REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2254 OF 2012

IN THE MATTER OF THE ESTATE OF DUNCAN KIMANI WAINAINA (DECEASED)

PAULINE WAMBUI KIMANI.....APPLICANT

VERSUS

STEPHEN NGUGI NJERI.....1ST RESPONDENT

TERESIA EVELYN NYANJAU.....2ND RESPONDENT

RULING

1. The cause relates to the estate of the deceased Duncan Kimani Wainaina who died intestate on 27th November 2011. His estate comprised:

(a) LR No. 1266/5 (originally/Hurlingham)

(b) LR No. 1/218/5 Hurlingham;

(c) LR No. 1268/7 Hurlingham;

(d) LR No. 4953/1175/101

(e) LR No. 76/332;

(f) LR No. 1/1268 (Original LR No. 1/218/7);

(g) Dagoretti/Riruta/2176

(h) Loc. 5/Kangunduini/881;

(i) LR No. 1/1313;

(j) bank accounts at Standard Chartered Bank, Kenya Commercial Bank and Bank of Africa;

(k) NSSF benefits;

(l) Fixed deposit at East African Building Society; and

(m) shares at Kenya Airways, National Bank of Kenya & East Africa Breweries.

2. When alive, he married the applicant Pauline Wambui Kimani with whom he got five children. In 1993, while the applicant was living in the USA, the deceased begun living with Jacinta Njeri Ngugi in his home at Section 9 at Thika. Jacinta came with her two children Stephen

Ngugi Njeri (1st respondent) and Teresia Evelyn Nyanjau (2nd respondent). The deceased, Jacinta and the children lived together until 2011 when he died. On 3rd January 2005 the deceased had sworn an affidavit to say that he had married Jacinta under Kikuyu customary law.

3. When the deceased died, the applicant returned home to bury him. On 20th September 2012 she petitioned this court for the grant of letters of administration. The grant was issued to her on 4th January 2013, and confirmed on 5th November 2013. There was no reference to Jacinta or the respondents. Jacinta subsequently died.

4. Fast forward, on 5th November 2018 the respondents filed an application to revoke the grant as confirmed on the basis that the applicant had obtained the grant and had it confirmed by falsely stating that the deceased had only one family when she knew that he had two families. The result was that the respondents had been disinherited.

5. The applicant opposed the application. He denied that the deceased had two families, or that he had married Jacinta under Kikuyu customary law, or at all. Her case was that she and the deceased had a monogamous marriage that did not allow for another marriage, customary or otherwise. She had been aware that the deceased and Jacinta were cohabiting, but denied that the relationship was a marriage.

6. The court heard the application and determined that, under **section 3(5**) of the **Law of Succession Act**, the deceased, although in a monogamous marriage with the applicant, had entered a Kikuyu customary law marriage with Jacinta, and that he had taken in the respondents and voluntarily assumed permanent responsibility over them. The court found that the respondents were entitled to inherit as dependants of the deceased because he had treated them as his children during his life. Lastly, it was found that the applicant was obliged to seek the consent of the respondents or cite them when petitioning for the grant, was obliged to serve them at the hearing of the application for the confirmation of the grant, and was obliged to provide for them during the distribution of the estate.

7. The court revoked the grant and set aside the certificate of confirmation as rectified. It ordered that the entire estate reverts into the name of the deceased. A fresh grant was issued in the joint names of the applicant and the 1st respondent. The two of them, or either of them, were at liberty to within 60 days' file and serve to all the beneficiaries an application for the confirmation of the grant.

8. These are the orders that aggrieved the applicant who filed a Notice of Appeal on 27th July 2021. She was appealing the decision to the Court of Appeal.

9. The applicant filed the present notice of motion dated 9th August 2021 seeking the stay of the proceedings and the execution of the ruling dated 21st July 2021 pending the hearing and determination of the appeal. Her case was that she was 83 years old sickly lady who had since transferred most of the properties in the estate since the grant was confirmed and who depended on the income of what had been left for survival and for treatment. She stated that the respondents were not the children of the deceased and that she had no way of knowing that the court would qualify them as the children of the deceased to be able to include them in the petition as beneficiaries. Her case was that she would suffer substantial loss if her application is not allowed.

10. The respondents opposed the application. They stated that the applicant lives in the USA, and that her alleged medical condition or needs had not been substantiated. They reiterated that since 1993 the applicant had known of their mother's relationship with the deceased, and the fact that the deceased had embraced them as his children.

11. Mrs. Thongori (SC) for the applicant and Mr. Ng'ang'a for the respondents filed written submissions and also addressed the court orally on the application.

12. The application was brought substantially under **Order 42 rule 6(1)** and **(2)** of the **Civil Procedure Rules** which provide as follows:- -

> **"(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**
>
> **(2) No order for stay of execution shall be made under subrule (1) unless—**
>
> > **(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
> >
> > **(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."**

13. Mrs. Thongori (SC) went to great lengths to discuss the reasons why she thought that the court was wrong, and why she thought that her client had a good case on appeal. It is not within the province of this court to estimate the chances that the applicant will have on appeal. What is important is that she was aggrieved by the decision of the court and has a natural and undoubted right to seek the intervention of the Court of Appeal, and this court will not put any unnecessary hindrance to her as she seeks to exercise the right **(Samvir Trustee Limited –v- Guardian Bank Limited, Nairobi (Milimani) HCCC No. 795 of 1997)**

14. The High Court's discretion to grant or not grant stay pending appeal is under **Order 42 rule 6** of the **Civil Procedure Rules** fettered by three conditions: the demonstration of substantial loss, the furnishing of security and the application being brought without unreasonable

delay **(John Mwangi Ndiritu – v- Joseph Ndiritu Wamathai [2016]eKLR).**

15. Mrs. Thongori (SC) made reference to the decision in **R.W.W. –v- E.K.W. [2019]eKLR** in which it was reiterated that the purpose of this application is to preserve the subject matter in dispute so that the rights of the applicant who is exercising her undoubted right of appeal are safeguarded and the appeal, if successful, is not rendered nugatory. However, the court has at the same time the responsibility of protecting the rights of the respondents who were successful in the decision sought to be appealed against and who should enjoy the fruits of their success. The question is, what is the substantial loss that the applicant will suffer if stay is not granted?

16. The court has asked that the applicant returns the estate into the hands of the deceased, and she and the 1st respondent be issued with a fresh grant as they apply for the confirmation of the grant. The applicant stated that she had begun to transfer the estate. The danger with that is that, if the application is allowed, the estate may be dissipated by the time the appeal is heard and determined. What will happen if the appeal is unsuccessful? What will happen if stay is granted, and it turns out that the respondents were to benefit from the estate of the deceased? It follows that the court, in dealing with this application, should weigh the likely consequences of deciding one way or the other, and avoid a situation where by the time the appeal is concluded there will be no estate to share, were it to be found that both sides should benefit from it **(Michael Nthonthi Mitheu –v- Abraham Kivondo Murau [2021]eKLR).**

17. There is no dispute that the application was brought without unreasonable delay. I also consider that the applicant did not offer any security of due performance of the orders that may ultimately be binding on her.

18. Considering all the facts of the case, and noting that there is no pending application for the confirmation of the grant, I will stay these proceedings for 120 days from today to allow the applicant to prosecute her appeal or seek stay in the Court of Appeal. At the conclusion of the 120 days, and if there will be no orders from the Court of Appeal, these proceedings shall resume.

19. In the meantime, and in bid to protect the estate of the deceased, the joint grant of letters of administration intestate that was ordered on 21st July 2021 shall issue.

20. The applicant has been indulged. She will pay the costs of this application.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 19TH DAY OF JANUARY 2022

A.O. MUCHELULE

JUDGE