Keen & 2 others v Keen & another (Civil Application E027 of 2023) [2024] KECA 970 (KLR) (26 July 2024) (Ruling)

Neutral citation: [2024] KECA 970 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E027 OF 2023

K M'INOTI, EM NGUGI, M NGUGI, LA ACHODE & LA ACHODE, JJA

JULY 26, 2024

IN THE MATTER OF THE ESTATE OF JOHN KEEN (DECEASED)

BETWEEN

VICTORIA NAISHORUA KEEN .... 1ST APPLICANT

EVA SEIN KEEN .... 2ND APPLICANT

NTHENYA MWENDWA .... 3RD APPLICANT

AND

ROSEMARY SANAU KEEN .... 1ST RESPONDENT

PAMELA SOILA KEEN .... 2ND RESPONDENT

(Application for stay of further proceedings pending the hearing and determination of an intended appeal from the ruling and order decree of the High Court at Nairobi (Muchelule, J.) dated 24th January 2023 in HC SC. No. 123 of 2017)

RULING

1. The notice of motion before the Court is dated 31st January 2023 and seeks an order of stay of further proceedings in High Court Succession Cause No. 123 of 2017 pending the hearing and determination of an intended appeal from the ruling and order of Muchelule, J (as he then was), dated 24th January 2023. The dispute relates to the estate of John Keen (Deceased), who died testate on 25th December 2016.

2. The 1st applicant (Victoria Naishorua Keen) and the 2nd applicant (Eva Sein Keen) are children of the deceased with his first wife, Gladwell Wairimu Keen (Gladwell), while the 3rd applicant, Nthenya Mwendwa is a granddaughter of the deceased. The two respondents, Pamela Soila Keen and Rosemary Sanau Keen, are also daughters of the deceased and executrixes of his Will.

3. The deceased, who was polygamous, had four wives. The first, Gladwell Wairimu Keen had six children while the second, Mary Njeri Keen had five children. The third wife, Rosemary Sanau Keen had two children and the last wife, Jane Wamuyu Keen had one child. It is common ground that during his lifetime the deceased made gifts inter vivos to his dependants and that by his Will he bequeathed properties to all his four houses.

4. The application presently before the Court was provoked by the outcome of three summons filed in the High Court by the applicants, all who hail from the house of Gladwell. In the first summons, dated 14th September 2020 and brought under section 26 of the *Law of Succession Act* (the Act), the 1st applicant deposed that she was acting on behalf of herself and the children of Gladwell, who died four years after the deceased, on 11th August 2020.

5. The prayer in the summons was that:

> " reasonable provision now be made for the applicants as dependants of the deceased out of his net estate as the court deems fit."

6. In the affidavit in support of the summons, the 1st applicant lamented that the house of Gladwell had been given a raw deal by the deceased in his Will and urged the court, in the interest of justice, to intervene and redistribute the estate of the deceased fairly, equitably and proportionately among the beneficiaries.

7. The second summons was taken out on 30th September 2020 by the 3rd applicant on her own behalf and on behalf of the grandchildren of the deceased from the house of Gladwell. The 3rd applicant averred that she was, together with the other grandchildren from the said house, dependants of the deceased who had not been provided for them in his Will.

8. The third and last summons was also taken out on 30th September 2020 by the 1st and 2nd applicants in their capacity as administrators of the estate of their mother, Gladwell. They again sought reasonable provision from the estate of the deceased in a prayer worded as follows:

> " such reasonable provision now be made for the estate of Gladwell Wairimu Keen as dependants of the deceased out of his net estate as the court deems fit."

Exactly how the estate of Gladwell, independent of her children, could be a dependant of the deceased is not entirely clear.

9. This second summons, though presented as an application for the limited purpose of provision for dependants, also contained an additional prayer worded as follows:

> " That this court be pleased to make an order that all properties acquired during the subsistence of the the marriage from 21st December 1957 to 11th August 2020 as between the late John Keen and the late Gladwell Wairimu Keen be treated as matrimonial property."

10. All the summons were opposed by the respondents and after hearing the parties, the trial court held that the validity of the deceased's Will had not been challenged and that under section 5 of the *Act*, the deceased had testamentary freedom, which the court could interfere with only if it was satisfied that he had not made reasonable provision for his dependants. After considering the gifts inter vivos made by the deceased as well as the dispositions made to his beneficiaries (wives, children and grandchildren)

in the Will, the learned judge concluded as follows as regards the prayers for reasonable provision for dependants:

> " There is no wife, child or grandchild that was not provided for. He (the deceased) indicated that although he had no obligation he had out of his own free will provided for his grandchildren. In clause 6 of the Will he asked the Trustees to cater for the grandchildren's education and to give those over 21and not in school such monies to enable them advance in life. The applicants may feel that they should have got more from the deceased's estate. Each may feel that, if he was the one making the will, he could have shared the estate differently. In my estimation, however, the deceased equitably and reasonably provided for his wives, children and grandchildren. No inequality, illegality or justifiable ground has been demonstrated by the applicants to enable the court to invoke its limited jurisdiction under sections 26, 27, 28 and 29 of the *Act* to tinker with the wishes of the deceased as contained in the will."

11. On the application by the grandchildren, the trial court found that the grandchildren were heirs of their parents rather than of the deceased and that they had not adduced any evidence to show that they were being maintained by the deceased immediately prior to his death.

12. Lastly, as regards the order on matrimonial property, the court held that it had no jurisdiction to delve into the issue because the applications before it were under the *Law of Succession Act* rather than under the *Matrimonial Property Act* which empowers the Court to divide matrimonial property between a husband and wife. Accordingly, the court found the three applications without merit and dismissed them with costs.

13. Aggrieved, the applicant have now moved to this Court to stay further proceedings in the trial court, pending the hearing and determination of their intended appeal. Mr. Kakai Kissinger, learned counsel for the applicants, relying on written submission dated 8th February 2023, submitted that the intended appeal is arguable because the High Court erred in holding that the deceased had provided for all his dependants whilst he had made no provision for Gladwell and Dennis Kiruti Keen (Dennis); by failing to hold that the deceased had made dispositions that were discriminatory, inequitable and disproportionate; by finding that the succession court did not have jurisdiction to determine the issue of matrimonial property; by failing to find that the deceased had unlawfully willed away matrimonial property over which Gladwell had a beneficial interest; by failing to hold that the deceased's testamentary freedom was not absolute; and by reaching conclusions not supported by evidence.

14. On whether the intended appeal risks being rendered nugatory, the applicants submitted that unless the order of stay of further proceedings was granted, the respondents would confirm the grant and distribute the estate in accordance with the Will of the deceased, thus destroying the substratum of the appeal.

15. The respondents, represented by Mr. Oduor, learned counsel, opposed the application by two replying affidavits sworn by the 1st respondent on 1st and 2nd March 2023 and a further affidavit sworn by the said respondent on 23rd June 2023, as well as written submissions dated 1st and 2nd March 2023. It was their contention that the intended appeal is not arguable because the applicants had not challenged the validity of the deceased's will and that the learned judge had not erred in any way in his findings and in the exercise of his discretion on whether or not to make provision for dependants.

16. The respondents submitted that any matrimonial property claims that Gladwell's may have had during her lifetime terminated upon her death and could not be maintained by the applicants. It was also

contended that Gladwell was happy with her bequest under the Will of the deceased, and that during her life time, she accessed and enjoyed the properties willed by the deceased.

17. It was also the respondents' contention that Gladwell and Kiruti were provided for in clause 9 of the Will of the deceased and that pursuant to an order of the court, they had access to the rental income generated from the property bequeathed to them. The respondents added that in making the bequests, the deceased had validly taken into account the conduct of some of his children towards him, particularly children from the house of Gladwell.

18. As for the grandchildren, the respondents submitted that they are not automatic dependants of the deceased and were obliged to prove by evidence that they were being supported by the deceased immediately prior to his death, which they failed to do.

19. On whether the intended appeal would be rendered nugatory if it succeeded, the respondents submitted that the applicants were hellbent on delaying the distribution of the estate and were simply dragging the dispute, which had been in court for about seven years. They contended that there were about thirty beneficiaries of the deceased who stood to be extremely prejudiced by an order of stay of further proceedings in that such an order would forestall their regular applications to court for access to moneys for their support and upkeep, including medical treatment.

20. It was also contended that whilst the applicants were seeking stay of further proceedings after losing the applications giving rise to this application, they had already moved to the High Court and filed a claim for matrimonial property, which they were busy prosecuting. In the respondent's view this was deliberate abuse of the process of the court.

