



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MUSINGA & M'INOTI, J.J.A.)

CIVIL APPLICATION NO. 331 OF 2019 (UR.292/19)

BETWEEN

ROSEMARY B. KOINANGE (Suing As The Legal Representative of the Estate of the  
Late Dr. Wilfred Koinange and also in her Own Personal Capacity)...1ST APPLICANT  
CKK Estates (1973) Ltd.....2ND APPLICANT  
SAMUEL KARUGA KOINANGE.....3RD APPLICANT  
SUSAN NDUTA KOINANGE.....4TH APPLICANT  
PETER WANDUGA KOINANGE.....5TH APPLICANT  
MECOL LIMITED.....6TH APPLICANT  
NGORONGO TEA FACTORY LIMITED.....7TH APPLICANT

AND

ISABELLA WANJIKU KARANJA.....1ST RESPONDENT  
PETER MBIYU KARUGA.....2ND RESPONDENT

(Being an application for stay of proceedings pending the hearing and determination of an intended appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (A. O. Muchelule, J.) dated 20th February 2019 in H.C. Succ. Cause No. 998 of 2006.)

\*\*\*\*\*

RULING OF THE COURT

1. **CKK Estates (1973) Ltd, Mecol Ltd and Ngorongo Tea Factory Ltd**, the 2nd, 6th and 7th applicants, filed an application before this Court dated 23rd September 2019 under **rules 5(2)(b), 42 and 43** of this **Court's Rules**. They seek an order to stay proceedings in **Succession Cause No. 998 of 2006** pending the lodging, hearing and determination of an intended appeal against the ruling of **Muchelule, J.** delivered on 21st February 2019.
2. The three applicants had filed an application on 14th December 2018 before the High Court seeking a determination that the Succession Court has no jurisdiction to determine the issue of ownership of shares in the three companies. The High Court dismissed the application on 21st February 2019. Being dissatisfied with that ruling, the three applicants filed a notice of appeal, evincing their intent to appeal against the ruling.
3. The gravamen of the application is that the Commercial Division of the High Court is the one that has jurisdiction to determine disputes touching on ownership of shares, not the Family Division which handles succession matters. The applicants argue that unless further proceedings are stayed pending determination of the intended appeal, they will be greatly prejudiced, and the intended appeal will be rendered nugatory, thus occasioning them substantial loss.
4. The applicants, through the affidavit sworn by **Rosemary Bagenda Koinange**, have set out various grounds which, in their view, render

the intended appeal arguable. They state, *inter alia*, that the impugned ruling ignored a binding order by this Court in **Civil Appeal No. 126 of 2016** that: **“The issue of the shares held by the deceased in the 2nd appellant, and any other limited companies, shall, if not agreed, be determined on available evidence during the administration of the estate in accordance with the law.”**

5. The 1st respondent opposed the application. She states, *inter alia*, that the applicants are intent on re-litigating issues that were determined by this Court in **Civil Appeal No.126 of 2016, Rosemary B. Koinange & 5 Others v. Isabella Wanjiku Karanja & 2 Others** on 15th June 2016 against the ruling of **Kimaru, J.** dated 22nd January 2015 in **Succession Cause No. 998 of 2006**, the same succession cause that the applicants wish to stay. She annexed to her affidavit the memorandum of appeal and the judgment of the Court, which we have carefully perused.

6. The 1st respondent further stated that this Court in the aforesaid judgment pronounced itself on the issue of the Succession court’s jurisdiction to determine disputes of ownership and distribution of shares in a company in a succession dispute. Following that determination, the 1st applicant filed an application for confirmation of Grant but during cross examination the three applicants yet again raised objections to the trial court’s jurisdiction, which was fully argued and dismissed. It is that ruling which the three applicants intend to appeal against. In the 1st respondent’s view, the intended appeal is not only frivolous but also an attempt to further delay finalization of succession cause. In addition, the 1st respondent argued, the applicants have not demonstrated the substantial loss they shall suffer unless the order sought is granted.

7. This application was canvassed by way of written submissions that were filed by **M/s Kamau Kuria & Company Advocates**, for the 1st applicant, **M/s LJA Associates LLP**, for the 2nd, 6th and 7th applicants and **M/s Murgor & Murgor Advocates**, for the 1st respondent. **M/s J. M. Njenga & Co. Advocates**, who are on record for John Miring’u Karuga and the Estate of Ernest Ngugi Karuga. They informed this Court’s Deputy Registrar vide their letter dated 4th March 2021 that their clients are opposed to the application, and associate themselves with the submissions filed by M/s Murgor & Murgor Advocates.

8. Whether or not to grant a stay of proceedings is a matter of judicial discretion, which must however be exercised judiciously. The Court must consider the pros and cons of grant or refusal of such an order. We must also bear in mind the caution given by the learned authors of the **Halsbury’s Laws of England**, 4th Edition Vol. 37 at page 330 that –

**“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”**

9. In the exercise of our jurisdiction under rule 5(2) (b), we have to consider whether the intended appeal is arguable, and if so, whether it shall be rendered nugatory unless the order sought is granted. An arguable appeal is not one that must succeed, it is one that raises at least one ground that ought to be fully argued.

See **Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR**.

10. Having perused this Court’s judgment in Civil Appeal No. 126 of 2016, we think that the all-important issue of jurisdiction of the Succession Court raised by the applicants was sufficiently addressed at paragraph 54 of the judgment as follows:

**“54. There can be no argument that the shares of a deceased in a limited liability company are assets which the family has power to distribute in a Succession Cause. The argument is rather that when there is a dispute on ownership of the shares, only a ‘Companies Court’ has jurisdiction to adjudicate. In this case, there is no dispute that the shares in the 2nd appellant (CKK Estates (1973) Ltd) were held by the deceased and Njoki at inception. It is averred that the deceased gifted his shareholding to Wilfred in 1994, but whether this was so is a matter the Succession Court is capable of determining. If the court holds that the shares were gifted to Wilfred, just as other gifts were made to the other beneficiaries, that would be the end of the matter. If they were not, then they vest in the administrators who may engage with the Company or Companies under the relevant laws and Articles of Association to wrest them back to the estate.”**

11. It therefore appears to us that this Court’s decision aforesaid was emphatic that the Succession court has jurisdiction to decide as to whether the deceased gifted his shares as alleged or not. If that be the case, we entertain grave doubts as to the arguability of the intended appeal.

12. But even assuming that the intended appeal is arguable, we are not satisfied that it shall be rendered nugatory unless we grant the order sought. This succession cause has been in court since 2006 and delaying its finalization any further to await determination of an interlocutory appeal is not in the interest of justice. The Succession court should be allowed to expeditiously finalise the matter so that if any party is not satisfied with the decision or any part thereof, they can prefer an appeal to this Court against the substantive decision. In any event, the shares that are contested have a determinate value and appropriate orders can be made for their preservation pending final determination of the dispute. The intended appeal will therefore not be rendered nugatory.

13. For the aforesaid reasons, we find this application lacking in merit and dismiss it with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MARCH, 2021.**

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**