



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 78 OF 2016 (UR 43/2016)

BETWEEN

NOEL AMBOSO OYOMBE.....APPLICANT

VERSUS

ZIPORAH ANYOLO ALIAS

SIPORAH ANYOLO.....RESPONDENT

(An application seeking orders to stay of execution and leave to Appeal against

the Ruling and Orders in Kakamega, (R. N. Sitati, J.) made on 16/8/2016

in Kakamega HC Succession Cause No. 790 Of 2006)

RULING OF THE COURT

[1] Before us is a Notice of Motion dated 10th October, 2016 expressed to be brought under Sections 3 of the appellate Jurisdiction Act, rules 1 (2) and 2 of the Court of Appeal Rules and Article 159 (d) of the Constitution. **NOEL AMBOSO OYOMBE**, (the applicant), seeks an order of stay of execution and leave to appeal to this Court against the Ruling and Orders made on 16th August, 2016, in favour of **ZIPORAH ANYOLO alias SIPORAH ANYOLO** (the Respondent).

[2] The application is founded on the grounds set out on the face thereof and also on the averments deponed in the applicant's supporting affidavit and further affidavit.

[3] A brief background of the dispute as can be gleaned from the applicants affidavit dated 10th October, 2016 and further affidavit dated 13th March, 2017 are that the applicant is a dependant to the estate of the late **HESBON MUDOGO**, (deceased), by virtue of being a daughter in law of the deceased and the widow of **JOHN AMBULWA MUDOGO alias JOHN AMBULWA MUDOPGO**, a son of the Deceased.

[4] It was the applicants further contention that she, together with her late husband, John Ambulwa Mudogo alias John Ambulwa Mudopgo during his lifetime were allocated **South Kabras/Shamberere/200** (the suit property) by the deceased which property the applicant has extensively developed.

[5] Further, that the learned Judge in her judgment erred in fact and law in issuing an order for the suit property to be distributed equally between the applicant and **CAROLYNE MUDOGO**, (a daughter of the Deceased and the Respondent herein without considering whether or not summons for confirmation of Grant in respect of the estate of the deceased had been filed or not.

[6] The learned Judge in a judgment dated 16th August, 2016 found that the suit property forms part of the deceased's estate and that the same was therefore available for distribution to the beneficiaries of the deceased's estate.

[7] Aggrieved by that decision, the applicant filed the instant application supported by her affidavit and further affidavit. The application was unopposed as the respondent did not file a replying affidavit or attend the hearing, though served with the hearing notice.

Submissions

[8] When the application came up for hearing, Mr Victor O. Osango appeared for the applicant while there was no appearance for the respondent.

[9] Counsel for the applicant informed the court that they have already filed the main appeal being **Civil Appeal No. 90 of 2016** in respect of this matter.

Counsel submitted that they seek orders of stay of execution of the Ruling and Orders of 16th August, 2016 and leave to appeal to this Court and that the Record of Appeal and the Memorandum of Appeal be deemed as properly filed.

[10] On arguability, counsel submitted that the applicant has an arguable appeal as inter alia, the learned Judge erred in law in confirming the Grant while what was before her was an application for revocation of Grant. Counsel argued that the appeal has a high chance of success.

[11] On nugatory aspect, counsel submitted that respondent was threatening to enforce the orders made which will occasion her to suffer prejudice and be disinherited of part of the suit property. Counsel urged us to allow the application.

Determination

[12] We have considered the application, the Affidavits, the submissions by counsel and the law.

[13] The jurisdiction of this Court in applications of the nature as the one before us is donated by **Rule 5(2)(b)** of the Court of Appeal Rules. The jurisdiction is original and discretionary. In the case of **Stanley Kang'ethe Kinyanjui Vs. Tony Keter & 5 Others, Civil Application No. Nai 31/2012**, this Court stated inter alia;

“That in dealing with Rule 5(2)(b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court.” The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”

[13] In considering the application, we shall bear in mind these principles. On the issue of arguability, the applicant has set out in her draft Memorandum of Appeal, several grounds under this limb including; whether the order that the suit property be shared equally between the applicant and **CAROLYNE MUDOGO** was valid without considering whether or not summons for confirmation of Grant in respect of the deceased estate had been filed or not and whether the applicant was required to obtain Grant of Letters of Administration Intestate in respect of her late husband, **JOHN AMBULWA MUDOGO** before accessing title to her share of the suit property.

[14] The court is minded to avoid going into the merits of the intended appeal, as this will be the preserve of the bench that will hear and determine the main appeal. We are satisfied that the applicant has an arguable appeal *inter alia*, whether the applicant was required to obtain Grant of Letters of Administration Intestate in respect of her late husband before accessing title to her share of the suit property.

[15] On the nugatory aspect, as this Court said in **Reliance Bank Ltd Vs. Norlake Investments Ltd [2002] I EA 227**, the factors which could render an appeal nugatory are to be considered within the circumstances of each particular case and that in doing so, the Court was bound to consider the conflicting claims of both side. In the circumstances of that particular case, the Court said at page 237 paragraph e;

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”

[16] In the instant case, the applicant’s counsel depones in paragraph 6 of the affidavit dated 10th October, 2016 that the applicant would suffer irreparable loss as the respondent is threatening to enforce the orders made on 16th August, 2016 which will occasion her to suffer prejudice by being disinherited of part of the suit property.

[17] On the application for leave, we are guided by the case of **Rhoda Wairimu Kioi & John Kioi Karanja Vs. Mary Wangui Karanja and Salome Njeri Karanja**, CA Civil App. NAI 69 of 2004; where it was held;

“We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.”

[18] From the circumstances of the application before us, we find that prima facie, there are grounds which merit serious consideration. The applicant has demonstrated that the appeal is arguable and will be rendered nugatory if the orders sought are not granted and the appeal succeeds.

[19] Accordingly, we allow the application and order as follows:-

1) Stay of execution of the Ruling and Orders of 16th August, 2016, pending the hearing and determination of the appeal.

2) Leave to file the appeal be and is hereby granted and the Record of Appeal and Memorandum of Appeal already filed as Kisumu C. A. No. 90 of 2016 be deemed as properly filed.

3) Costs of this application to abide by the outcome of the appeal.

Dated at Kisumu this 15th day of March, 2018.

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