



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL (APPLICATION) NO. 72 OF 2016

BETWEEN

THOMAS OCHIENG APOPA & ROBERT

ONYANGO APOPA (Both suing as part of the Legal

Representatives and Administrators of the

Estate of LEO APOPA (Deceased).....APPLICANTS

AND

GEORGE ONYANGO APOPA.....1ST RESPONDENT

FREDRICK APOPA.....2ND RESPONDENT

JULIUS APOPA.....3RD RESPONDENT

DOMINIC APOPA.....4TH RESPONDENT

(Being an application for stay of execution in an intended appeal from the

ruling delivered at Kisumu, (Majanja, J.) dated 10th August, 2016

in

H.C. SUCCESSION CAUSE NO. 370 OF 2006)

RULING OF THE COURT

Background

[1] The application before the Court is brought pursuant to Rule 5 (2)(b) of the Court of Appeal Rules.

[2] **Thomas Ochieng Apopa** and **Robert Onyango Apopa** (applicants) have applied to this Court for orders to stay execution of the orders of the High Court made on 10th August, 2016 by Majanja, J in

Kisumu Succession Cause No. 370 of 2006 pending appeal.

[3] The background of this application as can be gleaned from the record is that **Philip Leo Apopa**, (Deceased), died intestate on 22nd October, 2005. Five of the deceased's sons namely **George Apopa, Fredrick Apopa, Julius Apopa, Paul Apopa** and **Dominic Apopa** (the Respondents herein) petitioned for grant of Letters of Administration of the Estate of the Deceased. An objection to the issuance of the grant of Letters of Administration was lodged on 11th February, 2006 by the applicants who are also sons of the deceased. A grant was duly issued to the administrators on 24th September, 2008 after the objection lodged by the applicants was compromised by a consent dated 9th July, 2008 allowing **Thomas Apopa** to replace **Paul Apopa** as an administrator.

[4] An application for confirmation of Grant was lodged on 27th October, 2014 by **Thomas Apopa** but could not be heard as the administrators were not in agreement. The respondents filed an application on 15th August, 2014 seeking to discharge **Thomas** as an Administrator on the ground that he was intermeddling with the estate. **Thomas** also filed an application on 3rd November, 2015 seeking an account of the income of the estate.

[5] The learned Judge directed that the matter should be settled by determination of the issue of distribution. The learned Judge delivered a ruling on 10th August, 2016 which is the subject of this application.

[6] In his ruling the learned Judge found that there was no dispute regarding the heirs of the deceased and that the deceased had five wives namely; **MARTINA APOPA** (1st wife) deceased, **DOMTILA ADUDA APOPA** (2nd wife), **PAMELA AGOLA APOPA** (3rd wife) deceased, **FILGONA OCHOLLA APOPA** (4th wife) and **ROSE ATIENO APOPA** (5th wife) . It was also not in dispute that the deceased's properties were as follows:-

“North/Ugenya/Simur/1185, 1217, 1152, 1075, 1133, 2396, 1240, 1228, 1151, 1169 and 1155, Kisumu Municipality/Block 5/75 and Kisumu/Muhoroni/1098.”

[7] In his ruling, the learned Judge stated in part as follows:-

“At the hearing, I was told that before his death the deceased had settled each wife on her property and each beneficiary had in fact settled on their own land and there was no dispute as who was entitled to what property within each house.”

The learned Judge made the following orders:-

*“(1)The grant issued to **GEORGE O. APOPA, FREDRICK O. APOPA, JULIUS A. APOPA, PAUL O. APOPA** and **DOMINIC O. APOPA** is hereby revoked and the administrators are discharged from any liability to the estate.*

*(2) A fresh grant of letters of administration intestate is hereby issued to **DOMTILLA ADUDA, FILGONA OCHOLLA, ROSE ATIENO APOPA, DOMINIC ONYANGO APOPA** and **PAUL OTIENO APOPA**.*

(3) The grant is hereby confirmed in terms of the consent executed by the parties and filed in court on 10th August, 2012.

*(4) **KISUMU/ MUNICIPALITY 5/75** and **KISUMU/MUHORONI/1098** shall be held by the administrators and for the avoidance of doubt all the income, rents, past present and future shall be used for the maintenance of the deceased's surviving widows, **DOMITILLA ADUDA, FILGONA OCHOLLA** and **ROSE ATIENO APOPA** in equal shares during their lifetime absolutely and upon their death the properties shall be shared equally among each of the five*

houses.

(5) All previous orders in relation to this estate are hereby discharged unconditionally.

(6) THOMAS OCHIENG APOPA shall deliver up to this court within fourteen (14) days any title documents in his possession relating to the estate of the deceased together with a list of any unadministered assets of the deceased.

(7) There shall be no order as to costs.

