



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GATEMBU, J. MOHAMMED & KANTAL, J.J.A.)**

**CIVIL APPLICATION NO. E235 OF 2020**

**BETWEEN**

**ALICE WAMAITHA.....1ST APPLICANT**

**HARRIET WANJIRU GITHINJI .....2ND APPLICANT**

*(Suing as the administrators of the Estate of CECILIA WANJIRU KIBICHE)*

**AND**

**FAITH NYAMBURA.....1ST RESPONDENT**

**JANE WANJIRU MUIGAL.....2ND RESPONDENT**

*(Being an application for stay of execution of the Ruling of the High Court of Kenya*

*at Nairobi (Musyoka, J.) dated 23rd September, 2016*

**in**

**HC. Succession Cause No. 1058 of 2005)**

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**RULING OF THE COURT**

We are asked in the Motion brought pursuant to **rules 5(2) (b) and 47** of the **Court of Appeal Rules** to order a stay of execution with regard to the distribution of the estate of a deceased person as per the ruling of **Musyoka, J**, delivered on 23rd September, 2016 pending hearing and final determination of **Nairobi Civil Appeal No. 222 of 2011**. The Motion is supported by the grounds on the face of it and by a supporting affidavit of the 1st applicant, **Alice Wamaitha**. In sum it is said that the High Court in the said ruling disinherited the 1st applicant and others leading to the suit pending at the High Court; that an application for stay of execution was declined; that the respondents are intent on proceeding with execution; that the pending appeal is arguable; at paragraphs (e) to (g) of the grounds in support of the Motion:

***“(e) THAT unless an order of stay of execution of the ruling in issue is issued, the 1st applicant and other beneficiaries who were left out, stand to suffer irreparably as the estate will be distributed and the currently named beneficiaries will most likely dispose and or deal with their respective shares in such a manner that there shall be nothing left for re-distribution at the conclusion of the pending appeal which will thus be rendered nugatory.***

***(f) THAT 1st applicant and other beneficiaries who were left out of the deceased’s estate face a grave miscarriage of justice as they have resided with the deceased and depended on her since the early 1980’s and yet have been disinherited from the estate.***

***(g) THAT it is unknown when the pending appeal shall be reached for hearing and it is therefore only just and fair in the circumstances that interim orders do issue till then otherwise the highly meritorious appeal will be rendered nugatory.”***

It is also said that the applicant and other beneficiaries were not considered as beneficiaries yet they had resided with the deceased for over 30 years and in the case of the 1st applicant, had done so after the death of her husband and they were fully dependent on the deceased for their livelihood.

**Faith Nyambura Gakuha** (1st respondent) in a replying affidavit says that she is a daughter of the deceased. A grant of letters of administration intestate in respect of the estate of the deceased (Cecilia Wanjiru Kibiche) was issued to Alice Wamaitha and Harriet Wanjiru Githinji on 4th August, 2005 and confirmed on 23rd September, 2016. She further says that the High Court ordered that the entire estate be distributed to named persons, all grandchildren of the deceased

and also children of one Peter Gakuha Kibiche. According to her the administrators were slow in administering the estate and she had to apply to Court for its intervention. Further, that the administrators had failed to administer the estate in the manner that the law required them to do and she (Faith Nyambura Gakuha) had applied for revocation of the grant.

**Jane Wanjiru Muigai** (the 2nd respondent) in a replying affidavit adopts her co-applicant's affidavit urging that we disallow the Motion to enable the long standing dispute to end and also to assist the beneficiaries "... who are suffering by continued delay in the distribution of the estate ...". She further says that the applicants have enjoyed occupation, utilization and leases over the estate of the deceased for over 15 years to the prejudice of the beneficiaries.

There is a supplementary affidavit of the 1st applicant where she says, *inter alia*, that Jane Wanjiru is an estranged wife to a son of the deceased and that she was not named as one of the beneficiaries to the estate of the deceased; that she (Jane Wanjiru) did not file an appeal; that Jane is mother to Faith Nyambura; that Jane had antagonized the deceased even assaulting her and that it was only her (the 1st applicant) with her two children and one **Eliud Kibiche** who resided on the land and were dependent on the deceased for sustenance. Further, that Jane Wanjiru and Faith Nyambura were collecting rent "... running into hundreds of thousands ..."; that Jane had attempted to sell lands belonging to the estate; that the High Court had ordered distribution of a property that belonged to her (Alice Wamaitha), not to the estate; that:

***"(o) We as the administrators do appreciate that we have a duty to administer the Estate and account for such administration and the estate does not stand to be wasted in whatsoever manner if the same is left intact until the pending appeal is heard and determined. Todate, none of the Estate's assets have been disposed and/or encumbered by we the administrators."***

The 1st applicant further depones that she is a daughter in law of the deceased being the widow of the deceased's only son. She attaches various documents to the affidavit in support of her case.

Not to be outdone in the rather angry exchange Faith Nyambura Gakura, in a further affidavit, says that the prayers sought, if granted, would assist the applicants in not complying with the law on administration of the estate; that the applicants have not complied with some orders given by the High Court; allegations of criminal conduct are denied; that there is no arguable appeal. Jane Wanjiru Gakuha, in a further affidavit, says that she is a party in the appeal but denies that the 1st applicant was dependent on the deceased. She says that "... Only distribution of the estate will assist in addressing the complaints of the Applicants..." and that "... should this Court hold that daughters in law are entitled to the estate of their mother in law, which is the main ground of appeal, I will have equal share as the 1st applicant."

So many other things are said but let us stop there, there is enough material on which we can determine the Motion.

The principles that guide this Court in a matter of this nature are well known. For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that it is not frivolous. Such an applicant must, in addition, prove that the appeal would be rendered nugatory absent stay – See the case of **Stanley Kinyanjui Kangethe v Tony Ketter & Others [2013] eKLR**.

We have perused all the affidavits and written submissions and have considered the case law cited by both sides in the Case Digest filed and cases attached.

Although the applicants did not file a draft Memorandum of Appeal we can discern from the affidavits and submissions that the applicants take issue with the trial Judge who they say disinherited them from the estate of the deceased. The 1st applicant says that the deceased had only 1 child, her husband. She further says that the Judge distributed the deceased estate to the deceased's grandchildren and ignored her own claim as a daughter in law of the deceased whose husband had by then died. It is arguable in the appeal whether the 1st applicant, a daughter in law of the deceased, was entitled in law to inherit from the estate of her mother in law where her husband, a son of the deceased had since died. The 1st applicant also says that a property registered in her own name was included by the Judge as part of the distributable assets of the estate. We find these to be arguable points in the appeal and as was held in the case of **Dennis Mogambi Mongare v Attorney-General & 3 Others [2012] eKLR** an arguable point on appeal is not one that must succeed. It is a point deserving of the full attention of the Court for determination.

Turning to the nugatory aspect which, as we have seen, an applicant, to be successful, must also satisfy, this is not difficult to determine. The applicants are saying that if the estate is distributed as ordered by the Judge they will be disinherited; that the estate may be distributed and assets thereof disposed off and be not within reach of the applicants. Clearly that would render the appeal nugatory if the appeal was to succeed.

The applicants having satisfied both limbs of an application under **rule 5(2) (b)** of the **rules of this Court** the Motion dated 24th July, 2020 succeeds and is hereby allowed. Let costs of the motion be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. MOHAMMED

.....

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**