.7% of the deceased's estate. The applicant complained that the reduction of his share has reduced his source of livelihood and income dramatically since he had singlehandedly developed the subject property being *Plot No. 211 Biashara Street, Moyale (the subject property)*. The applicant contended that he was apprehensive that the respondents would realise the decree of the High court, which could lead to further disputes and anarchy within the community. The application was supported by the sworn affidavit of the applicant and the applicant's written submissions.

As a brief background to the application, by a decision in a succession dispute made on 23rd November 2016, the Senior Resident Kadhi Moyale (*Hon. Wako*) ruled that the applicant was entitled to 72.73% of the subject property being a part of his deceased's mother's estate on the basis that their deceased mother held the subject property in trust for the applicant, while the respondents and other siblings were awarded 27.27% of the deceased estate. The respondents were aggrieved by the decision and appealed to the High Court which determined that the applicant was only entitled to 18.18% of the income and assets of the estate and the respondents and other siblings entitlement was found to be 80.82%.

The 1st respondent, Ahmed Abass Edin opposed the application in a replying affidavit and asserted that the intended appeal was not arguable as the learned judge rightly discerned that the their mother did not hold the subject property in trust for the applicant, since it belonged to her as of right; that all the beneficiaries of the estate were entitled to their rightful shares as set out by Islamic Law and the Laws of Kenya, and that the applicant could not claim to have singlehandedly developed the subject property on his own as all the proceeds came from rentals to which all beneficiaries were entitled. The deponent contended that the applicant had continued to benefit from the proceeds of the estate to the exclusion of the other beneficiaries, and had gone so far as to transfer the title of the subject property from their late mother's

name and into his own name. That in the circumstances there was nothing for this Court to stay.

In so far as applications filed under **rule 5 (2) (b)** of this Court’s rules are concerned, the threshold to be satisfied, as exemplified in the case of **Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR**, is that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”

Upon considering the application, the affidavits and submissions, we are satisfied that the intended appeal is arguable since the applicant’s complaint is that though the learned judge had found that the Kadhi’s court had fallen into error when it determined that the applicant’s mother held the subject property in trust for the applicant, the court did not specify how or why the Kadhi’s court had fell into error.

On whether the intended appeal would be rendered nugatory if the prayer for the stay of execution was not granted, the applicant is in possession of the subject property, and continues to collect the rents. He has also registered the title of the subject property in his name. We would therefore agree with the respondents that if the applicant were to share any part of the proceeds of rent with his other siblings, or reinstate the subject property into the deceased’s name, this will not in any way render the intended appeal nugatory since, the applicant’s siblings are also entitled to the proceeds of rent, for which they can account, as will the applicant, at the appropriate time if the appeal were to succeed. In the same way, and so far as the reinstatement of the title of the subject property back into the name of the estate is concerned, there is nothing to stop this Court from ordering that it be transferred back to the applicant in the event the appeal were to succeed.

Accordingly, since the applicant has failed to satisfy the 2nd conditionality necessary for an order of stay of execution, the notice of motion dated 23rd April 2018 fails, and is dismissed. Costs in the intended appeal.

It is so ordered.

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

M.K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR