



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KOOME, M'INOTI & MURGOR JJ.A)

CIVIL APPLICATION NO. 121 OF 2018

BETWEEN

SAMWEL NDEGWA.....APPLICANT

AND

MIRIAM NYAMBURA.....RESPONDENT

(An application for stay of execution against the Ruling and orders of the High Court at Nakuru (A. Ndung'u, J) delivered on 24th May 2018 in Nakuru Succession Cause No. 231 of 1998)

RULING OF THE COURT

The Notice of Motion dated 8th August 2018 is brought pursuant to **rule 5 (2) (b)** of the *Court of Appeal rules 2010* seeking orders of stay of execution of the judgment of the High Court (*S. Ondeyo, J*) delivered on 21st January 2003 pending the hearing and determination of an intended appeal. The application was supported by the sworn affidavit of **the applicant, Samwel Ndegwa** where it was deponed that the applicant was aggrieved by the ruling of 24th May 2018 (*Ndung'u, J*).

The applicant's dispute with **the respondent, Miriam Nyambura** is with respect to a survey report that has formed the basis of the distribution of the deceased's estate among the beneficiaries. The applicant's complaint is that the deceased presented an erroneous survey report to the court for which the applicant sought a re-survey. The applicant was aggrieved with the court's dismissal of the application for re-survey because he claimed that it had resulted in the wrongful demarcation of the estate property. He added that the erroneous survey report was not reflective of the physical situation on the ground; that the respondents had since commenced demarcation of the estate property on the basis of the erroneous survey, and that his appeal will be negatively impacted unless the stay of execution orders are granted.

The respondent did not file a replying affidavit or written submissions despite having been served with a request to do so and the hearing notice.

The brief background to this application is that the applicant had filed an application in the High Court where he sought orders to compel the District Surveyor to re-survey the property of the estate of *Benson Ndirangu Mathenge (Deceased)* in accordance with the judgment of the court dated 21st January 2003; that upon such re-survey the portion marked 12 on the survey map should be allocated to the first widow of the deceased through Hannah Kabura Njuguna who had bought it from her; and that the portion marked 5 on the sketch map be allocated to Karanja Ndirangu who has built a house and developed the portion.

Upon considering the application and the respondents' replying affidavits, including the averments that all the beneficiaries apart from the applicant were satisfied with the distribution undertaken in the survey report and the manner of distribution of the deceased's property to the two houses, the trial court dismissed the applicant's application for want of merit.

In so far as applications filed under **rule 5 (2) (b)** of this Court's rules are concerned, the threshold to be satisfied, as stated 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 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.”

As to whether the application is arguable, upon considering the application, the affidavit in support and the submissions, the applicant claims that the learned judge misapprehended the grounds upon which the application to re-survey the estate was based, because the court failed to appreciate that the survey report relied upon was not reflective of the true position on the ground; that furthermore, the court did not take into account that the mode of balloting that was adopted for distribution of the portions of the estate among the beneficiaries was not fair and equitable.

When we consider the grounds of appeal set out, we are not persuaded that the appeal is arguable. The learned judge found that indeed the land in question was divided into 12 parts as ordered in the judgment. All the other beneficiaries were satisfied, save the applicant, who did not even produce a survey map to show the alleged errors in the division. The applicant too is not a beneficiary of the estate, but merely claims to have bought a parcel of land from the 1st widow, who herself has not raised any complaint. In any event, as the court properly noted, the issues that the applicant was purporting to raise ought to have been raised at the stage of confirmation of the grant.

Consequently, the applicant having failed to satisfy us that the appeal is arguable, we need not consider the 2nd limb, with the result that the application is unmerited 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

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR