REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1287 OF 2007

IN THE MATTER OF THE ESTATE OF PETER ELIUD NJAGI (DECEASED)

JOSEPHINE GAKII RUKARIA ……....APPLICANT

VERSUS

NANCY NYAWIRA NJAGI..... RESPONDENT

RULING

1. The deceased Peter Eliud Njagi died intestate on 16th January 2007. The applicant Josephine Gakii Rukaria petitioned the court for the grant of letters of administration intestate on the basis that she was the widow of the deceased, the two having been married under Meru customary law in 2006. The respondent Nancy Nyawira Njagi filed an objection and cross-petitioned for the grant. She stated that she was the only widow of the deceased whom he had married in church under **African Christian Marriage and Divorce Act** on 9th December 1972. The court heard the dispute to determine who would administer the estate, and who were the beneficiaries of the estate.

2. On 2nd April 2019 Justice M. Muigai delivered a judgment in which she found that both the applicant and the respondents were the widows of the deceased. It was found that the applicant's child Susan Mwendwa Njeru would only be a beneficiary after a DNA test has been conducted and had confirmed that she was the deceased's child. Further, it was determined that Nairobi Block 32/806 Ngummo Estate, LR No. 100846 Karen, Gaturi/Githimu/3541, 3542, 3538 and 3537 known as Njeru Kathangu Court – 16 houses for rent were assets between the deceased and the respondent and would remain with respondent and her children only, and were not therefore available for distribution.

3. The applicant was aggrieved by these orders, and on 16th April 2019 filed an appeal to the Court of Appeal. On 18th April 2019 she filed the present application under **Order 42 rule 6** of the **Civil Procedure Rules**. She sought the stay of the above orders pending the hearing and determination of the appeal.

4. The estate has not been distributed. The court appointed the applicant, the respondent, Anthony Kinyua Njagi and Dr. Joseph Kiambo Njagi as the administrators of the estate, and asked them to jointly consult, agree and file summons for the confirmation of the grant with written consents of the beneficiaries on the proposed mode of distribution.

5. The applicant's case was that if the matter goes for distribution, and her daughter has not been confirmed as a beneficiary, she (her daughter) will be excluded from the estate. Secondly, the properties above were in the name of the deceased and, according to her, she was to benefit from them. She will challenge the finding that her and her daughter would not benefit from the properties. Lastly, she stated that she was aware that the Ministry of Defence wanted to compulsorily acquire the Karen property. Now that the property has been determined to remain with the respondent and her children, she contended, the acquisition may proceed to her detriment. These are the reasons why she stated that, if stay is not granted she will suffer substantial loss.

6. The respondent opposed the application. She denied that the Ministry of Defence wanted to acquire the Karen property and indicated that there was no single correspondence shown from the Ministry to that effect. Secondly, that the grant had not been confirmed and the estate distributed, and therefore it was too early to say what the applicant might or might not get. Lastly, she stated that the properties have each a value and, if stay is not granted, and the applicant wins on appeal, she could be compensated. Therefore, she argued, it had not been shown that substantial loss would be suffered if stay is not granted.

7. Under **Order 42 rule 6(2)** of the **Civil Procedure Rules**, before the court can order stay of execution of a decree or order the applicant has to satisfy the court that substantial loss may result to him unless the order is made; that the application has been made without

unreasonable delay; and that the applicant has provided such security for the performance of such decree or order as may be binding on him **(Vishram Ravji Halai –v- Thornton and Turpin, Civil Application No. Nairobi 15 of 1990).**

8. In an application for stay, the court is called upon to balance two competing interests. First, a litigant, if successful, should not be deprived of the fruits of a judgment in his favour, and, secondly, an applicant who is appealing is exercising his right and therefore the court should guard against the appeal being rendered nugatory **(Kenya Shell Ltd –v- Kibiru & Another [1986] KLR 410).**

9. The judgment sought to be appealed against was delivered on 2nd April 2019, the appeal filed on 16th April 2019, and the present application brought on 18th April 2019. There is no dispute that the application was brought without any delay.

10. I agree with the respondent that, although the applicant was aggrieved with the determination that she would not benefit from certain properties in the name of the deceased, the parties have not filed an application for the confirmation for the grant. It is at the hearing of that application that the interests of the respondent and her children in relation to the properties in question will be determined. Before then, all the properties in the estate will be in the hands of the four administrators, who include the applicant. No action can be taken to deal with any property in the estate without reference to her. It has not been shown that, by the time the appeal is heard and determined confirmation will have been undertaken and the estate shared in respect of the property in question.

11. Regarding the Karen property, the allegation that it is about to be compulsorily acquired by the Ministry of Defence was not substantiated. In any case, compulsory acquisition is quite an elaborate process.

12. On the question of DNA testing to determine whether the applicant's daughter's father was the deceased, the proceedings show that this has been an outstanding issue for long. DNA was done in the past but the parties disputed the results. I do not think that, given the facts of the case, there should be any further delay in determining the issue.

13. In conclusion, I do not find that any substantial loss will be suffered if stay is not granted. I dismiss the application.

14. Costs shall abide the cause.

DATED and DELIVERED at NAIROBI this 27TH NOVEMBER 2019.

A.O. MUCHELULE

JUDGE