



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Succession Cause 96 of 2000

IN THE MATTER OF THE ESTATE OF RAHAB WANJIRU EVANS – DECEASED.

CHRISTINE WANGARI GACHIGI....1ST PETITIONER/ADMINISTRATOR

ELIZABETH WANJIRA EVANS.....2ND PETITIONER/ADMINISTRATOR

PETER GACHEGE NJOGU.....3RD PETITIONER/ ADMINISTRATOR

MARY WANJIKU GACHIGI.....4THPETITIONER/ADMINISTRATOR

AND

ELIZABETH WAMBUI.....1ST OBJECTOR/BENEFICIARY

MARY NYAMBURA.....2ND OBJECTOR/BENEFICIARY

MARGARET WANJIRU.....3RD OBJECTOR/BENEFICIARY

SALOME NJOKI.....4TH OBJECTOR/BENEFICIARY

ANTONY GACHIGI.....5TH OBJECTOR/BENEFICIARY

ZAINABU WANJIRU GACHIGI.....6TH OBJECTOR/BENEFICIARY

JOSEPH GACHIGI ZAMBETAKIS.....7TH OBJECTOR/BENEFICIARY

JENIFFER WANJIRU ZAMBETAKIS..8TH OBJECTOR/BENEFICIARY

JOHN IRUNGU ZAMBETAKIS.....9TH OBJECTOR/BENEFICIARY

RULING

On the 10th July 2007 this court delivered judgment whereby it distributed the estate of Rahab Wanjiru Evans (*deceased*) to her beneficiaries. The issue as to who are the beneficiaries of the deceased's estate had earlier been agreed by the parties to these proceedings. The 2nd administrator Elizabeth Wanjiru Evans being dissatisfied with the said judgment of this court has filed a Notice of Appeal indicating her intention to appeal against the said decision to the Court of Appeal. The 1st administrator Christine Wangare Gachigi has filed this application seeking to stay the execution of the said judgment pending the

hearing and determination of the intended appeal. The application is opposed. Mr. Githui, learned counsel for the beneficiaries has filed grounds in opposition to the application. The 3rd administrator, Peter Gachigi Njogu has filed a replying affidavit in opposition to the said application.

At the hearing of the application, I heard the submission made by Mr. Kurgat on behalf of the 1st administrator in support of the application. Mr. Karanja, learned counsel for the 2nd administrator supported the application for stay of execution pending the hearing of the appeal filed by the 1st administrator. Mr. Githui and Mr. Kanyi made submissions opposing the said application for stay of execution. I have carefully considered the said rival submissions made before me. I have also carefully read the rival pleadings filed by the parties to this application. The issue for determination by this court is whether the 1st and 2nd administrators have established a case to enable this court grant them the application for stay of execution sought. The principles to be considered by this court in deciding whether or not to grant the said application for stay of execution was set out by the Court of Appeal in the case of **Butt vs Rent Restriction Tribunal [1982] KLR 417** where Madan JA, held at page 419 as follows;

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal if successful from being nugatory per Brett LJ in Wilson vs Church (No.2) 12 Ch D (1879) 454 at P.459. In the same case Cotton LJ said at P.458;

‘I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see the appeal, if successful, is not nugatory’.”

Order XLI Rule 4(2) of the Civil Procedure Rules provides that;

“No order for stay of execution shall be made under sub rule (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 degree or order as may ultimately be binding on him has been given by the applicant.”

In the present application, the applicant has stated that she would suffer substantial loss if the said judgment is executed because the estate would be unable to settle the liabilities which this court failed to take into account when it distributed the estate of the deceased. It was further her case that in the event that the estate is distributed without taking into account the said liabilities that have remained unpaid by the estate, the estate would be wound up without the said liabilities being settled and hence prejudice the administrators of the deceased’s estate.

I have carefully considered the grounds that the applicant has put forward in support of her application for stay of execution. It is the view of this court that the applicant has not satisfactorily established that she would suffer substantial loss or that the appeal would be rendered nugatory in the event that the said estate of the deceased is distributed to the beneficiaries. This court is of the view that once an estate of a deceased person is distributed, none of the beneficiaries of the said estate can purport to shoulder the liabilities of the estate. This court in its judgment took into account the said liabilities of the estate of the deceased and indeed made an order that one of the properties that comprised part of the deceased’s estate be sold to offset the said liabilities. I have carefully read the said affidavit sworn by Christine Wangare Gachigi in support of her application to stay the execution of the said judgment. It is apparent that apart from the liabilities of the estate, the said applicant is not challenging the distribution of the estate of the deceased by this court.

In the circumstances therefore I hold that the applicant has not established that she will suffer

substantial loss or her intended appeal would be rendered nugatory in the event that this court does not stay the execution of its judgment. The application for stay of execution lacks merit and is hereby dismissed with costs.

DATED at NAKURU this 5th day of SEPTEMBER 2007.

L. KIMARU

JUDGE