



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO, (P), KARANJA & KOOME, J.J.A)

CIVIL APPLICATION NO. 49 OF 2020

BETWEEN

DAVID OKUKU ODOYO.....APPLICANT

AND

PERES OJIEM ODOYO.....1<sup>ST</sup> RESPONDENT

PESILA NYAMGUTU ODOYO.....2<sup>ND</sup> RESPONDENT

(Being an application for stay of execution against the Ruling of the High Court at Homabay (J.R. Karanja, J.) dated 12<sup>th</sup> February, 2020

in

HC Misc. Succession No. 749 of 2015,

formerly,

Homa Bay Succ. Cause No. 134 of 2004)

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RULING OF THE COURT

This dispute relates to the estate of the late Samuel Odoyo (deceased), who was a polygamous man with nine wives and a total of 43 children. Following his death, a grant of letters of administration intestate was issued to the applicant, a son and Ludia Anyango Odoyo, one of the widows in respect of the estate on 3<sup>rd</sup> August, 2004 and confirmed several years on 29<sup>th</sup> December, 2010. Ludia Anyango Odoyo also passed away on 24<sup>th</sup> April, 2010 leaving the applicant as the sole administrator of the estate. Following the death of Ludia Anyango Odoyo coupled with family feuds, the respondents, also widows of the deceased applied to the High Court for the revocation of the grant. While the applicant did not have serious opposition to the application for revocation, he instead asked the court to issue a fresh grant to himself and the 2<sup>nd</sup> respondent.

After considering the arguments, the court, (J.R. Karanja J.) was of the view that the best way to preserve the estate and secure the interests of all the beneficiaries was to altogether revoke the impugned grant in order for the process to start afresh. The result of the revocation was that the ownership of all immovable properties, the subject of the succession cause were to be transferred back and registered in the name of the deceased. This, the learned Judge estimated would facilitate an equitable and proper distribution of the estate.

Aggrieved by this ruling, the applicant has evinced an intention to challenge it on appeal to this Court by lodging the notice of appeal. In the meantime, however, he prays to this Court in an application brought pursuant to **Rule 5(2)(b)** of this Court's rules to protect the estate from intermeddling by the respondents. He submitted that the intended appeal raises arguable points of law as the learned Judge erred by substituting a deceased administrator while there was already a co-administrator managing the estate; that it was erroneous for the learned Judge to revoke the grant in the absence of grounds permitting such revocation; and that the learned trial Judge acted on wrong principles by suspecting unfair conduct on the part of the applicant in the absence of evidence.

On the nugatory aspect, it was posited that the respondents are likely to administer the estate in manner that will lead to some of the beneficiaries being disinherited, going by the fact that they have opened parallel bank accounts where proceeds of the estate are deposited

without involving the applicant as a joint administrator; that they have sidelined him in all decision making processes relating to the estate; and that if the stay orders sought are not granted, the intended appeal shall be rendered nugatory as the estate will have been wasted by the respondents.

The respondents in response accused the applicant of acting in bad faith as his intention is to continue to mismanage the estate without due regard to the rest of the beneficiaries; that no arguable point has been disclosed by the draft memorandum of appeal; that in any case the intended appeal will not be rendered nugatory; and that it is the estate of the deceased that stands to suffer peril, if the applicant's conduct to illegally apportioned land forming part of the estate to himself is anything to go by.

Pursuant to the two principles enunciated by the Court under **Rule 5(2)(b)** of our rules and summarized by this Court in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others** (2013) eKLR, we are unable to identify any point at this stage that is arguable. Our own assessment of the facts is that the effect of the impugned ruling is to preserve the estate of the deceased pending the issuance of a fresh grant that would involve the entire family of the deceased, including the applicant and to achieve parity and accountability in the management of the estate.

For these reasons, we do not think the intended appeal will be rendered nugatory as, we have observed, the intention of the trial court conveyed through the order in question is to preserve the estate pending the issuance of a fresh grant.

In the result, the intended appeal is not arguable neither will it be rendered nugatory if the orders sought are not granted.

We must decline the invitation to stay orders of the court below us since we find no merit in the invitation. The application fails and is accordingly dismissed with costs.

**Dated and delivered at Nairobi this 4<sup>th</sup> day of December, 2020.**

**W. OUKO, (P)**

.....

**JUDGE OF APPEAL**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**M.K. KOOME**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**