



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)**

**CIVIL APPLICATION NO. 42 'A' OF 2015**

**BETWEEN**

**YUNES KERUBO ORUTA.....1<sup>ST</sup> APPLICANT**

**DAVIN KWAMBOKA ORUTA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**GEORGE KOMBO ORUTA.....1<sup>ST</sup> RESPONDENT**

**ROSE NYANCHAMA AENCHI.....2<sup>ND</sup> RESPONDENT**

*(Being an application for stay pending the determination of the appeal against the Judgment of the High Court of Kenya at Kisii, (Hon C. B. Nagillah, J.) dated 3<sup>rd</sup> July, 2015*

**in**

**SUCCESSION CAUSE NO. 169 OF 2013)**

\*\*\*\*\*

**RULING OF THE COURT**

1. This is an application by the applicants seeking a stay of the judgment and all orders made by the High Court at Kisii on 3<sup>rd</sup> July 2015 in Succession Cause No. 169 of 2013 dismissing the applicants' petition for grant of Letters of Administration for the estate of Jameson Oruta Oroni, deceased, among other orders.

**Background**

2. Jameson Oruta Oroni, deceased, (the deceased) died on 17<sup>th</sup> October 2003. His widow, Yunes Kerubo Oruta, the 1<sup>st</sup> applicant and several children, including Davin Kwamboka Oruta, the 2<sup>nd</sup> applicant, and George Kombo Oruta, the 1<sup>st</sup> respondent, survived him. Rose Nyanchama Aencha, the 2<sup>nd</sup> respondent is the deceased's daughter in law.
3. In April 2013, the applicants petitioned the High Court at Kisii for a grant of Letters of Administration intestate of the estate of the deceased. According to the applicants, the inventory of

the deceased's assets, which they estimated to have a value of Kshs. 8,300,000.00 consisted of three parcels of land namely Nyaribari Chache/B/B/Boburia/2607, Riosiri Market/ Plot No.1 and Riosiri Market/ Plot No.22. The applicants also indicated that the persons who survived the deceased, were:

*“(a) Yunes Kerubo Oruta - Widow*

*(b) Lameck Nyakundi Oruta – Son*

*U.S.A - Resident*

*(c) George Kombo Oruta.*

*(d) Lawrance mauti Oruta – Son – U.S.A*

*Resident.*

*(e) Rose Nyanchama Aencha – W/O*

*Andrew Obinchu (Deceased)*

*Daughter in Law.*

*(f) Davin Oruta Kwamboka – Daughter*

*(g) Emily Nyaboke Ogega – W/O Tom.*

*Ogega (Deceased) Daughter in Law.*

*(h) Everlyne Moraa Oruta – Resident –*

*United Kingdom.*

*(i) Mercy Nyaboke Oruta – Adopted*

*Daughter.*

*(j) Simon Ongati Kombo – Grandson*

*(k) Nicholas Oroni Obinchu – Grandson*

*(l) Manuel Mauti Nyakundi – Grandson*

*(m) Michael Ogega Ogega – Grandson”*

4. George Kombo Oruta the 1<sup>st</sup> respondent, who is the second born child to the deceased and the 1<sup>st</sup> applicant, filed an answer to the petition opposing the issue of the grant of Letters of Administration of the estate of the deceased to the applicants. At the same time, the 1<sup>st</sup> respondent petitioned, by way of cross application, for the grant of Letters of Administration of the estate of the deceased to be issued to him.
5. The grounds on which the 1<sup>st</sup> respondent opposed the appointment of the applicants as the administrators of the estate of the deceased were that they are not fit and proper persons to administer the estate. According to the 1<sup>st</sup> respondent, the 1<sup>st</sup> applicant, in collusion with the 2<sup>nd</sup> applicant, fraudulently transferred properties belonging to the estate to her and generally intermeddled and wasted the estate of the deceased. According to him, in addition to the three properties mentioned in the applicants' petition, the deceased had seven other immovable

