



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, OKWENGU & KANTAL, J.J.A)

CIVIL APPLICATION NO. 42 OF 2019 (UR. 31/19)

BETWEEN

PATRICK JEREMY NYAGA.....APPLICANT

AND

JOYCE MUTHONI JUSTUS.....RESPONDENT

*(Being an application for stay of execution pending hearing and determination of an intended appeal from the Ruling of the High Court of Kenya at Chuka (Limo, J.) dated 14<sup>th</sup> February, 2019*

in

Misc. Succession Cause No 51 of 2017)

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RULING OF THE COURT

1. In a Ruling delivered on 14<sup>th</sup> February, 2019 by **Limo, J.** which **Patrick Jeremy Nyaga (applicant)** intends to appeal against, the estate of the late **Lotham Njagi Njagara (deceased)** was ordered to be distributed by **Joyce Muthoni Justus (respondent)**. This was according to her proposed mode of distribution which she had proposed in her application seeking confirmation of grant. The court had appointed the respondent as the administratrix of the deceased estate. The only property comprising the estate of the deceased which is the centre of the dispute is **Title No Mwimbi/Murungi/118 (suit land)** which the court directed be shared among the dependants of the deceased namely: -

1. **Joyce Muthoni Justus**

2. **Harriet Ukima Murithi**

3. **Gatakaa Tirus**

2. Dissatisfied with the aforesaid Ruling, the applicant filed a Notice of Appeal on 13<sup>th</sup> March, 2019 intimating his intention to appeal against the whole of the said Ruling. Subsequently on the 11<sup>th</sup> April, 2019 he filed the instant notice of motion seeking an order for stay of execution of the orders made in the aforesaid ruling. The application is supported by the grounds that if the respondent proceeded with execution and the applicant stands the risk of being evicted from the suit land where he has lived for over twelve (12) years. In the event that stay orders are not granted, the intended appeal will be rendered nugatory besides the fact that the applicant will too be rendered destitute. Finally that the appeal is arguable and this application was made without unreasonable delay.

3. The motion is supported by the applicant's affidavit sworn on 3<sup>rd</sup> April, 2019 in which he the applicant really says nothing about the arguability of the appeal other than that he has lived with his family on the suit land for more than twelve (12) years and made extensive developments and that he has filed a notice of appeal. During the plenary hearing of the motion, the applicant was represented by **Mr. Calvin Otieno**. The respondent did not attend court at the hearing although his counsel one **Basilio Gitonga** was duly served with a hearing notice. **Mr. Otieno** submitted that the other reason that renders the intended appeal strong is the fact that the applicant was given an opportunity to file an affidavit of protest before the trial court, but he failed to do so on time. Nonetheless it was filed late but the Judge expunged it from record which prejudiced the applicant. Counsel urged us to allow the application.

4. We have considered the matters stated in the notice of motion and deliberated on the submissions by counsel. As aforesaid, the motion

was not opposed but that notwithstanding, a party seeking orders under **Rule 5 (2) b** of the Court of Appeal Rules which are discretionary in nature, must satisfy the two conditions; that is that the intended appeal is arguable and unless the order of stay is granted, the appeal if successful would be rendered nugatory. This has been stated in a plethora of cases determined by this Court, among them the case of; - **Trust Bank Limited & Another vs. Investech Bank Limited & 3 Others - Civil Appeal Nos. 258 & 315 OF 1994** (unreported):

***“The jurisdiction of the court under rule 5 (2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable or put another way, it is not frivolous and secondly, that unless he is granted a stay the appeal or intended appeal if successful, will be rendered nugatory. There are guiding principles but these principles must be considered against facts and circumstances of each case. ....”***

5. We do not wish to delve into the merit of the appeal, that being the mandate of the Bench that will deal with it, save to say that the gravamen of this application was a dispute over inheritance of a parcel of land belonging to the deceased. We note on the outset that the Notice of appeal was filed on 13<sup>th</sup> March, 2019 while the Ruling intended to be appealed against was issued on 14<sup>th</sup> February, 2019.

**Rule 75 (2)** of the Court of Appeal Rules provides that a notice be lodged within 14 days of the date of the decision against which it is desired to appeal. We will nonetheless not dwell on that as we are not dealing with the competency of the Notice of Appeal.

6. On the twin issues for consideration, counsel for the applicant submitted that the applicant’s affidavit of protest was expunged from the record for reasons that it was filed late. However, he has not given any reasons why the applicant filed the affidavit of protest late. In the absence of any reasons, we are unable to decipher whether the Judge exercised his discretion wrongly in expunging the affidavit of protest which admittedly was filed late. In the circumstances, we are not persuaded that this is an arguable point. On the nugatory aspect of the intended appeal, the applicant contended that he has lived on the suit property for more than twelve (12) years and should the order of stay of execution not be issued, he stands a risk of being evicted. We note what was before the trial court are succession proceedings where the grant of letters of administration was confirmed and the applicant’s case seems to be a claim for land.

7. Taking into account our view on the twin issues of arguability and nugatory aspects arising from this matter, we are not convinced that the application deserves the exercise of this Court’s discretion in favour of the applicant. The upshot of the foregoing is the instant application is dismissed. As there was no opposition by the respondent, we make no order as to costs.

***Dated and delivered at Nairobi this 8<sup>th</sup> day of November, 2019.***

**M. K KOOME**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**