



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OUKO, NAMBUYE & KARANJA, J.J.A.)

CIVIL APPLICATION NO. 69 OF 2020

IN THE MATTER OF THE ESTATE OF HARISH CHANDRA HINDOCHA (DECEASED)

BETWEEN

CATHERINE MATEI CHENA.....APPLICANT

VERSUS

PRADEEP HARISH HINDOCHA.....RESPONDENT

(Application for stay pending appeal against the ruling and order of the High Court of Kenya at Kitale (H. K. Chemitei, J.) dated 5th May, 2020

in

Kitale HCP & A No. 175 of 2008)

RULING OF THE COURT

On 9th November, 2020, the Notice of Motion dated 3rd June, 2020 came before us for hearing and determination. The motion is brought under **Rule 5(2)**

(b) of the Court of Appeal Rules, **Section 5** of the Court of Appeal (Organization and Administration), under **Article 164 (3) (a)** of the Constitution of Kenya and **Rule 73** of the Probate and Administration.

The motion substantively seeks:

“(b) that there be stay of execution of the Judgment delivered on 11th June, 2019 and decree issued on 8/7/2019 and the further orders given on 18/11/2019 and 5/5/2020 in Kitale HCP&A No. 175 of 2008. IN THE MATTER OF THE ESTATE OF HARISH CHANDRA HINDOCHA (DECEASED) CATHERINE MATEI CHENA (OBJECTOR) VS. PRADEEP HARISH HUNDOCHA (ADMINISTRATOR) pending the hearing and determination of this application and thereafter hearing and determination of the intended appeal.

(c) An injunction to issue restraining the respondent, entering, using, transferring, wasting, renting, selling, charging or in any other way interfering with the occupation of the Applicant over land parcel number Moi’s Bridge/Ziwa Block 16 Chebarus/324 registered in the name of the Applicant, Catherine Matei Chena, pending the hearing and determination of this application and thereafter hearing and determination of the intended appeal.

(d) That the Court be pleased to issue an order conserving the entire estate of the late Harish Chandra Hindocha (Deceased) pending the hearing and determination of this application and thereafter hearing and determination of the intended appeal.

(e) That the Court do issue an injunction against the Respondent barring transfer of title in land parcel No. Moi’s Bridge/Ziwa Block 16 Chebarus/324 pending the hearing and determination of this application and the entire appeal.

(f) Costs to be in the intended appeal”.

The Notice of Motion is supported by grounds on its body and a supporting affidavit sworn by **Catherine Matei Chena**, the applicant together with the annexures thereto. It has been opposed by the respondent's replying affidavit and submissions to the motion emailed on 6th November 2019. The motion was canvassed by the respective parties rival pleadings and written submissions together with legal authorities relied upon by the respective parties in support of their rival positions without oral highlighting. The set for the applicant is dated 31st October, 2020 while that for the respondent is dated 5th November, 2020.

On 9th November, 2020, we considered the record in light of the rival pleadings, submissions and legal authorities relied upon by the respective parties in support of their opposing positions at the conclusion of which we granted interim orders pending this ruling as follows:

(1) An interim order of stay of execution of the Judgment delivered on 11th June, 2019 and decree issues on 8th July, 2019 and the further orders given on 18th November, 2019 and 5th May, 2020 in Kitale HCP & A No. 175 of 2008 in the matter of the Estate of Harish Chandra Hindocha (deceased)-Catherine Matei Chena (Objector) Vs. Pradeep Harish Hindocha (Administrator) be and is hereby granted pending delivery of the ruling on 18th December, 2020.

(2) An interim order of injunction do issue restraining the respondent from entering, using, transferring, wasting, selling, charging or in any other way interfering with the occupation of the applicant over land parcel Number Moi's Bridge/Ziwa Block 16 Chebarus/324/registered in the name of the applicant, Catherine Matei Chena be and is hereby granted pending delivery of the ruling on 18th December, 2020.

(3) An order conserving the entire estate of the late Harish Hindocha (deceased), be and is hereby granted pending delivery of the ruling on 18th December, 2020.

(4) An interim injunction barring transfer of title in land parcel

No. Moi's Bridge/Ziwa Block 16 Chebarus/324 be and is hereby granted pending delivery of the ruling on 18th December, 2020.

(5) Costs of the application to abide the outcome of the ruling on 18th December, 2020.

