



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA, & KANTAL, J.J.A)

CIVIL APPLICATION NO. 119 OF 2020

BETWEEN

FLORENCE WANJIRU NDUNGI.....APPLICANT

AND

PERSIAH MUTHONI MASINDE (Sued as the sole Administratrix of the Estate of

John Gitau Gichuru (deceased)).....1ST RESPONDENT

JOAN NJOKI NDUNGI (Sued as the sole Administratrix of the Estate of

James Samuel Gichuru (deceased)).....2ND RESPONDENT

(Being an Application for Stay of Execution of the Ruling and Order of the

High Court of Kenya at Nairobi (Achode, J.) dated 24th September 2019

pending the determination of an intended Appeal)

in

Succession Cause No. 20 of 1983)

RULING OF THE COURT

1. Before the Court is a motion on notice dated 13th May, 2020 brought under **Rule 5(2)(b)** of this Court's Rules seeking stay of execution of the ruling and order of the High Court at Nairobi (Achode, J.) where the learned Judge entered judgment and gave orders, *inter alia*, that the administratrix (applicant herein) files a proper list of assets of the estate; and that the estate of the late James Samuel Gichuru (deceased) be distributed equally between the administratrix of the estate of the deceased and the estate of the late John Gitau Gichuru.

2. This application emanates from succession proceedings before the High Court for the distribution of the estate of the late James Samuel Gichuru who died intestate on 10th August, 1982 and was survived by his wife, Rahab Wangui Gichuru who died on 6th May, 1995, and five children: John Gitau Gichuru, Mary Nyaguthii Gichuru, Anne Njeri Gichuru, David Ndatha Gichuru who died on 21st July, 1998, 2nd September 2001, 24th August, 2003 and 9th May, 2001 respectively, and Joan Njoki Ndungi. The applicant herein is a grandchild to the deceased and a daughter to the 2nd respondent whereas, the 1st respondent herein is a creditor to the estate of the deceased.

3. It was the applicant's case that the estate comprises of properties and registered companies; that it came to her knowledge in 2003 that the deceased's estate was embroiled in litigation which had huge debts; some of the assets listed did not form part of the deceased's estate i.e., either they did not belong to the deceased or they had been disposed of; and that some companies' assets were encumbered by mortgages.

4. The application is supported Lawrence Muriithi Mbabu, submissions dated 4th March, by the affidavit of the applicant's counsel, sworn on 13th May, 2020 and written 2021. It is predicated on grounds, *inter alia*, that the applicant is aggrieved by the impugned decision, that there is on record a notice of appeal dated 1st October, 2019 duly filed and served on 2nd October, 2019 and 3rd October, 2019 respectively, that the instant application was proffered expeditiously, and that the applicant has already requested for certified copies of the trial Court's

proceedings with the intent of appealing the impugned decision.

5. In his submissions, learned counsel for the applicant submitted that the applicant intends to challenge the impugned decision on grounds that the resultant orders were discriminatory as it favoured the deceased's children who are either alive or are survived by either a spouse or children or both; that the applicant had been issued with certificates of grant of probate of written will and appointed as the sole executrix over the estate of Mary Nyaguthii Gichuru vide **High Court Succession Cause No. 2712 of 2001** and the estate of Anne Njeri Gichuru vide **High Court Succession Cause No. 2800 of 2003** on 2nd July 2002 and 4th December 2003 respectively.

6. Further, that despite the deceased's wife and all his children being listed as beneficiaries in the certificate of confirmation of grant issued on 24th April, 1983, they were not included in distribution of the estate; that the respondents have already taken steps to execute the impugned order therefore unless orders for stay are granted, the intended appeal shall be rendered nugatory; that the grants of probate of written will issued to the applicant as the executrix of the estates of Mary Nyaguthii Gichuru and Anne Njeri Gichuru have not been challenged or revoked by any Court of law; that the applicant by operation of the said grants has already disposed of some of the properties previously apportioned to them from the deceased's estate to offset the estates' liabilities; that if stay is not granted the applicant will be condemned to refund all the third party buyers hence personally bearing the burden of the said liabilities which will cause her irreparable loss not capable of being compensated in damages in the event the intended appeal succeeds; and that the balance of convenience weighs heavily in favour of the applicant.

7. The 1st respondent opposed the application vide her replying affidavit sworn on 15th June, 2020; Its written submissions however do not appear on record. In sum, it was her argument that: in the impugned decision, the trial Court declined to make any orders in favour of the applicant on grounds that her relationship with Mary and Anne was not clear and the alleged wills pursuant to which she claimed to have been appointed as the executrix were not presented in Court; that the applicant lacked legal basis to claim a share of the deceased's estate; that the applicant's intended appeal had no arguable grounds and was therefore an abuse of the Court process.

8. The principles upon which this Court can grant a stay of execution are old hat: - it must be demonstrated that the intended appeal is arguable and that if stay is not granted, the intended appeal would be rendered nugatory in the event that the appeal succeeds. (See: **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others (2013) eKLR**).

9. On one hand, the applicant claims to have a stake in the deceased's estate by virtue of being the appointed executrix of the estates of Mary and Anne who were the deceased's daughters and who passed on during the succession proceedings in respect to the deceased's property. On the other hand, the 1st respondent argues that in the impugned decision, the trial Court properly evaluated the evidence before it hence reaching proper findings that the applicant had no legal basis to claim a right over the estates of either Mary nor Anne. This alone shows that there are issues calling for determination by a Court.

10. It is trite that whether the appeal is arguable, the applicant need not establish a multiplicity of grounds and it is sufficient if a single bona fide arguable ground of appeal exists. (See **Damji Pragji Mandavia v. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004**). We are satisfied that the limb on arguability has been demonstrated.

11. As to whether the appeal would be rendered nugatory if stay is not granted in the event that the intended appeal is successful, the applicant has not demonstrated the same as it had not placed any evidence on record to suggest that it has disposed of any properties forming part of the estate to offset liabilities of the estates of Mary and Anne or that any creditors have pursued the offsetting of any such liabilities.

12. In view of the forgoing, though the applicant has demonstrated that the intended appeal is possibly arguable, the nugatory aspect has not been demonstrated. Besides, this Court would be hesitant to stay orders issued by the trial Court in respect of rendering of accounts directed at both parties in the impugned Ruling as that would amount to staying performance of a legitimate statutory duty imposed on the administratrix by the Law of Succession Act. Indeed the duty to account is paramount and in the interest of the entire estate.

13. In view of the foregoing, we hold the view that the applicant has failed to satisfy both limbs of arguability and the nugatory aspect under **Rule 5(2)(b)** of this Court's Rules. As severally held by this Court, in order for a party to succeed in an application such as this one, both limbs must be satisfied and demonstrating only one will not aid the applicant (See **Stanley Kangethe vs Keter (Supra)**).

14. On the whole, therefore, we are not persuaded that this application meets the required threshold for it to succeed under **Rule 5(2)(b)** of the Rules of this Court. Accordingly, the application is dismissed with no order as to costs, this being a family matter.

Dated and delivered at Nairobi this 19th day of March, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR