REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 3 OF 2017

IN THE MATTER OF THE ESTATE OF JOYCE KANJIRU NJIRU (DECEASED)

AND

ROSE NJERI AYANGA.....1ST APPLICANT

CATHERINE GICHUKU MBARIRE.....2ND APPLICANT

JOHN MIRITI MBARIRE.....3RD APPLICANT

VERSUS

NICHOLAS IRERI MBARIRE.....1STRESPONDENT

LUCY GATUNE NJIRU.....2ND RESPONDENT

RULING

1. This ruling relates to the estate of **Joyce Kanjiru Njiru** (deceased). Judgment in the matter was delivered on 7th December, 2017. The totality of the judgment was that all the dependants of the deceased were to share the properties in the estate of the deceased equally. The Court having considered the evidence by the parties the Court came to the conclusion that the estate of the deceased should devolve as provided under **Section 38** of the **Law of Succession Act Cap 160 Laws of Kenya** which provides that:

> ***"Where an intestate has left a surviving child or children but no spouse, the net estate shall subject to the provisions of Section 41 and 42 devolve upon the surviving child if there be only one or shall be equally divided among the surviving children."***

Whether the shares be given in fractions or in decimals the crux of the final judgment is that the estate of the deceased was to be shared equally amongst her surviving children. Two grandchildren were included to get the share(s) of their deceased parents. In particular the Court directed that Yvonne Mercy Debenham share on **L.R. 2787/395** be where the house built by her mother stands. This was the totality of the judgment of the Court. There were proposals by the petitioners and protestors but the final judgment adopted distribution under **Section 38** of the **Act** (supra). The handwritten judgment was not the one which was read out in Court as that was a draft. In any case the issue of the share of Catherine Gichuku getting her mother's house was not in dispute. This succession cause was independent of the Estate of their deceased father which was determined by Embu High Court and had to be determined on its own merits.

2. The application at hand seeks stay of execution. The principles of granting stay of execution in High Court are provided for under **Order 42 rule 6** of the **Civil Procedure Rules**. It provides:

> ***"6.(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) suchsecurity 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."

3. The grounds in support of the application states that judgment will enrich some beneficiaries to the detriment of the petitioners. The typed judgment materially differs from the oral judgment read in Court. That the judgment is incapable of implementation in material respects and will lead to unending family feud, enmity and even bloodshed. That the judgment is not fair and just.

a. Substantial loss occurring.

The decision of the court on whether substantial loss will occur will depend on the balancing act between the rights of the parties; the applicant's right to his appeal and the right of the respondent to the fruits of his judgment. The onus of proving that substantial loss would occur unless stay is issued rests upon and must be discharged accordingly by the applicant. It is not enough to merely state that loss will be suffered, the applicant ought to show the substantial loss that it will suffer in the event the orders sought are not given.

In the case of **Charles Wahome Gethi –v- Angela Wairimu Gethi [2008] eKLR**the Court of Appeal held the following view on the issue of substantial loss;

The applicant does not claim that the respondent intends to sell the portion of land in dispute and that it will not be in existence by the time the appeal is determined…….. In the circumstances of this case, the applicant would suffer substantial loss rendering the appeal, if successful nugatory only if the suit land is disposed of before the appeal is determined. The applicant does not claim that the suit land would be disposed of. The applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the appeal, if successful would be rendered nugatory.

In the case of **James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR** the Court held:

No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

"…the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

The judgment of the court was that the estate of the deceased be divided equally among all the beneficiaries. The applicants have not demonstrated that if the said orders are effected, they will incur any substantial loss. All they claim in their application is that the typed judgment differs with the handwritten copy and the court should conduct investigations as to who altered the judgment. Therefore no substantial loss has been proven. The Judgment was not altered in anyway. The hand written notes never formed the Judgment of this court. This court when comparing the proposals on distribution of the estate came up with tables. One being the mode proposed by the Petitioner to be found at Page 3 Paragraph 5 of the Judgment. This had excluded two of the deceased's children. Lucy Gature and Nicholas Ireri from getting any share in Land Parcel No. LR 2787/395 Nanyuki.

The 2nd table is to be found at Page 4 of the Judgment Paragraph -6- which is the proposal by Nicholas Ireri Mbarire one of the Petitioners.

The Judgment was that distribution is as provided under Section 38 Laws of Succession Act where each of the beneficiaries would get an equal share of the net estate. This is distribution as provided under the Act and no beneficiary would suffer substantial loss. The applicant will not suffer any loss if the estate is distributed equally.

b. Requisite security

The applicants have not given option of security but it is appreciated that the court also has discretion to order the kind of security they should give.

c. Was there undue delay?

The applicants being aggrieved with the judgment of the trial court delivered on 7th December, 2017 proceeded to file notice of appeal and application for stay of execution on 18th December, 2017. The applicants filed application timeously and without delay. The applicants despite having brought the application without unreasonable delay have not demonstrated that they will suffer substantial loss if the Court does not grant the orders sought.

None of the grounds in support of the application show that the applicants are likely to suffer substantial loss. Were the Court has ordered that the Estate be distributed equally amongst all the children without discrimination, no party is likely to suffer substantial loss. The

applicant is mixing issues to state that some beneficiaries ended up with more land. The distribution of the Estate of their deceased father was done on merit and independently of the estate of their mother and this Court was not sitting on appeal of the judgment of Embu High Court. The decision of this Court was on the estate of Joyce Kanjiru Njiru and followed the law of succession to the letter. In such circumstances no substantial loss may be occasioned. The judgment was not tampered with. This Court listed the proposed mode of distribution in two different tables and the Court may have read the wrong table orally in Court which may have been an oversight. However the final judgment has been supplied to the parties. My view is that the applicant has failed to prove that he is likely to suffer substantial loss. Matters of bloodshed alluded to by the applicant are matters which will be dealt with under the law if and when they occur. I find that the application for stay is without merits and is declined.

Dated and delivered at Kerugoya this 13th day of April 2018.

L. W. GITARI

JUDGE