- properties that the applicants did not disclose in their inventory of the deceased's assets. The 1<sup>st</sup> respondent went on to say that the applicants had included in the petition, persons who did not qualify as beneficiaries of the deceased, namely grandchildren.
6. The 1<sup>st</sup> applicant filed an answer to the 1<sup>st</sup> respondent's objection and to the cross application for grant. She contended that as the widow of the deceased, she has priority over the 1<sup>st</sup> respondent to the grant of Letters of Administration for the estate of her husband; that she and her daughter the 2<sup>nd</sup> applicant are fit and proper persons to administer the estate; that the inclusion of the deceased's children and grandchildren as those surviving the deceased was proper as two of the deceased's sons had died leaving behind children and spouses who were legitimate beneficiaries of the estate of the deceased; that the 1<sup>st</sup> respondent was driven by self interest and was not a proper person to administer the estate; that she had obtained a limited grant of Letters of Administration for the estate of the deceased for purposes of collecting and preserving the deceased's estate; and that she intended to ensure that the estate is reasonably and equitably distributed amongst the beneficiaries of the deceased.
  7. The petition, the objection and the cross application were disposed of by written submissions. C. B. Nagillah, J delivered judgment on 3<sup>rd</sup> July 2015 in which he held that the inclusion of grandchildren as beneficiaries of the estate of the deceased in the petition by the applicants was irregular; that the applicants have intermeddled with the estate of the deceased in that the 1<sup>st</sup> applicant transacted with property of the estate without a grant or confirmed grant of Letters of Administration; that the 1<sup>st</sup> applicant transmitted the property of the deceased to herself and "sold off part of the property without obtaining grant or even consent from her children"; that in those circumstance the objection by the 1<sup>st</sup> respondent to the issue of grant of Letters of Administration to the applicants is justified and not in the best interests of the estate.
  8. The Judge proceeded to make the following orders:
    - a) *The petition by Yunes Kerubo Oruta and Davina Oruta Kwamboka is hereby dismissed on grounds that the two are not fit and/or proper persons to whom a grant of representation may issue and have intermeddled in the estate.*
    - b) *The transfers effected since the death of Jameson Oruta Orori on 17<sup>th</sup> October, 2003 without grant of representation are hereby declared null and void.*
    - c) *A prohibition of any dealing in the property standing in the name of **Jameson Oruta Orori** as at 17<sup>th</sup> October, 2003.*
    - d) *The objector **George Kombo Oruta** can proceed and file for petition for grant of letters of administration intestate in favour of the estate of Jameson Oruta Orori."*
  9. The applicants filed a notice of appeal dated 7<sup>th</sup> July 2015 intending to appeal against the whole of that judgment.

### **The present application**

10. The applicants now seek, by their notice of motion dated 18<sup>th</sup> August 2015 presented under rule 5(2)(b) of the Rules of this Court for an order that:
  - a) *The Judgment and all Orders of the High Court of Kenya made on 3<sup>rd</sup> July, 2015 in Kisii High Court Succession Cause No. 169 of 2013 by Honourable Justice C. B. NAGILLAH be stayed pending the determination of the intended appeal."*
11. To succeed, the applicants need to demonstrate that the intended appeal is arguable and that if we

decline to grant the order sought, the intended appeal will be rendered nugatory. See **Ishmael Kagunyi Thande v HFCK Civil Application No. Nai 157 of 2006** where this Court stated that:

***“Two principles guide the Court in the exercise of that jurisdiction [under rule 5(2)(b) of the rules of the Court.] These principles are now well settled. For an application to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”***

12.Mr. C. L. Kasamani, learned counsel for the applicants submitted that an arguable case had been made out; that there can be no justifiable grounds for the High Court to have ordered the 1<sup>st</sup> respondent to the exclusion of all others, to petition for the grant of Letters of Administration of the estate of the deceased; that the effect of that order is to exclude the widow, who ordinarily would have priority, as well as other beneficiaries who would be affected, as well as third parties who have an interest in the administration of the estate; that the Judge made far reaching orders well beyond what was before him; that the matter of cancellation of titles was not before him; that if the Judge was satisfied that the 1<sup>st</sup> respondent’s objection was merited, he should have upheld that objection and left matters there.

13.Opposing the application, Mr. G. M. Nyaanga learned counsel for the respondents, referred to the replying affidavit sworn by the 1<sup>st</sup> respondent on 12<sup>th</sup> January 2016 and submitted that the applicants have not demonstrated an arguable case; that the orders granted by the High Court were justified as the estate of the deceased is in “*a sorry state*”; that the Judge correctly found that the 1<sup>st</sup> applicant had intermeddled in the estate; that no prejudice will be caused to any interested party as every person having an interest in the estate will have an opportunity to be heard in the course of hearing the petition by the 1<sup>st</sup> respondent; and that the application is frivolous and should be dismissed as the conditions for the grant of the order sought have not been fulfilled.

### **Determination**

14.We have considered the application, the affidavits and the submissions by learned counsel. We caution ourselves that we must restrain ourselves from expressing any concluded views on matters that will require further interrogation when the substantive appeal between the parties is heard. That said, we do not think that the complaints raised by the applicants are frivolous. We are mindful that that an arguable appeal is not one which will necessarily succeed. As this Court stated in **Dennis Mogambi Mong’are vs. Attorney General & others [2012] eKLR:**

***“An arguable appeal is not one that must necessarily succeed; it is simply one that is deserving of the Court’s consideration.”***

15.In keeping with the object of rule 5(2)(b) which is the “***preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals***” [per Githinji JA, in **Equity Bank Limited v West Link Mbo Limited Civil Application No. Nai 78 of 2011**] we think the circumstances in this case warrant a stay of the Judgment and Orders of the High Court given on 3<sup>rd</sup> July 2015. We accordingly allow prayer (a) of the applicants’ application dated 18<sup>th</sup> August 2015. Costs of the application shall abide by the outcome of the appeal.

Orders accordingly.

**Dated at Kisumu this 27<sup>th</sup> day of May, 2016.**

**D. K. MUSINGA**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

**JUDGE OF APPEAL**

**A.K. MURGOR**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**