The background to the application albeit in a summary form is that, the proceedings in the trial court relate to the Estate of **Harish Chandara Hindocha** (deceased). The respondent, a son to the deceased petitioned for a grant of letters of administration to the Estate of the deceased to the exclusion of the applicant who claims to be a widow of the deceased. A temporary grant was issued to the respondent prompting the applicant to file objection proceeding thereto, which partially proceeded by way of *viva voce* evidence in which the applicant stated that she had cohabited with the deceased for a long time and had two issues between them who are all adults namely, **Joel Kevin Chena Hindocha** and **Sharon Cherotich Hindocha**. It was in the course of the said cohabitation that land parcel Number **Moi's Bridge/Ziwa Block 16 Chebarus/324** was acquired and registered in her name. She produced a copy of the title deed to the suit property. The court ordered her to produce the original and have it deposited in court for safe custody. Efforts to get the original certificate of title from the person she had allegedly given for safe custody were fruitless with the person alleging that the same was either misplaced or lost.

When she came for further hearing of her objection proceedings, she was arrested and incarcerated and while awaiting to be committed to civil jail for her failure to produce the original title deed to the suit property as had been directed by the court, is when the objection proceedings concluded without her further participation resulting in adverse orders being issued against her.

Aggrieved, she filed an application dated 24th June, 2019 seeking to set aside the *ex parte* orders on the basis of her inability to attend the proceedings occasioned by her incarceration by alleged fraudulent acts of the respondent. The respondent filed a response thereto. The same was canvassed on merit resulting in conditional orders issued that she deposits a sum of Kshs. 60,000/= as throw away costs and deposit the original title deed to her land. She only managed to deposit the sixty (60,000/=) but not the original title to her land resulting in the objection proceedings filed by her being dismissed paving the way for the respondent to execute the *ex parte* Judgment and decree earlier issued therein in his favour.

There is therefore danger of losing title to the suit land in which she has resided for over thirty four (34) years and which has never been registered in the name of the deceased. She unsuccessfully filed an application dated 23rd December, 2019 seeking variation of the conditional orders of the 2nd limb which in her view, was incapable of being performed, dismissed on 5th May, 2020 prompting the intended appeal in respect of which the applicant timeously filed a Notice of Appeal on 14th May, 2020 on which the application under consideration is anchored.

The applicant therefore contends that the intended appeal is arguable and that if the reliefs sought are not granted, the intended appeal will be rendered nugatory.

To buttress the above argument, the applicant has relied on the case of **Nairobi Women's Hospital vs. Purity Kemunto [2018] eKLR** and **Regnoil Kenya Limited vs. Winfred Njeri Karanja [2019] eKLR** for the principle that an arguable appeal must be one that raises a bona fide issue deserving consideration by a court. Second, that even one bona fide issue will satisfy this requirement; **William Nto Mauta M'ethenga sued as M'Mauta Nkori vs. Baikiamba Kirimania [2017] eKLR**, for the proposition that the aim of a court of law is to do justice to the parties. It should not therefore impose conditionalities to fetter the wide discretion given it so as to infringe on a party's fundamental right to be heard; **Toshika Construction Company Limited vs. Harambee Co-Operative Savings and Another [2019]eKLR**, for the proposition that exercise of discretion by a court of law should be judicious; the case of **Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) vs. Kariuki Marega & Another [2018]eKLR** for the proposition that a party should not be denied the right to be heard; and lastly, the case of **Attorney General vs. Okiya Omtata Okoiti & Another [2019]eKLR**, that the guiding principle when deciding whether the intended appeal will be rendered nugatory is whether what the applicant intends to reclaim would be reversed.

In opposition to the application, the respondent relies on his replying affidavit and written submissions. His main contention is that, the applicant is non suited as this Court has no jurisdiction to stay a negative order. Second, that the notice of appeal against the order of 5th May, 2020 dismissing with costs the application filed on 5th February, 2020 cannot form basis for staying the Judgment and decree of the court issued on 11th June, 2019.

