



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ASIKE-MAKHANDIA, GATEMBU & KANTAL, J.J.A.)**

**CIVIL APPLICATION NO. 78 OF 2020**

**BETWEEN**

**FRANCIS WESONGA ODIPO.....1ST APPLICANT**

**RAMADHAN WANZOFU MUNGAYI.....2ND APPLICANT**

**AND**

**ALI OMONDI MALICHI.....1ST RESPONDENT**

**MANEYA MAKOKHA OSAMBAYO.....2ND RESPONDENT**

*(Being an application for stay of execution of the Judgment of the High Court of Kenya at Kakamega (Njagi, J.) dated 17th June, 2020*

*in*

**HC. Succession Cause No. 595 of 2009)**

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**RULING OF THE COURT**

In a Judgment delivered on 17th July, 2020 at the High Court of Kenya at Kakamega the Judge distributed a parcel of land known as **South Wanga/Lureko/181** to seven persons after those granted letters of administration had failed to agree on the mode of distribution. The question for the Judge to determine in the case was whether **Ali Omondi Malichi** (the 1st respondent) and **Maneya Makokha Osambayo** (the 2nd respondent) were beneficiaries to the estate of the late Odipo Wangoma. The Judge found that they were beneficiaries and awarded them appropriate acreages of land. **Francis Wesonga Odipo** (the 1st applicant) and **Ramadhan Mungayi** (the 2nd applicant) were dissatisfied with those findings and filed a Notice of Appeal.

In the Motion brought under **rules 5(2) (b), 41 and 47** of the **rules of this Court** we are asked in the main to stay execution of the said Judgment and subsequent proceedings in Kakamega **High Court Succession Cause No. 595 of 2009** pending hearing of the application and of an intended appeal. In grounds in support of the Motion and in a supporting affidavit of the 1st applicant it is said amongst other things that the subject of an intended appeal concerns distribution of an estate of a deceased person and that it is in the interests of justice that we grant the order; that the Judgment will be executed if we don't grant stay of its execution thus rendering the intended appeal nugatory; that the 1st respondent was not a child of the deceased and was not entitled to an inheritance from the Estate and that the intended appeal has high chances of success.

We did not see a replying affidavit in the matter.

For an applicant to succeed in an application of this nature he must firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the appeal is not frivolous. If the applicant successfully jumps that hurdle he must, in addition, demonstrate that the appeal would be rendered nugatory absent stay – **Stanley Kangethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR**.

We have considered the record of the Motion.

The 1st applicant and one John Mungayi Odipo filed protests challenging the distribution of a parcel of land subject of the Succession Cause. It was shown that the parcel of land belonged to the late Odipo Wangoma. It was the case of the 1st applicant that although he was not the

son of Odipo Wangoma (his father was Malichi Wangoma) Odipo held the land in trust for his brother, Malichi Wangoma.

In the draft Memorandum of Appeal the applicants urge that the Judge erred in awarding 12 acres of the suit land to the 1st respondent who was not a child of the deceased; that the Judge erred in finding a trust in favour of the father of the 1st respondent and that the Judge did not follow certain provisions of law. We find that whether or not the 1st respondent who was not a child of the deceased was entitled to inherit part of the suit land is an arguable point. It is true that an arguable point is not a point that must succeed.

It is urged that the Judgment is about to be executed and if that happens the suit land will be transferred as per the distribution ordered by the Judge. If that happens the suit land may be put beyond the reach of the applicants and the intended appeal would be rendered nugatory.

The Motion succeeds and is hereby allowed. Costs to abide the intended appeal.

**Dated and delivered at Nairobi this 20th day of November, 2020.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**