



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KIAGE, SICHALE & J. MOHAMMED, JJA]

KISUMU CIVIL APPLICATION NO. 117 OF 2019

BETWEEN

GEORGE ORONDO OWUOCHE.....1ST APPLICANT

HELIDA AOKO OKUMU.....2ND APPLICANT

AND

JEMIMA JUMA OKETCH.....RESPONDENT

(Being an application for the order of stay of execution of the Judgment and Decree of Hon. E.N. Maina, J.) Given at Kisumu on the 3rd day of July, 2018

in

Succession Cause. No. 682 of 2013)

RULING OF THE COURT

By a Notice of Motion dated 24th September, 2019, the applicants have invoked our jurisdiction under **Rule 5(2) (b)** and **Rule 4** of the Court of Appeal Rules seeking the following orders *inter alia*:

“1. ... (spent)

2. **THAT pending the hearing and determination of this application inter-parties, the Honourable court be please (sic) to issue interim orders restraining the Respondent from selling, alienating, apportioning, leasing, transferring or in any way dealing with land parcel number East Gem/Ulamba/392.**

3. **THAT pending the hearing and determination of the intended appeal, the Honourable court be please (sic) to issue temporary orders restraining the Respondent from selling, alienating, apportioning , leasing, transferring or in any way dealing with land parcel number East Gem/Ulamba/392 .**

4. **THAT the proposed appellants /applicants be granted leave to appeal out of time against the whole judgment of Hon. Lady Justice E.N Maina, delivered on 3rd July, 2018.**

5. **THAT the Notice of Appeal annexed hereto be deemed as duly filed and served upon the Respondent.**

6. **THAT the Honourable Court be pleased to issue any other order for purposes of maintaining the status quo.**

7. **THAT costs of this application be in the cause”.**

The facts giving rise to this application stem from the judgment of **Hon. Lady Justice E.N Maina**, delivered on 3rd July, 2018, wherein the court found no merit in the applicants’ protest against the mode of distribution of the estate of the deceased, **Samuel Opwapo**, comprised in land Parcel LR No. East Gem/Ulamba/392 (the suit property) as well as the deceased’s share in East Gem/Ulamba/160 and consequently

declared the respondent the sole beneficiary of the suit property as well the deceased's share in **East Gem/Ulamba/160** and ordered a certificate of confirmation to issue.

In support of the application, the 1st applicant deposed that the suit property is ancestral land housing hundreds of families and which should not have formed part of the estate of the deceased; that the respondent had started to dispose of the suit property; that when judgment was delivered the original court file went missing for more than a year hindering them from timeously filing the appeal; that they believed that the respondent was appointed as an administratrix to hold the land in trust for all family members; that they will suffer great prejudice if the orders sought are not granted given that they shall lose their homes and lastly, that they have an arguable appeal which shall, if successful, be rendered nugatory if the orders of stay are not granted.

We have considered the record, the rival written submissions, the authorities cited and the law. The applicants have asked this Court to exercise its jurisdiction under **Rule 5(2)(b)** and **Rule 4** of this Courts Rules. It is settled that for a Court to grant orders of stay of execution under **Rule 5(2)(b)** the applicants must satisfy us that its intended appeal is arguable and that unless the Court grants the orders sought, the intended appeal if successful will be rendered nugatory, be of no consequence or merely academic. (*See Jaribu Holdings Ltd v Kenya Commercial Bank Ltd. CA No. 314 of 2007.*)

It is clear that the applicants intend to challenge the court's finding that the respondent is the sole beneficiary of the suit property and the consequent issuance of a certificate of confirmation of grant. The applicants argue that the suit property is ancestral land bequeathed to them by their grandfather and father-in-law respectively, one **Musa Otolo Orondo** who was the original owner of the land, and that the deceased illegally registered the suit property in his name. In our view, these are arguable issues worthy of the court's consideration on appeal. We therefore find that the first limb of the twin principles has been met.

On the nugatory aspect, it was submitted that the respondent has already started to dispose of the suit property, on which the applicants and other families live. We have considered whether the intended appeal shall be rendered nugatory if the stay orders sought are not granted by this Court. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.(see *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR*)

What is clear to us is that the applicants' assertion that the 1st respondent intends to sell or has started selling off the suit property has not been denied or otherwise answered on oath. This averment is therefore uncontroverted. The possibility of dozens of family homes being destroyed and family members being evicted from their homes is not a matter lightly to be taken and to avoid such an eventuality, we think that the injunctive orders sought should be granted to avoid irreparable damage and to preserve the integrity of the appellate process so as not to render any eventual success a worthless victory. Consequently we find that the applicants have satisfied the twin principles and are persuaded to exercise our unfettered discretion as sought.

Accordingly, we grant the application in terms of prayer 3 and stay the decree in **Succession Cause. No. 682 of 2013** pending the hearing and final determination of the applicants intended appeal.

Costs of the application will be in the intended appeal.

Dated and Delivered at Nairobi this 4th Day of December, 2020.

P.O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR