



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJA.)

CIVIL APPLICATION NO. 17 OF 2018

BETWEEN

NORAH ADONGO ONYANGO.....FIRST APPLICANT

GLORIA APIYO ONYANGO SECOND APPLICANT

AND

JANE AWINO ONYANGO RESPONDENT

*(Being an Application for stay of execution of the judgment in High Court High Court, Civil Appeal No. 39 of 2017, Kisumu, pending the hearing and determination of an intended appeal against the judgment and orders of the High Court (**Majanja, J**) dated 7th February, 2018 in Civil Appeal No. 39 of 2017*

RULING

[1] This is an application brought by **Norah Adongo Onyango** and **Gloria Apiyo Onyango** under Ruler 5(2)(b) of the Court of Appeal Rules in which the applicants seek orders for stay of execution of the judgment and order issued on 7th February, 2018, in High Court Civil Appeal No. 39 of 2017.

[2] The subject of the judgment and orders sought to be stayed, is the burial of Stephen Onyango Achola (hereinafter referred to

as the deceased) who died on 4th February, 2016. The family of the deceased have been embroiled in a dispute pitting the two applicants and their brother Paul Onyango Achola, (who are all children of the deceased) by an earlier marriage against their step mother Jane Awino Onyango. The dispute was initially determined by the Senior Resident Magistrate in Kisumu who ruled that the deceased be buried in his father's homestead.

[3] The respondents being aggrieved appealed against the judgment to the High Court in Kisumu. The High Court in the judgment now sought to be stayed, allowed the appeal and directed that the deceased be buried on his own homestead in Kisumu/ Nyalunya/1638 in Ufunyu Village, Nyalunya Sub location Central Kolwa Location and that the respondent being the deceased surviving widow lead the funeral arrangements and ensure the participation of all the children of the deceased including the applicants.

[4] The applicants having unsuccessfully sought a stay of the order before the High Court, are now before this Court seeking the same order. The main ground relied upon by the applicants in their motion and in the affidavits sworn by each of them, is that the firm of Ken Omollo & Company Advocates who appeared for the applicants in the High Court had no instructions from them and that since the applicants were not personally served, they were not given a hearing in the appeal. The applicants maintain that they are prejudiced by the orders that were made by the learned judge and therefore urged the Court to stay the orders to enable them pursue the appeal.

[5] The respondent has objected to the application through a replying affidavit sworn on 25th April, 2018. It is contended that the applicant's motion is incompetent, frivolous and misconceived; that the allegation that the applicants did not instruct the firm of Ken Omollo & Company advocates to act for them is false as the advocate indicated to the Court that he had appropriate instructions; that the application is undeserving and meant only to delay the burial of the deceased; and that the bill for preserving the body of the deceased at Avenue Health Care had accumulated to 2,093,438.66.

[6] In arguing the application, Mr. Maua who appeared for the applicants reiterated that the applicants were denied a chance to be heard in

the appeal. He urged the Court to allow their motion. Mr. Omondi, counsel for the respondent, submitted that the applicants had not demonstrated that they have a plausible appeal nor had they shown that they were likely to suffer any harm if the orders sought are not granted. Counsel argued that under Order 9 Rule 5 of the Civil Procedure Rules, Mr. Ken Omollo who was appearing for the applicants in the magistrate's court was deemed to be the advocate for the applicants in the appeal. He urged the Court to dismiss the motion as lacking merit.

[7] We have given careful consideration to this application. Being a motion under rule 5(2)(b) of the court rules, the Court has discretion to grant the order of stay provided that the Court's jurisdiction has been invoked through the filing of an appeal or notice of appeal. In addition, the applicants must meet the twin conditions for granting a stay which are: demonstrating that the intended appeal is arguable and not frivolous; and that the intended appeal would be rendered nugatory unless the order for stay is granted. (*Reliance Bank Limited vs Norlake Investments Ltd.*) [2002] 1EA 227.

[8] In this case, the applicants filed a notice of appeal on 8th February, 2018, therefore the jurisdiction of the Court has been properly invoked. As regards the arguability of the intended appeal, the applicants have availed a draft memorandum of appeal which shows that they intend to raise the issue of fair hearing, and the failure of the learned judge to uphold customary law in accordance with Article 11 of the Constitution. These are not issues that can be considered frivolous and to that extent the intended appeal is arguable.

[9] With regard to the nugatory aspect, the subject of the appeal is the place of burial of the deceased. We reiterate what was stated by Githinji JA in *Equity Bank Ltd. Vs West Link Mbao Ltd.* Civil Application No. Nai. 78 of 2011 that:

“It is clear that Rule 5(2)(b) is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeal.”

The deceased body has been lying at the morgue for about one(1) year and two(2) months. The mortuary charges for preserving the body continue to accrue daily. As at 5th February, 2018, the hospital had issued a demand notice for payment of the interim bill of Kshs.2,093,438.66. Delay of burial will mean that this bill will continue to escalate further. It is true that if an order of stay is not granted, the deceased will be buried in accordance with the directions given in the order of 7th February, 2018. That order gives opportunity to all the parties to participate in the burial ceremony. The interment of the body of the deceased will not necessarily prevent the applicants from proceeding with the appeal. Should the applicants succeed in the appeal, there will be nothing to prevent the Court from giving an order of exhumation and removal of the body from the place interred to another suitable place.

[10] For the above reasons, we find that the applicants have failed to satisfy the nugatory aspect. As was stated in *Republic vs Kenya Anti-Corruption Commission & 2 Others [2009]* KLR, 31, the applicant must satisfy both limbs of arguability and nugatory aspect to enable them succeed. Having failed to demonstrate the nugatory aspect, we do not find it appropriate to exercise our discretion in their favour.

[11] Accordingly, we dismiss the application. This being a family dispute we direct each party to bear their own costs.

Dated and delivered at Kisumu this 26th day of April, 2018.

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTYT REGISTRAR.