



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPLICATION NO. 110 OF 2018 & 53 of 2019

BETWEEN

PROF. PETER ANYANG NYONG'O.....1ST APPLICANT

NYAGOY NYONGO BLOCH.....2ND APPLICANT

AND

KENNETH ODHIAMBO OKUTHE.....1ST RESPONDENT

GEOFFREY OMONDI NYONG'O.....2ND RESPONDENT

(An application for stay of execution of the orders and ruling of the High Court of Kenya at Kisumu (Thrispisa Cherere, J.) dated 11th October, 2018

in

Succession Cause No. 815 of 2010)

RULING OF THE COURT

[1] Two applications, that is, Civil Application No. 110 of 2018 and Civil Application No. 53 of 2019 brought by way of Notice of Motion primarily under Rule 5(2)(b) of the Court Rules, have been argued before us. The two applications have their root in a judgment delivered on the 11th October, 2018 by the High Court (Cherere, J.), in Kisumu Succession Cause No. 815 of 2010 relating to the estate of the late Hesbon Shimei Nyong'o (deceased). The applicants in both applications are Prof. Peter Anyang Nyong'o and Nyagoy Nyong'o Bloch (who are the children of the deceased). The respondents in both applications are Kenneth Odhiambo Okuthe (1st respondent) and Geoffrey Omondi Nyongo (2nd respondent) who are the deceased's grandsons.

[2] In the judgment the learned judge ordered, *inter alia*, that letters of administration that had been issued to the applicants on 8th November, 2011 and confirmed on 9th July, 2014 be revoked; that the 1st respondent, be appointed as a co-administrator of the estate jointly with the two applicants; and that letters of administration be issued in the joint names of the three administrators. The applicants and their other siblings were also directed to render and file in court, an account of the deceased's estate from 9th July, 2014 when the certificate of confirmation of the revoked grant was issued to them.

[3] The applicants who were aggrieved by the judgment filed a notice of appeal on 16th October, 2018. The applicants also filed a notice of motion dated 29th October, 2018 in the High Court seeking orders of stay of execution of the judgment pending the hearing and determination of the intended appeal. The learned judge directed that the motion be served and mentioned on 19th November, 2018 for directions. When the matter came up on that date the learned judge directed that the application be heard inter parties on the 19th December, 2018.

[4] In the meantime the 1st respondent by an application dated 19th December, 2018 sought orders for the applicants to be compelled to deposit into a joint interest earning account all proceeds collected from the deceased's properties, pending the hearing of his motion, and that the applicants and one Mary Owiti be committed to civil jail for a period of six months for disobedience and contempt of the court orders issued on the 11th October, 2018.

[5] The applicants opposed the respondents' application contending that the orders made on the 11th October, 2018 were the subject of Civil Application No. 110 of 2018 which the applicants had filed in the Court of Appeal on 4th December, 2018, and in which they were seeking orders to stay execution of the orders of 11th October 2018; and that the respondent's motion was brought in bad faith to forestall the applicants motion that was pending in the Court of Appeal for orders of stay of execution.

[6] In a ruling dated 23rd May, 2018 but which must have been delivered on 23rd May 2019, the learned judge of the High Court made a finding that the applicants did not have a good reason for failing to comply with the orders of the High Court as, absent stay orders, the notice of appeal and motion for stay of execution could not operate as a stay, nor did it give the applicants the right to act in willful defiance of the court order. The learned judge therefore made orders convicting the applicants of contempt of court and directing that they personally appear in court on the 28th May, 2019 for sentencing and further orders.

[7] As expected the applicants were aggrieved and filed another notice of appeal dated 28th May 2019 in the Court of Appeal registry indicating their intention to appeal against the orders made on 23rd May, 2019. On the same date, that is 28th May 2019, the applicants filed a notice of motion dated 27th May, 2019 that was registered as Court of Appeal Civil Application No. 53 of 2019, seeking an order of stay of execution of the contempt orders made by the learned judge in Succession Cause No. 815 of 2010 pending the hearing and determination of their intended appeal against the orders. Although the two motions were in separate files and we heard the motions separately, the two motions are closely intertwined and we find it appropriate, expedient and efficient use of judicial time to make a consolidated ruling for the two applications.

[8] In regard to the motion filed on 4th December, 2018 the applicants maintained that they have an arguable appeal against the judgment delivered on 11th October, 2018. A draft memorandum of appeal in which six grounds were raised was filed. In arguing that motion, **Ms. Judith Guserwa** learned counsel who appeared together with **Mr Chacha Odera**, informed the Court that the applicants have already filed Civil Appeal No. 122 of 2019 against the order of 11th October, 2018. Pointing out that the learned judge of the High Court had made an order for revocation of the grant when there was no such prayer, Counsel urged that the applicants had an arguable appeal, and that unless the orders of stay of execution was granted, they would suffer irreparable loss as they are exposed to risk of being jailed; and therefore the court should give them protection.

[9] The respondent did not file any reply to the applicants' motion. However, Mr. Rogers Mugumya, learned counsel for the respondent, made submissions urging the court to dismiss the applicants' motion. He contended that the applicants had not come to the court with clean hands. This is because the applicants had not given any reason as to why they had not complied with the judgment of the High Court. Counsel submitted that the estate of the deceased was at the verge of being wasted and therefore an order of stay of execution should not be granted.

[10] In Civil Application No. 53 of 2019 Dr. Nyagoi Nyong'o Bloch swore an affidavit in which she narrated the events leading to the order of 23rd May 2019. She asserted that their intended appeal would be rendered nugatory unless the orders sought were granted. She availed a copy of the memorandum of appeal in which four grounds were raised, and maintained that they have an appeal with high chances of success.

