



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MUSINGA & KIAGE, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 230 OF 2019

BETWEEN

J.W KIARIE T/A WAKINI KIARIE & CO. ADVOCATES.....APPELLANT/APPLICANT

AND

ALICE ROSA PERTET AND ZIPPORAH NKINI SIMON

(Administratrix of the estate of the late Simon Loonkishu Pertet).....RESPONDENT

(Application for stay of execution pending the hearing and determination of the appeal against the

ruling of the High Court of Kenya at Nairobi (F. Amin, J.) dated 27th July 2017

in

Misc. App. No. 2 of 2017)

RULING OF THE COURT

By the motion dated 2nd July, 2019 brought under **Rule 5(2)(b)** of this **Court's Rules**, the applicant, **J.W Kiarie T/A Wakini Kiarie & Co. Advocates** seeks an order of stay of execution of the ruling issued against her by the High Court at Nairobi (F.Amin, J) in **Miscellaneous Application No. 2 of 2017** pending the hearing and determination of her appeal against the same. By that ruling, the court *inter alia* directed the applicant to deliver up to the respondents the title deed of LR No. NGONG/NGONG/53284 and the original certificate of the confirmed grant. The applicant was also ordered to provide a copy of the ruling to the Professional Conduct Committee of the Law Society of Kenya for consideration.

The application is founded on grounds that the applicant's application for stay of execution at the High Court was dismissed on 9th May 2019 but she has an arguable appeal that would be rendered nugatory if execution were to proceed.

In a supporting affidavit sworn on 2nd July 2019, the applicant deposes that she practices in the name and style of **Wakini Kiarie & Co. Advocates**. She was the respondent in **Nairobi Miscellaneous civil application no. 2 of 2017** where orders were sought for her to deliver up to the respondents title deed no. NGONG/NGONG/53284 registered in the name of the respondents' deceased father as well as the original certificate of confirmation of grant of letters of administration to the estate of the respondents' deceased father.

The applicant further deposes that in the intended appeal, she intends to challenge the order that a copy of the impugned ruling be provided to the Professional Conduct Committee of the Law Society of Kenya for consideration, and the order of costs. The applicant through her advocates on record, **Wanjiru Theuri & Co. Advocates**, also filed written submissions dated 10th

March 2021 giving a background to the matter.

The respondents oppose the application through written submissions dated 16th March 2021 and filed by the firm of **R.W. Chege & Associates Advocates**. It is submitted that the applicant having received title deed LR NGONG/NGONG 53284 in her professional capacity as an advocate for the respondents, she owed a duty to the client to have custody of the said document for purposes of the brief and to account to the instructing client in that regard, yet the applicant acted on a third party's instructions and held on to the respondents' title, placing herself in a position of conflict of interest.

The respondents further assert that the applicant has already complied with orders of the court for delivery up to the respondents' the title deed and paying costs of the proceedings.

We have given due consideration to the application, the affidavits, the contending submissions and the law. It is common ground that a stay of execution lies at the discretion of the Court, to be exercised on a case by case basis, with a view to attaining the ends of justice. To merit an order of stay, an applicant must satisfy the Court that; first, he has an arguable appeal, which means one that raises a *bona fide* point worthy of consideration, though it need not necessarily succeed and; second, that if the stay is not granted the appeal would be rendered nugatory, which is another way of saying useless or of no effect, due to harm having been suffered in the intervening period.

In a draft memorandum of appeal dated 2nd July 2019, the applicant contends that the learned judge erred in law by making orders that the parties had not moved the court to grant, to *wit*, that a copy of the ruling be provided to the professional conduct committee of the Law Society of Kenya for its consideration.

Without going into the merits of the appeal, we find that whereas it may be arguable, we are unpersuaded the applicant will be prejudiced in any way by the court's order that the impugned ruling be submitted to the professional conduct committee of the Law Society of Kenya for consideration. We do not discern how that would render the appeal nugatory.

The application therefore fails and we dismiss it with costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY, 2021.

W. OUKO, P

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR



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