To buttress the above submissions, the respondent relies on the case of **Peter Anyang' Nyong'o & 2 others vs. Minister for Finance & Another [2007]eKLR** for the holding *inter alia* that under **Rule 5(2) (b)**, the Court has jurisdiction to grant three reliefs namely, a stay of execution, an injunction and a stay of further proceedings. Second, in a dismissal order, the Court does not order any of the parties to do anything or refrain from doing anything as there is therefore no enforceable positive order. Third, there is no jurisdiction to grant relief for an order which is extraneous. The case of **Nairobi City Council vs. Resley [2002] 2EA 487**, for the holding *inter alia* that, an application under **Rule 5(2)(b)** of the Court of Appeal Rules has to be anchored on a valid notice of appeal. Lastly, **Nguruman Limited vs. Shompole Group Ranch & Another [2014]eKLR** wherein, the Court faulted a relief granted under **Rule 5(2) (b)** of the Court of Appeal Rules in the absence of a valid notice of appeal on which such an application could be anchored.

Before we delve into the merits of the application, we find it prudent to deal with a preliminary issue raised by the respondent in his submissions namely: that the applicant is non suited on her application as laid before us for the reason that the notice of appeal on which it is anchored cannot be used as basis for seeking stay of the Judgment delivered on 11th June, 2019 as **Rules 75(1) & (2)** and **77(1)** require such a notice to be filed within fourteen (14) days of the decision/order/Judgment intended to be impugned and served within seven (7) days of the lodging of the same. In terms of the above rules, the notice of appeal on which the application is anchored would *prima facie* not suffice as basis for staying the Judgment and decree as originally passed. The applicant's arguments are however that she was aggrieved by the learned Judge's refusal to set aside the harsh conditional orders for setting aside the decree then issued in favour of the respondent and restoring the same for execution. What she therefore seeks to forestall is the order refusing to set aside what she has termed as "**harsh and impossible to perform conditionalities**" for setting aside and restoring the original Judgment and decree for execution. In this regard, her grievances stem from the restoration order. The notice of appeal filed would therefore in her opinion suffice in the circumstances, a position we entirely agree with.

But that apart, we find it prudent to determine whether the proper procedure has been invoked for attacking the validity of the said notice of appeal process. The procedure for faulting an invalid notice of appeal as we know it is as set out in **Rules 83** and **84** of the Rules of the Court. These provide:

"83. If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.

84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be."

Our take on the above rules is that, there is no provision in the said rules for an informal application made either orally in court or through submissions. No cross application has been filed by the respondent seeking to strike out the notice of appeal on which the application under consideration is anchored in terms of the procedure laid down in either **Rules 83** or **84** of the Rules of the Court as the case may be. The above being the correct position in law for faulting a defective notice of appeal, we decline the respondent's invitation through his written submissions for us to fault the notice of appeal on which the application is anchored either partially or wholly. The application is therefore properly laid before us in the circumstances. We, therefore, proceed to consider it on merit.

The substantive provision for accessing the relief sought is **Rule 5(2) (b)** of the Court of Appeal Rules. We, therefore, find it prudent not to interrogate the applicability of the other provisions of law cited alongside the above Rule.

Rule 5(2) (b) of the Rules of the Court provides as follows:

"In any civil proceedings where a notice of appeal had been lodged in accordance with rule, order and stay of execution, an injunction, for a stay of any further proceeding on such terms as the court may think just."

The principles that guide the Court in the discharge of its unfettered discretionary mandate under the said rule and which we fully adopt some of which we have already highlighted above are as were aptly restated in the case of **Stanley Kangethe Kinyanjui vs. Tonny Ketter & 5 Others [2013]eKLR**.

The first to be addressed is whether the order of dismissal granted herein falls for consideration for purposes of the reliefs the applicant has sought from the court. The record is explicit that the order issued on 5th May, 2020 triggering the filing of the notice of appeal on which the application under consideration is anchored was a dismissal order, which in law as borne out by the content of the principles of law highlighted above does not fall for consideration for purposes of granting orders for stay. However, in light of the application as laid, the applicant is not totally non suited on all aspects of the application under consideration. Our reasons are that, the order for reinstatement of the Judgment and decree of the High Court which triggered the filing of the application for setting aside resulting in the conditional orders would fall for consideration for granting of an order of stay of execution effective the date of restoration which brings the notice of appeal on which the application is anchored within the prerequisites in **rules 75(1) & (2)** and **77(1)** of the Rules of this Court. Second, there is also a prayer for an injunction which is not barred by the sheer presence of a negative order. Third, there was also a prayer for stay of further proceedings

which would in effect if successful operate to stay the execution of the reinstated Judgment and decree. We therefore find sufficient basis for us to decline striking out the application along the lines suggested by the respondent.