21. Lastly, the respondents submitted that upon distribution of the estate of the deceased in accordance with his Will, there was still a residually estate that could be used for equalisation in the event the applicants' intended appeal succeeded. In the circumstances they urged that the intended appeal would not be rendered nugatory.

22. The application was also opposed by Mr. Bwire, learned counsel for nine of the beneficiaries, who submitted that the intended appeal was not arguable because the applicants had not challenged the validity of the Will of the deceased. Counsel added that the trial court had correctly found that the deceased had reasonably provided for all the beneficiaries and that the court was called upon to determine only whether the provision, in the totality of the circumstances was reasonable, not equal. Counsel further argued that in addition to the bequests in the will, the deceased had also made gifts inter vivos to his beneficiaries, which the court took into account. In his view, the intended appeal was premised on a challenge of exercise of discretion by the trial judge, which this Court is slow to interfere with.

23. As regards the claim by the grandchildren and the claim based on matrimonial property, counsel submitted that these were not arguable because grandchildren are not automatic dependants of the deceased section 29 of the *Act* and that the trial court had no jurisdiction to entertain a matrimonial dispute under the Matrimonial Property Act while seized of a succession cause.

24. On whether the appeal would be rendered nugatory, these beneficiaries adverted to the delay in finalisation of the cause and the prejudice it continues to expose them to and the fact that there was a residually estate after distribution of the estate in accordance with the will of the deceased.

25. Ms. Kiarie, learned counsel and Ms. Ngigi, learned counsel, appearing for two other beneficiaries, elected to leave the matter to the Court.

26. We have carefully considered this application, the ruling of the trial court, the submissions, both written and oral, and authorities cited by the parties. All the parties to the application are agreed on the principles that guide this Court under rule 5(2) (b) of the *Court of Appeal Rules*. The bone of contention is the application of the facts to the principles.

27. To recapitulate the principles, an applicant under rule 5(2)(b) must satisfy the Court that the intended appeal is arguable, and that unless, the order sought is granted, the intended appeal will be rendered nugatory if it succeeds. The Court has reiterated time and again that an arguable appeal is one which is not frivolous. Such an appeal need not succeed when it is ultimately argued. It needs only to raise an issue worthy of full consideration by the Court. Additionally, an arguable appeal need not raise a multiplicity of issues. Even one bona fide issue will be sufficient. (See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR).

28. At the heart of the second consideration of whether the appeal will be rendered nugatory is the Court's concern that a successful appeal should not end up as a mere pyrrhic or paper victory. What will render an appeal nugatory will depend on the circumstances of each case as established by the material placed before the Court. At the end of the day, the Court needs to satisfy itself that if what the applicant apprehends were to come to pass, it cannot be undone or adequately compensated by award of damages. (See *Ahmed Musa Ismael v Kumba ole Ntamorua & 4 Others* [2014] eKLR and *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227).

29. An applicant must satisfy the Court on those two principles.

    Satisfying only one principle will not entitle the applicant to the order sought. In particular, if the applicant is unable to satisfy the court that the intended appeal is arguable, the court does not have to consider the second principle. In determining an application under rule 5(2)(b), the Court does not make any definitive findings, that being the jurisdiction of the Court when it hears the appeal. The Court is merely required to determine whether prima facie, the intended appeal raises a bona fide issue worth of full consideration.

30. In this application, there are a few red herrings that we must call out. The first is the contention that the trial court erred by finding that the deceased had provided for Gladwell and Dennis while the Will did not mention Gladwell. Clause 9 of the will does make bequests for the benefit of Dennis and "Gladys" Wairimu Keen. It is a bit disingenuous to claim that "Gladwell" was not provided for whilst from the record it is crystal clear that the deceased had no dependant known as "Gladys Wairimu Keen". That all the parties understood Gladys Wairimu Keen to mean Gladwell Wairimu Keen is put to rest by the fact that Gladwell and Dennis successfully made applications to the High Court to access property which the applicants now claim was willed away to "Gladys" rather than "Gladwell".

31. The other point is that when the trial court stated that the applicants had not challenged the will of the deceased, it is plainly clear that the Court meant that the formal validity of the Will had not been challenged.

