



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: NAMBUYE, SICHALE & KANTAI, J.J.A.)

CIVIL APPLICATION NO. 300 OF 2017

BETWEEN

ELIZABETH WANJIRU MBURUAPPLICANT

VERSUS

JOHNSON KAMAU NJUNGUNARESPONDENT

(Being an application for temporary injunction pending the hearing and determination of the ruling of the High Court of Kenya (Hon. R.E. Ougo, J.) dated 10th November 2017

in

Nairobi Civil Appeal No. 12 of 2006)

RULING OF THE COURT

Before us, is a Notice of Motion dated 20th December 2017 under **Article 40** of the **Constitution of Kenya, Order 40 Rules 2(1), (2), (3), 4(1)** and **Order 51 Rule 1** of the **Civil Procedure Rules, Section 3, 3A** and **63(e)** of the **Civil Procedure Act (Revised Edition) 2010** and any other enabling provisions of law, substantively seeking orders that an order for temporary injunction do issue restraining the respondent, his servants and agents from trespassing, entering, occupying, evicting or doing any other act of waste upon the suit premises, all that parcel of land known as **Limuru/Bibirioni/138**, pending the hearing and determination of this application *inter partes*; that the appeal herein attached be dispensed with expeditiously so to avert the perpetual attrition vented upon the applicants' larger family together with an attendant order that costs be in the cause.

It is supported by grounds on its body and a supporting affidavit of **Elizabeth Wanjiru Mburu**, the applicant herein together with annexures thereto. It has not been opposed.

The background to the application albeit in summary form is that **Joshua Mburu** filed Succession Cause No. 4 of 1997 to which the respondent objected. After a merit trial of the objection proceedings, the trial Judge **Onyancha, J.** (as he then was) then granted orders for a joint grant to be issued to both the petitioner and objector. **Joshua** died before distribution of the estate. **Sarah Wangari Kuria**, the mother of **Joshua Mburu Gathu**, deceased, and one of the beneficiaries in **Succession Cause No. 4 of 1997**, filed an application for revocation/annulment of the joint grant issued by **Onyancha, J.** to **Joshua Mburu** and the respondents under **section 76** of the **Law of Succession Act** dated 16th January 2009 on grounds highlighted in the ruling intended to be impugned. **Sarah Wangari Kuria** who described herself in the deposition before the High Court as **Mburu's** mother did not exhibit proof that she was the administrator of **Mburu's** estate. **Sarah** passed on before the conclusion of the appellate process before the High Court.

The applicant herein successfully applied and was substituted in the place of **Sarah Wangari Kuria**, but she too did not exhibit proof that she was the legal representative of the estate of either **Joshua Mburu** or **Sarah Wangari Kuria**. The respondent objected to the applicant's participation in the appellate proceedings citing lack of *locus standi* on her part to do so. The learned Judge **R.E. Ougo, J.** sustained the respondent's objection that the applicant herein had no *locus standi* in the matter before Court and ruled in so far as she purported to champion the interests of either **Mburu** or **Sarah Wangari** and dismissed her application together with an order that the administrators do proceed to confirm the grant and distribute the estate.

It is against the above uncontroverted position that the applicant intends to champion her intended appellate rights before this Court. She intends to fault the learned Judge on the basis of the grounds set out in the home grown draft memorandum of appeal annexed to the

supporting affidavit.

We have considered the record in light of the above sole pleadings. Our invitation to intervene on behalf of the applicant has been invoked under the provisions of law cited in the heading of the application, all of which with the exception of **Article 40** of the Constitution of Kenya, 2010 do not guide determination of matters falling for consideration by this Court. However, going by the content of prayer 2 of the applicant’s notice of motion and considering that the relief sought is meant to cushion the applicant’s pending appeal, we have no doubt the injunction relief meant to be sought though framed as an original relief was meant to be accessed under **Rule 5(2)(b)** of the Court’s **Rules** donating mandates to the Court to issue injunction relief to an aggrieved party subject to satisfaction of the prerequisites governing the exercise of such a mandate under the said **Rule**.

Lack of proper citing of the relevant access provision and proper framing of the relief sought notwithstanding the inherent power of the Court enshrined in **Rule 1(2)** of the **Rules** of the Court, **sections 3A** and **3B** of the **Appellate Jurisdiction Act** enshrining the overriding objective principle giving the Court greater latitude in the discharge of its mandate under the said **Act**, and **Article 159** of the Constitution of Kenya enshrining the nontechnicality principle enjoins us to refrain from striking out the application for either want of citing the correct access provisions of law for the relief sought, or want of form of the content of the relief sought, hence the merit determination that follows.

However, before we deal with the merits of the application, we find it prudent to deal with the issue of lack of applicant’s *locus standi* to champion the intended appellate right because if we were to agree with the learned judge that the applicant herein does not have *locus standi* in the matter, there will be no need for us to delve into the merits of the application.

It is common ground that **Sarah** moved the High Court to champion the interests of **Joshua Mburu** in the application for revocation of grant proceedings. She passed on before those rights were actualized. The applicant purported to step into the shoes of **Sarah** to champion **Mburu’s** rights. The law mandating one to champion rights of a deceased person is that provided for in the **Law of Succession Act, Cap 60 Laws of Kenya**. In summary, according to the prerequisite in the above **Act**, an administrator is defined as a person to whom a grant of letters of administration has been made under the **Act** while a personal representative is defined as an executor or administrator of a deceased person’s estate. Powers and duties of a personal representative are provided for in **sections 82** and **83** of the **Act** respectively. These include championing of litigation in courts of law on behalf of estates of the deceased persons in their capacity as either holders of a full grant or ad colligenda bona. Neither of which the applicant has exhibited.

In light of the conclusion we have reached above, the application is a proper candidate for striking out which we hereby do with no order as to costs since it is not defended.

DATED and DELIVERED at NAIROBI this 16th day of April, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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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