



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, SICHALE & J. MOHAMMED, JJ.A.)**

**CIVIL APPLICATION NO. NAI E348 OF 2020**

**BETWEEN**

**MARY WANJIKU NJOGU** (Suing on behalf of Eunice  
 Nungari Ashford (Deceased).....**1<sup>ST</sup> APPLICANT**

**LUCY WAMBUI**..... **2ND APPLICANT**

**JOHN KIMANI NJUGUNA**.....**3RD APPLICANT**

**SUSAN NJUGUNA** .....**4TH APPLICANT**

**CAROLINE NYOKAMBI** .....**5TH APPLICANT**

**AND**

**JESINTA NJERI ASHFORD** ..... **1ST RESPONDENT**

**PUBLIC TRUSTEE**..... **2ND RESPONDENT**

**AND**

**MARY WANJIKU NJOGU**

**AGNES WANJIKU KINYANJUI**

**ANNE WANJIRU MUIGAI**...**INTERESTED PARTIES**

(Being an application for stay of execution of the order of the High Court at Nairobi Family Division (**Ali-Aroni, J**) dated **23<sup>rd</sup> July, 2020** in **HC Succession Cause No. 1589 Of 1994**)

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**RULING OF THE COURT**

[1] By a notice of motion dated 3rd November, 2020 the applicants have moved this Court for orders that:

**“The execution (lifting) order of the High Court made against the applicants on the 23rd July, 2020 be stayed pending the determination of the intended appeal against the said order of the High Court. ...”**

[2] By a chamber summons lodged in the High Court by the 1st respondent under **Rule 73** of the **Probate and Administration Rules**, she sought to have the two Cautions lifted on the grounds that they were impeding the distribution of the estate of the deceased in accordance with the confirmation of the Certificate of Grant dated 14th November, 2011 wherein the suit property was distributed to the beneficiaries namely: **Lucy Wambui, John Kimani Njuguna, Susan Njuguna and Caroline Nyokabi**.

[3] In the ruling, the learned Judge of the High Court (Ali-Aroni, J) ordered that the two Cautions which had been registered against **LR No. Dagoreti/Riruta/1512** (the suit property), by the 2nd and 3rd applicants be removed, because the matter has been pending since 1994 and the applicants had not taken any action to resolve the matter.

[4] Being aggrieved by the ruling of the learned Judge, the applicants intend to appeal to this Court, hence, the orders sought. The applicants claim that the suit property belonged to their deceased's father who was a polygamist, and that they are beneficiaries of his estate, and the caution was registered against the title to the suit property to protect their interests.

[5] In addition, the applicants challenge the validity of the Will used by the 1st respondent to be appointed the executrix of the estate. They blame the 1st respondent for leasing part of the deceased property to one Grace Wambua who has constructed a school on the suit property, and also secretly subdividing the suit property and submitting the plans for approval by the Registrar of Lands without involving the applicants. The applicants plead that they have an arguable appeal, and that unless the order of stay is issued, the appeal may be rendered nugatory.

[6] The 1st respondent has filed a replying affidavit in which she maintains that the applicants' motion is made in bad faith with a malicious intention of blocking the finalization of the distribution of the estate of the deceased; that the applicants have never recognized the 1st respondent as a widow of the deceased and the executrix of his Will, despite clear findings made by the High Court.

[7] In a replying affidavit sworn by the 1st applicant, it is maintained that the 1st respondent is misleading the Court; and that the High Court (E. Githinji, J) (as he then was), directed that the issue of validity of the will be dealt with, but this was not done. The 1st respondent disputes the ruling of the High Court (Musyoka, J) contending that the learned judge did not take into account an affidavit sworn by the 4th applicant and only relied on the affidavit of the 1st respondent. The applicants also dispute the courts' finding that they were indolent.

[8] The applicants and the 1st respondent have filed written submissions reiterating their positions and urging the Court to rule in their favour. The applicants maintain that they have an arguable appeal while the 1st respondent urges the Court to dismiss the applicants' motion.

[9] We have considered this application, the contending affidavits and the submissions filed. The motion before us is one for stay of execution pending appeal under **Rule 5(2)(b)** of the **Court Rules**.

[10] In ***Safaricom Limited -vs- Ocean View Beach Hotel Limited & 2 others [2010] eKLR***, this Court stated:

**“The Court has, over the years, developed certain well known guidelines on which it would grant or refuse to grant the preservative order sought. The appeal or the intended appeal must be one which is arguable, i.e. one which is not frivolous. If an appeal or the intended appeal is a frivolous one, the Court will refuse to grant an order preserving the status quo. Again, the party seeking the preservative order must show to the Court that if an order is not granted and his appeal or the intended appeal were to succeed in the end that success would have been rendered nugatory by the earlier refusal to grant the preservative order.”**

[11] The applicant is seeking to have the order that was made by the Court on 23rd July, 2020 “lifted” pending the determination of the appeal. The order of the court was that the two cautions registered against the suit property be lifted. We have not been told what the position on the ground is, as the applicants have not produced any search certificate to confirm whether the cautions are still registered against the title to the suit property. The order having been made by the High Court on 23rd July, 2020 we cannot assume that the cautions have not been removed. In other words, the applicant has not satisfied us that the two Cautions have not been lifted as was directed by the High Court. He may be trying to stop what has already taken place and this Court cannot act in vain.

[12] Be that as it may, assuming that the Cautions still remain registered against the title to the suit property, the issue that we need to address is whether the applicants have satisfied this Court that they have an arguable appeal. That is; an appeal which is not frivolous. Secondly, they must satisfy this Court that if the order which they seek is not granted their intended appeal may be rendered nugatory or worthless.

[13] It is apparent from the facts which were laid before this Court that the suit property which was subject of the Caution was part of the estate of **Ashford Njuguna Nduni** (deceased), whose estate has been subject of a succession cause that was registered in 1994. The Cautions which were ordered to be removed were registered on 21st October, 1993 and 11th June, 2004 respectively. Reference was made to a ruling delivered by Musyoka, J in the succession matter.

[14] According to a certificate of confirmation of grant dated 14th November, 2011 which is annexed to the affidavit of **Mary Wanjiku Njogu**, the grant issued to the 1st respondent was confirmed and the suit property distributed amongst the beneficiaries who include the 2nd, 3rd, 4th and 5th applicants. It is evident that the applicants are dissatisfied by that position as they have complained about the 1st respondent's attempts to have the suit property subdivided. However, the Law of Succession Act provides for appropriate procedures where the beneficiaries or anyone else has an objection to any process in the succession of the estate and any dissatisfied beneficiary is at liberty to pursue that process.

[15] In regard to the Cautions, the learned judge having taken into account the length of time that the Cautions have remained in force, the fact that the 1st respondent had a certificate of confirmation of grant distributing the suit property, and the fact that she had initiated a subdivision process, exercised her discretion in removing the Cautions. We do not see anything arguable in regard to the exercise of that discretion.

[16] As regards the nugatory aspect, the applicants claim that the Caution had been lodged to protect their interests as beneficiaries. The certificate of confirmation of grant shows that four of the applicants have been identified as beneficiaries and the 1st respondent is in the process of distributing the estate through subdivision. Should there be any complaints in regard to that process, the applicants have recourse

to relief through the succession cause.

[17] We therefore find that the application lacks merit as the applicants have also failed to satisfy the twin principles for granting the order of stay of execution under **Rule 5(2)(b)** of the **Court Rules**.

[18] Accordingly, we dismiss the applicants' motion. This being a matter arising out of a family dispute, we do not find it appropriate to make any orders on costs.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**