Addressing satisfaction of the first prerequisite, first, the memorandum of appeal on record raises fifteen (15) grounds of appeal. In these, the applicant intends to argue on appeal that the learned Judge erred both in law and in fact in holding that: the applicant's title be cancelled and the suit property transferred to the respondent and therefore erroneously failed to appreciate that the suit land does not form part of the estate of the deceased. Also failed to appreciate that there was no application by the respondent for the applicant to deposit title to the suit property in court. It was therefore erroneous for the learned Judge to grant the said order *suo motu*. The Judge also fell into error in disregarding the applicant's plausible and uncontroverted evidence especially the fact that she had partially complied with the conditional orders of 18th November, 2019; failing to appreciate that the original title was lost; fettering his discretion as to set aside; dismissing the applicant's application dated 23rd December, 2019 and reinstating the Judgment delivered on 11th June, 2019 and decree issued on 8th July, 2019; denying the applicant a right to be heard; disregarding the fact that the applicant and her two children are beneficiaries of the estate of the deceased and therefore dismissing the application in the manner done would cause them irreparable loss; deciding a case not before him. Also by: imposing conditions impossible to achieve; being overly biased against the applicant; failing to exercise judicial discretion in a manner that meets the ends of justice to both parties and without undue regard to procedural technicalities; and all of which we find arguable notwithstanding, that they may not ultimately succeed.

In law, an arguable appeal need not be one that will succeed but one that is sufficient for interrogation by the court. One that is not frivolous. We detect no frivolity in the highlighted intended grounds of appeal and which we find well founded on the background to the application set out above. Second, that one arguable point will suffice. Herein what we have set out above reveals existence of more than one arguable ground. We therefore find that the applicant has satisfied the first prerequisite for granting relief under **Rule 5(2) (b)** of the Rules of this Court.

Turning to the second prerequisite, the position in law is that, an appeal would be rendered nugatory if the consequential effects for the failure to grant the relief sought would be either irreversible or highly prejudicial so as to render of no consequence the intended appeal or appeal if ultimately successful. Herein, what is sought to be forestalled is basically the execution of the *exparte* judgment and decree. We appreciate the respondent filed a replying affidavit which as we mentioned above was not laid before us so as to gauge as to whether he had made provision for preservation of the substratum of the intended appeal, pending hearing and determination of the intended appeal or giving some guarantee, undertaking or assurance that the substratum of the proceedings which is title to the suit property will not fizzle out before the determination of the intended appeal, having found none in the written submissions. Instead, the theme of those written submissions in our consideration is that he should be allowed to proceed with the execution of the *exparte* Judgment and decree as subsequently reinstated. The above being the position, we cannot ignore the applicants uncontroverted position that her right of entitlement to the deceased's estate stems from her assertion that she was a wife to the deceased with whom they have two issues both of whom are now adults; and, second that the suit property is registered in her name as of right; and indeed third that the suit property does not form part of the estate of the deceased. This is what she sought to champion through the objection proceedings. We appreciate she was granted reprieve through a conditional order which she partially performed. It is the failure to meet the 2nd limb of the conditional order that resulted in her losing the right to be heard on her objection proceedings.

In light of the above assessment and reasoning, on this prerequisite, we find that in the circumstances of the rival position as laid before us, declining the relief sought would pave the way for the respondent to execute the judgment and decree granted in his favour as deemed fit, which may result either in an irreversible consequence or one that would likely be reversed after considerable hardship or expense and would therefore be highly prejudicial to the applicant, hence we allow the application and order as follows:

- 1. The interim order granted of injunction issued restraining the respondent from entering, using, transferring, wasting, selling, charging or in any other way interfering with the occupation of the applicant over land parcel number Moi's Bridge/Ziwa Block 16 Chebarus/324, registered in the name of the applicant, Catherine Matei Chena be and is hereby affirmed pending hearing and determination of the intended appeal.**
- 2. The order of injunction granted conserving the entire estate of the late Harish Hindocha (deceased) be and is hereby affirmed pending hearing and determination of the intended appeal.**
- 3. The interim injunction granted barring transfer of title in land parcel**
No. Moi's Bridge/Ziwa Block 16 Chebarus/324 be and is hereby affirmed pending hearing and determination of the intended appeal.
- 4. Costs of the application to abide the outcome of the intended appeal.**

Dated and Delivered at NAIROBI this 29th day of January, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR