



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL (APPLICATION) NO. 11 OF 2018

BETWEEN

MESHACK OTIENO AIDA.....1ST APPLICANT

SUNDAY AYUB AIDA.....2ND APPLICANT

AND

SHARON ATIENO AIDAH.....1ST RESPONDENT

MOUREEN ACHIENG AIDAH.....2ND RESPONDENT

BRENDAH ADHIAMBO AIDAH.....3RD RESPONDENT

OSCAR ENOKA AIDAH.....4TH RESPONDENT

STAYCE AIDAH.....5TH RESPONDENT

BOAZ OSIR AIDAH.....6TH RESPONDENT

CALEB MIYUMO AIDAH.....7TH RESPONDENT

APOLO OGUTU AIDAH.....8TH RESPONDENT

(Being an application for stay of execution and stay of proceedings pending the hearing and determination of an appeal from the ruling and orders of the High Court of Kenya at Kisumu, (Majanja, J.) dated 6th day of February, 2018

in

H.C. SUCCESSION CAUSE NO 143 OF 2008)

RULING OF THE COURT

[1] This application is brought under **Rule 5 (2) (b)** Court of Appeal Rules and other enabling provisions of the law for:

- (i) stay of execution of the order of the High Court dated 6th February, 2018 directing the applicant to surrender the original grant of letters of administration issued in respect of the estate of **Enoka Eli Aida** for cancellation and for
- (ii) stay of proceedings flowing from the orders of the High Court made on 6th February, 2018 pending the hearing and determination of the appeal from the said orders and ruling.

[2] The dispute relates to the estate of **Eli Enoka Aida** who died on 16th December, 2007 (*Deceased*). Sometime in 2008, five sons of the

deceased namely, **Boaz osir Aida; Caleb Miyumo Aida; Meshack Otieno Aida; Apolo Ogutu Aida** and **Sunday Ayub Aida** filed High Court **Succession Cause No. 143 of 2008** seeking a grant of letters of administration intestate in respect of the estate.

On 18th June, 2008, the High Court issued a grant of letters of administration intestate to the five sons of the deceased.

Subsequently and on application the grant was confirmed on 6th March, 2009 and a certificate of confirmation issued on 10th March, 2009. According to the confirmed grant each of the over fifty plots situated within Kisumu City comprising of the estate was to be registered in the name of the five sons of the deceased to hold in equal shares as stipulated in the confirmed grant.

The documents annexed to the replying affidavit filed in this application show that on or about 18th July, 2017, the said plots were registered in the names of the five sons of the deceased.

However, one property **LR No. Kisumu Municipality/Block 7/279** was sold by the administrators to **Multibase Limited** for a sum of Shs. 36, 000,000/= in January, 2017.

[3] By an application dated 2nd July, 2017, five children of Samuel Imbo Aidah filed summons for the revocation of the grant of letters of administration on the grounds, *inter alia*, that the grant was obtained fraudulently by making false statements and concealment of material facts.

The applicants **Sharon Osir Aidah, Moureen Aching Aidah, Brendah Adhiambo Aidah, Oscar Enoka Aidah** and **Stayce Aidah** claimed that the administrators concealed the fact that their father Samuel Imbo Aidah who died on 6th August, 2005 was a son of the deceased and a brother of the administrators. The applicants also claimed that the administrators did not disclose that they had a sister **Joyce Aida** who was living in United States of America.

[4] By a Ruling dated 6th February, 2018, the High Court, (**Majanja, J.**) allowed the application and revoked the grant issued and confirmed in the proceedings. In revoking the grant the learned judge said in part:

“5. “The fact that a direct heir of the deceased was neither named nor disclosed is not denied.

Neither is the fact that the applicants are the children of the deceased’s son. The reason given by the administrators for failing to disclose is not sufficient in law. The duty of disclosure is paramount in succession proceedings.

.....

6. I would add that while grandchildren of the deceased are not direct heirs when their parents die, they become heirs by virtue of the principle of representation which is applicable...”

The extracted order further shows that the learned judge made a further order thus:

“the original grant to be delivered within seven (7) days from the date hereof and the administrators do file an account of the estate within Thirty (30) days from the date hereof.”

[5] The learned judge granted leave to the applicants to appeal against the decision. Subsequently the applicants filed **Civil Appeal No 11 of 2017** on 20th February, 2018.

The present application is made in the appeal.

[6] The application is supported by the affidavit of Meshack Otieno who states, *inter alia*, that the appeal is not frivolous and that the surrender of the original grant and its cancellation and subsequent redistribution of the estate will occasion harm and render the intended appeal nugatory.

The application is opposed on the ground contained in the replying affidavit of Sharon Atieno Aidah who depones, amongst other things, that, the application has been overtaken by events as the appellants have already rendered accounts; that there is nothing left to stay as the grant and the confirmation were revoked and that the justice of the case does not call for staying of the proceedings.

[7] The principles for grant of stay of execution or stay of proceedings are well established. The applicants are required to demonstrate, *inter alia*, that, the appeal already filed is arguable and that unless the orders appealed from are granted the appeal would be rendered nugatory.

[8] As regards the merits of the appeal, the memorandum of appeal filed in the appeal reveals that the applicants’ main complaint is about the procedural irregularities and illegalities in respect of the proceedings for revocation of the grant including the denial of the right to be heard. The appeal also raises the issue of the jurisdiction of the court to revoke the grant in the circumstances of the case.

The Court should refrain at this stage from making findings that may be preemptory or which may embarrass the court which will hear the appeal. It is sufficient to say that the appeal discloses arguable grounds.

[9] However, we have considered the first prayer in the application. It seeks a stay of execution of the order directing the surrender of original grant for cancellation.

Indeed, **Mr. Otieno** for the applicants submitted that the purpose of the application is to stop the cancellation of the grant. In our respectful view, that prayer is misconceived as the High Court has already revoked the grant including the confirmed grant. That means that unless and until the decision of the High Court is set aside by the appellate court, the grant remains revoked and does not therefore exist. The order for surrender of the revoked grant to court for cancellation was a consequential order.

The **Rule 5 (2) (b)** jurisdiction of the Court does not give the court jurisdiction to reverse a substantive judgment or order given by the trial court. That jurisdiction can only be exercised at the hearing of the appeal.

[10] However, the Court has jurisdiction to stay the proceedings although that jurisdiction is exercised sparingly. Since the applicants are exercising their right of appeal, the Court should ensure that the appeal, if successful, is not rendered nugatory.

In view of the gravity of the dispute and in order to save costs and judicial time, it is in the interest of justice that further proceedings should be stayed pending the determination of the appeal on terms that are just.

There is nothing to stop the administrators from alienating the plots already registered in their names pending the determination of the intended appeal.

It is just that the order of stay of proceedings should be granted on terms that the assets of the estate are preserved and on terms that the hearing of the appeal is expedited.

[11] For the foregoing reasons, the application is allowed to the extent and we order that:

(i) Further proceedings consequent to the orders of the High Court dated 6th February, 2018 are stayed pending the hearing and determination of the appeal.

(ii) (a) Status quo in respect of the assets of the estate already transferred to the beneficiaries shall be maintained by the beneficiaries. For avoidance of doubt, the order of maintenance of status quo means that the respective beneficiaries to whom the respective properties have been conveyed are restrained from further dealing with the properties including conveyance thereof pending the determination of the appeal.

(b) Status quo in respect of the Registers of the plots comprising the estate shall be maintained and the County Land Registrar is restrained from registering any dealing in respect of the aforesaid plots pending the hearing and determination of the appeal.

(iii) The Deputy Registrar to allocate a hearing date of the appeal convenient to the parties on priority basis.

(iv) The costs of the application shall be costs in the cause in the appeal.

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