32. Turning to the merits of the application, it is crystal clear to us that as far as the applicants challenge the decision of the trial court as regards provision for dependants, that is a challenge to exercise of discretion. Under section 26 of the *Act*, if the court "is of the opinion" that the deceased has not made "reasonable" provision" for a dependant, the court may make "such reasonable provision as the court thinks fit." Section 27 addresses the discretion of the court in making an order for reasonable provision and reiterates that "the court shall have complete discretion."

33. When it comes to challenge of the discretion of the trial court, this Court is slow to upset the decision of the trial court because under the law, the discretion is vested in the trial court, not in the appellate

court. That this Court could have come to a different decision if it was hearing the matter in lieu of the trial court is not sufficient ground for upsetting the decision of the trial court. In *John Mathara Mwangi v Consolidated Bank of Kenya & 3 Others* [2024] KECA 250 (KLR), the Court explained as follows:

> " At the heart of both the denial of the application for adjournment and the dismissal of the suit for want of prosecution is exercise of discretion by the learned judge on both occasions. This Court does not determine whether to interfere with exercise of discretion by the trial court by divination, casting of lots or voodoo. It does so on the basis of firmly established principles, well-articulated by Madan, JA (as he then was) in *United India Insurance Co. Ltd. v East African Underwriters (Kenya) Ltd.* [1985] EA 898 as follows:
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>> 'The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.'"

34. Turning to the claim by the grandchildren in the intended appeal, we agree with the respondents and the beneficiaries who oppose this application that the legal position is crystal clear. The grandchildren are not direct beneficiaries of a deceased and provision for them is dependent on proof that they were being maintained by the deceased immediately prior to his death. (See *Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 Others* [2016] eKLR). The grandchildren in this application did not adduce evidence of any such dependency and therefore, we do not perceive any bona fide arguable point in that respect.

35. As for the claim founded on the Matrimonial Property Act, again, it is first principles and is well settled that the jurisdiction of the succession court does not extend to determination of disputes regulated by independent procedures in independent statutes. (See *Pacific Frontier Seas Ltd v Kyengo & Another* [2022] KECA 396 (KLR)). That the applicants themselves appreciate the futility of their argument is borne out by the fact that, belatedly, they have changed track and moved to the High Court under the Matrimonial Property Act.

36. In all, we are not satisfied that the applicants have placed before us bona fide issues worthy of full consideration on appeal. But even if we were charitable enough to find the intended appeal arguable, we would dismiss this application for failure to satisfy the Court that the intended appeal will be rendered nugatory if it succeeds.

37. The respondents deposed in paragraph 13 of the replying affidavit sworn on 2nd March 2023 that there is a residually estate from which the applicants could be provided for. More than one year later, the applicants did not challenge or respondent by an affidavit to that direct averment. When the Court raised the issue with counsel for the applicants at the hearing of this application, he casually responded from the bar that there was no residually estate because the respondents had intermeddled in the estate. The applicants were obliged to place before the Court affidavit evidence that the residually estate no longer exists. They did not, and we are satisfied that they have not displaced the respondents' averments on the residually estate and have therefore failed to establish that the intended appeal will be rendered nugatory.

38. Lastly, we bear in mind that of the three reliefs that the Court may issue under rule 5(2) (b), an order of stay of further proceedings is granted in the clearest of cases, because of the delay that is wrought by such an order and its negative effects on the administration of justice. It is a relief which is granted sparingly and in exceptional circumstances. The editors of the *Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332*, explain the approach as follows:-

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."

39. And in *Marriot Africa International Ltd v Margaret Nyakinyua Marigu & 4 others*, CA No. Nai. E152 of 2022, this Court held thus:

> " Whilst this Court has unfettered jurisdiction to issue an order of stay of proceedings, it must be satisfied that there are genuine and compelling grounds to justify such an order, whose effect may be to undermine one of the fundamental constitutional principles, namely that justice shall not be delayed."

(See also *Katangi Developers Ltd v Prafula Enterprises Ltd & Another* [2018] eKLR and *Meta Platforms, Inc & another v Samasource Kenya EPZ Ltd t/a Sama & 185 Others* [2023] KECA 999 KLR). Nothing exceptional has been placed before us to justify an order of stay of proceedings.

40. For all the foregoing reasons, we find no merit in this application and the same is hereby dismissed with costs to the respondents and beneficiaries who came forward to oppose the application. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024.

K. M'INOTI

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JUDGE OF APPEAL MUMBI NGUGI

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JUDGE OF APPEAL

K. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

***DEPUTY REGISTRAR*.**