(8) The administrators shall be at liberty to apply for any other or further orders.”

[8] Aggrieved by that decision, the applicants lodged a notice of appeal against the ruling. The applicants also filed this application seeking stay of execution of the orders issued on 10th August, 2016. The application is expressed to be brought under Rules 1(2), 5(2) (b) and 57 of the Court of Appeal Rules, 2010 and Article 159 of the Constitution of Kenya. The application is supported by the grounds set out on the face of the application and the affidavit sworn by **Thomas** who has also sworn the affidavit on behalf of the second applicant, **Robert**.

[9] The applicants' seek the following orders;-

“a) The ruling/decree of Majanja, J. in HCC Succession Cause No. 370 of 2006 dated 10th August, 2016 be and is hereby set aside.

b) This Hon. Court do make its own findings on the issue of Confirmation of Grant based on evidence and sound legal principles.

c) The costs of this Appeal be provided for.”

Submissions

[10] The respondents did not file any response to the applicant's Notice of Motion nor did they appear at the hearing of the motion. **Thomas** appeared in person and submitted that the applicants were seeking a stay of execution of the order No. 4 granted in the impugned ruling to the effect that **Kisumu/Municipality 5/75** and **Kisumu/Muhoroni/1098** (the suit properties) shall be held by the administrators and all income and rent shall be used for the maintenance of the deceased's surviving widows, **DOMITILLA ADUDA**, **FILIGONA OCHOLLA** and **ROSE ATIENO APOPA** in equal shares during their lifetime absolutely and upon their death the properties shall be shared equally among each of the five houses.

[11] The applicants also sought to stay the order in the impugned ruling which ordered them to deliver up to the court any title documents in their possession relating to the estate of the deceased together with a list of any unadministered assets of the deceased within 14 days from the date of delivery of the impugned ruling on 10th August 2016.

[12] **Thomas** further submitted that the applicants have an arguable appeal and that if a stay is not granted and the appeal succeeds, the appeal will be rendered nugatory as the respondents may proceed to execute the orders issued in the impugned ruling and distribute the deceased's estate to the prejudice of the applicants.

Determination

[13] We have considered the application, the affidavits, and the submissions by the 1st applicant, the authorities cited and the law. The jurisdiction of this Court in applications under rule 5(2)(b) of the Court of Appeal Rules 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.”

See **Housing Finance Company of Kenya –vs- Sharok Kher Mohamed Ali Hirji & Another [2015], eKLR.**

[14] The memorandum of appeal raises some arguable points.

These include, inter alia, whether in the circumstances of this case the mode of distribution of the Estate of the deceased was carried out in accordance with the law.

This 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 the main appeal. We are satisfied that the applicant has an arguable appeal as the existence of only one arguable point is sufficient.

[15] On the nugatory aspect, as this Court said in **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227**, the factors which could render an appeal nugatory have to be considered within the circumstances of each particular case and that in doing so, the Court is bound to carefully weigh the conflicting claims of both parties and each case must be determined on its own peculiar facts. 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] It was the applicant’s contention that if execution proceeds as per the mode of distribution in the impugned ruling, the intended appeal will be rendered nugatory as the respondents will proceed to execute the orders issued in the impugned ruling and that the respondents will proceed to distribute the deceased’s estate in pursuance of the orders granted by the High Court, to the prejudice of the applicants.

[17] We find that the orders made in the impugned Judgment are in favour of the surviving widows in equal shares during their lifetime and upon their death the properties shall be shared equally among each of the five houses. We therefore find that there will be no prejudice to the applicants if the injunction and stay of execution sought are not granted and the appeal succeeds. In the circumstances, the appeal will not be rendered nugatory.

[18] From the circumstances of the application before us, the applicants have demonstrated that the intended appeal is arguable but have failed to demonstrate that it will be rendered nugatory if the order of stay is not granted. Rule 5(2)(b) of this Court’s Rules requires that both limbs be satisfied.

[19] The upshot is that:-

i) We dismiss the application as it relates to stay of execution of the order granting a life interest of KISUMU/MUNICIPALITY 5/75 and KISUMU/MUHORONI/1098 to the 3 surviving widows of the deceased namely, DOMITILLA ADUDA, FILIGONA OCHOLLA and ROSE ATIENO APOPA and the incomes accruing therefrom in equal shares.

ii) We grant an order staying the delivery by Thomas Ochieng Apopa of title documents in his possession relating to the estate of the deceased and list of unadministered assets of the deceased, pending the hearing and determination of the appeal, on condition that he does not sell, charge or in any way dispose of the properties and assets.

[20] This being a family matter, there shall be no order as to costs.

Dated and delivered at Kisumu this 18th day of October, 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.

DEPUTY REGISTRAR