



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, WARSAME, ASIKE-MAKHANDIA, J.J.A.)

CIVIL APPLICATION NO. 69 OF 2019

BETWEEN

NDERI WATHUKO CHONGO.....1ST APPLICANT

PETER NDERI CHONGO.....2ND APPLICANT

AND

SAMUEL NJOROGE WATHUKO.....1ST RESPONDENT

SERAPHINE WANJIKU WATHUKO.....2ND RESPONDENT

(An application for stay of execution of the Judgment of Honourable A.O Muchelule

dated 7th day of September 2016 together with the Ruling dated 16th March 2018

by Hon. A.O. Muchelule, J and Ruling dated 29th January 2019 by Hon. A.O.

Muchelule J) to file and serve Notice of Appeal in ELC APPEAL NO. 83 OF 2016)

RULING OF THE COURT

1. By a Notice of Motion dated 28th February 2019 the applicants moved this Court under 5(2)(b) of the Court of Appeal Rules, 2010, Article 47 (1) & (3), 48 and 50(1) of the Constitution and section 1(A), 3 and 3 (A) of the Civil Procedure Rules for the orders;

(a) That, stay do issue against judgement by Hon. A.O. Muchelule dated 7th September, 2016 and delivered by the Hon. W. Musyoka, J. on 16th March 2018 and

(b) That, stay do issue against the ruling dated 16th March 2018 by Hon. A.O. Muchelule J. delivered by the Hon. W, Musyoka, J on 20th March, 2018 and

(c) That stay do issue against the ruling dated 29th January 2019 by Hon. A.O. Muchelule, J.

(d) That cost of the application be in the cause.

2. The orders sought are predicated upon the distribution of property in the matter of the estate of Wathuko Chongo Wathuko (deceased) who passed on intestate on 30th May 2001. What gave rise to the determination of the trial court on 7th September 2016 was the applicants' motion for revocation of a certificate of confirmation of grant dated 6th May 2013 and a subsequent application to set aside and vacate a consent order on the distribution of the suit estate entered on 6th May 2013. The same was dismissed with costs. Aggrieved, the application moved the Court for review and setting aside of the judgment dated 7th September 2016 dismissing the application for the revocation of the grant. In a ruling dated 16th March 2018, the trial court found that the application for review fell short of merit and was dismissed with costs.

3. Undeterred, the applicants moved the trial court in an application for leave to appeal out of time which again the trial court found without merit and dismissed the same with costs in the ruling dated 29th January, 2018.

4. Having considered the application along with the material placed before us, the issues commending to us for determination are threefold; are the orders of the trial court capable of being stayed, does the instant application meet the threshold for granting the orders sought and is this Court clothed with jurisdiction to entertain the orders sought herein.

5. This Court in ***Peter Gathecha Gachiri v AG and 4 Others (Civil Appl. NAI 24 of 2014 (unreported))*** with regard to the principles that govern grant of orders under rule 5(2)(b) of the Rules of the Court noted that Rule confers on us independent discretionary jurisdiction exercisable in accordance with the twin principles, on arguability of an intended appeal and that the appeal, if successful, shall be rendered nugatory if stay is not granted. These principles guide this Court in the exercise of its discretionary power in determining an application premised on Rule 5(2)(b) and the rationale in these principles is intended to balance two parallel propositions; *that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause* and; that a litigant who is aggrieved by a decision must not be deprived of the right to challenge it in the next higher court (see ***Butt v Rent Restriction Tribunal*** [1982] KLR 417. See also ***Kenya Shell Ltd v. Kibiru & Another*** [1986] KLR 410. In addition, it is imperative for an applicant seeking an order under Rule 5(2)(b) to satisfy the Court on both principles. *An applicant must show that the appeal is not frivolous.* (See. ***George Ole Sangui & 12 others v. Kedong Ranch Limited*** [2015] eKLR).

6. The trial court in three separate occasions dismissed the applications now before us for orders of stay. Whether dismissal of a suit gives rise to orders capable of being stayed by an order under Rule 5 (2) (b) was considered in ***Western College of Arts & Applied Sciences v. Oranga & Others (1976) KLR 63***. Negative orders are not capable of being stayed as there is nothing arising out of the High Court decisions for this Court in an application for stay to enforce or restrain by injunction.

7. We are constrained to observe further that the orders sought cannot issue for the simple reason that there is no valid Notice of Appeal in place to support the orders sought. The jurisdiction of this Court under Rule 5 (2) (b) of this Court's Rules arises only where an appeal has been filed or a notice of appeal has been lodged. Rule 5 (2) (b) of the Rules provides;

“(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

...

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

8. An application under Rule 5(2) (b) presupposes that such stay of execution of judgments or proceedings are only applicable when a notice of appeal has been filed, under Rule 75 *and is pending* in this Court. (See ***Jennifer Koinante Kitarpei v. Alice Wahito Ndegwa & Another*** [2014] eKLR).

9. It is apparent from the forgoing that the application is defective and lacks merit. The same is accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.

M. K. KOOME

.....

JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR