



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, KIAGE & SICHALE, J.J.A)

CIVIL APPEAL (APPLICATION) NO. 98 OF 2020

BETWEEN

KATTON CHEMUSANY KERKER.....1ST APPELLANT

GIBSON NIWAI CHEMUSANY.....2ND APPELLANT

AND

SHEILA CHEMUTAI CHEMUSANY.....1ST RESPONDENT

SELINA CHEPKEMOI CHEMUSANY.....2ND RESPONDENT

PATRICK JUMAMOSI CHEMUSANY.....3RD RESPONDENT

JACKSON LOMERI.....4TH RESPONDENT

LILIAN CHEROP CHEMUSANY.....5TH RESPONDENT

LOICE CHERUTO.....6TH RESPONDENT

(Application for stay of execution pending the hearing and determination of Eldoret Civil Appeal No. 21 of 2020 (Kisumu Civil Appeal No. 98 of 2020) against the Judgment of the High Court at Kapenguria (Sitati, J.) dated 13th February, 2020

in

Succession Cause No. 9 of 2018)

RULING OF THE COURT

By the motion dated 19th October 2020 brought under **Rule 5(2)(b)** of our rules, the applicant seeks the following orders:

a) THAT there be a stay of execution of the judgement of the superior court by Lady Justice Ruth N. Sitati read on 13th February 2020 at the High Court at Kapenguria in Succession cause no. 9 of 2018 pending the hearing and determination of this application, and while pending the hearing and determination of Eldoret Civil Appeal No. 21 of 2020.

b) THAT the appellants be granted leave to file a supplementary record of appeal to include a certified copy of the decree.

The motion is supported by the affidavit of **Gibson Niwai Chemsany**, the second appellant, sworn on 19th October 2020, and is predicated on grounds on its face to the effect that; in **Kapenguria Succession Cause No. 9 of 2018**, the High Court ordered that the estate of the late Chepleke Chemusany be divided equally among his eight children; an appeal was preferred to this Court on 4th August 2020 and the appellants have an arguable case; an application for stay of execution before the High Court was dismissed on 7th July 2020 in effect allowing the respondents to proceed with survey and subdivision of the contested property; and there is a real and imminent danger that if subdivision and transfer is effected, the appeal would be rendered nugatory.

In answer to the application the first respondent has asserted that the High Court ruling of 7th July 2020 at Kapenguria observed equality and no family member was prejudiced. Further, this case has been in court since 1990 and that for 30 years justice has been delayed.

We have considered the rival contentions and the law. It is trite that an applicant for relief under **Rule 5(2)(b)** 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 is not frivolous. That does not mean however, 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 appellant contends in the memorandum of appeal that the learned judge erred in law by proceeding to hear the confirmation of grant yet there was no pending application for confirmation of grant before it. The trial court having exercised its discretion in accordance with the law in the matter, we find that the appeal, which is no more than a protest against equal distribution because it puts the female children at par with the males, is unarguable. We take this view on a tentative basis, alive that it is for the bench seized of the appeal to make conclusive findings on the issue.

Regarding the nugatory aspect, (which we probably need not go into having found the appeal unarguable) the appellant argues that unless orders of stay are granted, the respondents will proceed with the survey and subdivision of the contested property. It is common ground that the trial court divided the property in question equally among the eight siblings, we are therefore not persuaded that any of the parties will be prejudiced in the intervening period.

Taking all the circumstances of this case into consideration, we find the Motion to be without merit and it inevitably fails, and is accordingly dismissed with costs.

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