[11] Mr. Chacha Odera, learned counsel who argued the second motion on behalf of the applicants, submitted that the respondents' application which resulted in the impugned judgment of 11th October 2018 was for revocation of the confirmation of the grant, and not for revocation of the letters of administration. He therefore faulted the learned judge for revoking the letters of administration, instead of revoking the confirmation of grant only.

[12] In addition, Mr. Chacha posited that in appointing the 1st respondent as a co-administrator of the estate, the learned judge did not take into account section 66 of the Law of Succession Act that identifies persons entitled to priority in the issuance of letters of administration. On the nugatory, aspect Mr. Chacha submitted that the applicants faced the threat of being jailed, because the issue of accounts and the appointment of the 2nd respondent as an administrator had not been resolved. Relying on **Rose Detho vs. Rantila Automobiles Limited & 6 Others [2007] eKLR**, Mr. Chacha pointed out that a party could be heard even where they have not purged a contempt of court.

[13] On his part, Mr. Mugumya appearing for the respondent submitted that the intended appeal was not arguable; that the deceased's estate was vast and stands to be wasted if the orders sought are granted; that the court reserves a right to remove an administrator who is not properly administering the estate; that the applicants have not come to court with clean hands; and that no books of account have been filed.

[14] Both applications having been brought under Rule 5(2)(b) of the Court Rules. The principles upon which such an application is to be determined is now well settled. The applicant must satisfy the Court that he has an arguable appeal that is not frivolous; and that unless the orders of stay or injunction that are sought are issued, the intended appeal will be rendered nugatory. Both requirements of arguability and nugatory aspect must be satisfied, but it is enough that the applicant has at least one arguable issue. (**Reliance Bank Limited vs. Norlake Investments Limited [2002]1 EA 227**; **Republic v. Kenya Anti-Corruption Commission & 2 others [2009] KLR 31**). **Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union** Civil Application Nai. No. 72 of 2001).

[15] In this case, the applicants has exhibited draft memoranda of appeal in regard to the two intended appeals. The grounds for the appeal against the judgment of 11th October, 2018 fault the learned judge for having erred in revoking the certificate of confirmation of grant without adequate justification in law; making findings that were not supported by known provisions of the law; failing to consider the applicants evidence that was produced in court; and appointing the 1st respondent as a co-administrator without considering his locus standi within the family lineage. It is not for us at this stage to consider the merits of these grounds, nor is it imperative that these grounds must succeed. It suffices that the grounds are arguable, and we believe they are.

[16] In regard to the order of 23rd May, 2019 the grounds that had been exhibited includes the learned judge: failing to consider the

submissions by the applicants regarding the application for contempt; finding the applicants to be in contempt when there was no basis for so finding; making findings that were not supported by any provisions of the law; and failing to consider the applicants evidence. Again, we are satisfied that these grounds are not frivolous and are arguable.

[17] With regard to the nugatory aspect, the applicants maintained they would be prejudiced if the orders are not stayed, as the court had given a timeline of sixty days and the orders would be executed with the result that their appeals would be rendered an academic exercise. The applicants therefore urged that it was fair and just to issue the orders sought so as to preserve the estate. It is evident that an attempt was indeed made to execute the orders of 11th October 2018 and that this resulted in an order convicting the applicants of contempt of court and this is what gave rise to the second motion by the applicants.

[18] The issue is whether the applicants' first motion filed on 4th December 2018 is spent in light of the attempted execution, or whether there are still orders to be stayed. The order made by the High Court on 11th October 2018 included an order requiring the applicants to render accounts and this order has apparently not been executed. In her submissions learned counsel Ms Guserwa stated from the Bar (and this was not disputed), that pursuant to an order of committal made by the High Court on 25th July 2019, the applicants have had to each pay a fine of KShs. 400,000/= plus an additional Kshs. 50,000/; that a total of Kshs 900,000/- has been paid by the applicants' to avoid going to jail, and that notwithstanding this, the risk is still hanging over their head as they are yet to fully comply with the orders of 11th October 2018. Thus, the execution process has not been completed and it cannot be said that the applicants motion dated 4th December 2018 for stay of execution of the order of 11th October 2018 is spent. Indeed, the execution proceedings in the High Court were only stopped by the order of stay issued by this Court on 30th July 2019.

[19] In regard to the appeal against the orders of 23rd May 2019, the applicants contended that they have been exposed to the risk of being jailed and that they had already been forced to pay a total of 900,000. As pointed out by the applicants the respondents have not filed any replying affidavits, nor have they raised any point of law. The respondents appear to have stolen a march against the applicants by having the orders of 23rd May 2019 issued when the applicants' motion for stay of execution that was filed in the High Court much earlier, appears to have been totally ignored. It is evident that the risk to the applicant's liberty is one that cannot be taken lightly, and that this would render the intended appeal nugatory as the orders sought to be appealed against would have been spent.

[20] For the above reasons, we are satisfied that the applicants have met the two requirements for issuing orders of stay of execution of the orders of 11th October 2018 and 23rd May 2019 issued in HC (Kisumu) Succession Cause No.815 of 2010. Accordingly, we grant the motions filed on 4th December 2018 in Civil Application No. 110 of 2018 and 28th May 2019 in Civil Application No.53 of 2019, and issue orders of stay of execution pending the hearing of the appeals.

It is so ordered.

Dated and Delivered at Kisumu this 3rd day of October, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR