



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CASE NO. 53 OF 2016

IN THE MATTER OF THE ESTATE OF CECILIA WANJIRU KIBICHE (DECEASED)

RULING

1. Before court is an Application by way of Notice of Motion filed on 26th April, 2019 by Alice Wamaitha and another (Applicants) seeking several orders , including stay of the orders of this court issued on 5th April, 2019 and particularly the order requiring the administrators to distribute the deceased's estate as per the judgment of Musyoka J. delivered on 23rd September, 2016, pending the hearing and final determination of **NAIROBI CIVIL APPEAL NO. 222 OF 2018 ALICE WAMAITHA & ANOR VS JANE WANJIRU MUIGAI**. In the alternative, the Applicants pray that the court be pleased to review the orders of Ngugi J. issued on 8th February, 2018 concerning stay pending appeal, and also review of the court's orders issued on 5th April, 2019 requiring the administrators to proceed and distribute the estate as per the Judgment of Musyoka J. delivered on 23rd September,
2. The application is based on among other grounds that unless an order for stay of execution is issued, the estate will be distributed and the Applicants will suffer irreparably and the pending appeal will be rendered nugatory.
3. **ALICE WAMAITHA** swore the supporting affidavit as the 1st Applicant herein on her own behalf and on behalf of the 2nd Applicant. She deposed that having been dissatisfied with the judgment of Musyoka J., they have since lodged an appeal against the said judgment and that this Court has directed that the deceased's estate be distributed as per the said judgment. In the circumstances, she contended that it is imperative that there be an order staying the distribution pending determination of the appeal. She stated that she stands to suffer irreparably and that the appeal will be rendered nugatory.
4. The Respondents filed a Notice of Preliminary Objection and their Grounds of Opposition on 18th June, 2019, mainly stating that the Court is *functus officio* and therefore lacks jurisdiction to entertain the application for stay pending appeal.
5. Subsequently, the 1st Respondent filed her replying affidavit on 23rd September, 2019. She deposed that the administrators have refused to distribute the estate and as such are in contempt of court orders. She contended that the administrators continue to lease out the estate land despite injunctive orders restraining such activity. She urged the court to dismiss the application.
6. The application was canvassed by way of oral arguments. Miss Wambua, for the Applicants submitted the pending appeal in the Court of Appeal will be rendered nugatory if the estate is distributed. It was submitted that the appeal is arguable and that the dependants who lost before Musyoka J. will suffer loss and prejudice. It was asserted that the Respondents may dispose of the estate assets once distributed; that their application is not *res judicata* and that the court should grant the order for stay and /or review the orders of Ngugi J.
7. Mr. Mirie, counsel for the Respondents opposed the application. He submitted that the court is *functus officio* as this is the third time similar prayers are being sought by the Applicants. It was submitted that the Applicants have refused to distribute the estate and that their appeal and present application cannot be used to delay or thwart distribution. The court was urged to dismiss the application so that the beneficiaries can benefit from the estate.
8. The court has considered the material canvassed in respect of the application by **Alice Wamaitha**, filed on 25th April 2019. The application is expressed to be brought under Rule 73 of the Probate and Administration Rules. First of all, no appeal has been filed in respect of this court's ruling and directions of 5th April 2019. The court had stated at the end of the ruling of 5th April 2019 that:

“The court also notes that there is no order staying the distribution of the estate, and in the result is satisfied that a case has been made out for the issuance of a temporary injunction in terms of prayer (2) of the Summons, pending the distribution of the estate in accordance with the judgment of Musyoka J. Moreover, in view of the obvious disinclination by the Administrators to administer the estate to completion, this court directs pursuant to Section 83 (g) of the Law of Succession Act, that the Administrators do proceed with the administration of the estate to completion, within a period not exceeding 6 (six) months of today's date, and to produce to the court a full and accurate account of the completed administration on or

before the 15th of October, 2019”

9. By this direction, the court was merely reiterating the decision of **Musyoka J** of 23rd September 2016 regarding the distribution of the estate and directing compliance therewith. This court cannot stay *in vacuo* its directive order as to compliance, there being no appeal thereto. As crafted, what prayer (2) of the instant motion seeks, is to stay execution of the judgment of **Musyoka J**. Prayer (3) of the motion seeks in the alternative, the review of the orders of **Ngugi J** of 8th February, 2018 declining stay of execution pending appeal, as sought before him by the same applicant, **Alice Wamaitha**.

10. However, as correctly argued by counsel for the Respondent, what the Applicants had sought **Ngugi J** was stay of execution pending appeal. Before me, Counsel for the applicant has purported that **Ngugi J** in his ruling delivered on this aspect, *inter alia*, on 8th February 2018, did not deal with the merits of the application and declined the application for stay of execution on a technicality, namely, the absence of an existing appeal. Nothing could be further from the truth. At paragraphs 22 and 23 of his ruling **Ngugi J** delivered himself as follows:

“I will now turn to the Alice Wamaitha’s prayer for a stay of execution. For a party to be entitled to a stay of execution, apart from showing that the appeal is arguable, she must demonstrate that her intended appeal will be rendered nugatory. In appropriate circumstances, she is also required to give such security as the court may order for the due performance of the decree which may ultimately be binding on her.

I have already concluded that the appeal is eminently arguable and that it was brought without undue delay. The question is whether it will be rendered nugatory if stay is not granted. I am not persuaded that it will be. The declared beneficiaries of the estate are all children of the deceased son of the Deceased – some of whom are children. Alice Wamaitha is one of the Co-Administrators of the estate of the Deceased. I do not see how her appeal will be rendered nugatory if stay is not granted. Indeed, most of the estate of the Deceased is made up of land – and if she were successful on appeal she can always get her share of the land. On this score, I will deny Alice Wamaitha’s request for stay.”

11. If indeed the intention of the Applicants was to move the court to review the orders of **Ngugi J** as prayer No.3 of the instant motion appears to suggest, the Applicant ought to have brought her application within the purview of the provisions of Order 45 Rule 1 of the Civil Procedure Rules as applied by the Probate and Administration Rules, to succession causes.

Order 45 Rule 1 of the Civil Procedure Rule provides that:

1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

12. The Applicants did not by their grounds, affidavit or arguments attempt to demonstrate the discovery of any new and important matter, mistake or error apparent on the face of the record or other sufficient reason to warrant the review of the ruling of **Ngugi J**. Prayer (4) of the Applicants’ motion is outrightly *res judicata*, having been rejected by **Ngugi J** in his ruling.

13. This court, having earlier noted the reluctance on the part of the Applicant/Administrators and others to distribute the estate, had directed the administrators to proceed with the administration of the estate and to render accounts on 15th October 2019. On that date, no accounts were furnished, counsel for the present Applicant/Administrators merely stating that her client was unable to account and sought the court’s directions on how to deal with the assets.

14. Meanwhile, it appears from submissions by counsel for the Respondent at the hearing of the instant application and on 15th October 2019, and relevant affidavits that, the administrators have all but ignored the injunction issued by this court to stop wastage of the estate. That they have continued to lease the suit assets for mining purposes, despite clear orders of the court. Such a party cannot expect the court to sanitize her disobedience of court orders by granting orders which would effectively endorse the *fait accompli* she has scripted. The application filed on 25th April 2019 has no merit and is dismissed with costs.

DELIVERED AND SIGNED AT KIAMBU THIS 20TH DAY OF DECEMBER 2019

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C. MEOLI

JUDGE

In the presence of:

Miss Wambua for Applicant

Mr Mirie for Respondent

C/A Nancy