IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & GATEMBU, JJ.A.)

CIVIL APPLICATION NO. 7 OF 2020

BETWEEN

RKE.....APPLICANT

AND

DAM.....RESPONDENT

(Being an application for stay of execution and proceedings pending the hearing of appeal against the Ruling and Order of the High Court of Kenya, Family Division at Nairobi (Ali-Aroni, J.) delivered on 31st October 2019

in

***Succ. Cause No. 568 of 2008.*)**

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RULING OF THE COURT

1. The applicant's Notice of Motion dated 15th January 2020 sought a conservatory order staying further proceedings in Nairobi **Succession Cause No. 568 of 2008** and implementation of the Court ruling delivered on 31st October 2019 pending hearing and determination of her appeal against the Ruling of **Aroni, J**. delivered on 31st October 2019 in the above matter.

2. The gravamen of the dispute in the Succession Cause that is before the trial court is whether the applicant's daughter, **EAM** was fathered by the late **MJM,** (deceased) who the applicant alleges was her husband. In the impugned ruling, the learned judge noted that there was a consent that the applicant's daughter, **EAM,** and the respondent's son, **JNM.,** were to undergo a sibling DNA test that was to be conducted by the Government Chemist; that upon service of the order, the Government Chemist held discussions with the parties and they gave their respective opinions on two options of DNA sampling that were given to them by the Government Chemist; the Government Chemist opted to have the sampling involving all the two biological mothers and their children to enhance accuracy of the results, which the trial court endorsed and ordered accordingly, but the applicant was not entirely satisfied. She therefore filed a notice of appeal against that decision, on which this application is premised.

3. The applicant states in her affidavit in support of the application that her desire is to cast the net wider to allow "**plausible and verifiable gene extraction**" as the respondent's children are all male, while she has only one daughter, who she alleges was recognized as the daughter of the deceased. The applicant argued that if the pool of people who will be involved in the DNA test is drawn from men only, the results may not be accurate and reliable and therefore wants the court to allow aunts of her daughter to be involved. The applicant contended that she has an arguable appeal with chances of success, which will be rendered nugatory unless the orders sought are granted.

4. The respondent opposed the application on grounds that the impugned ruling arose out of a consent of the parties which was endorsed by the court but the applicant and her daughter refused to comply with it; that the application does not meet the requirements of **rule 5(2)(b)** of this **Court's Rules**; that the applicant has not established any basis for involving other relatives of her daughter in the DNA sampling and therefore urged this Court to dismiss the application.

5. We have considered the application, the parties' submissions and the brief highlights by their respective advocates. The principles that guide this Court in its consideration of **rule 5(2)(b)** applications are well known. An applicant must satisfy the Court that the appeal is arguable and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory.

6. The impugned ruling was the trial court's endorsement of a consent by the parties that the applicant's daughter, EAM. and the

respondent's son, JNM., do undergo a sibling DNA test to be conducted by the Government Chemist. However, the methodology of carrying out the tests was not agreed upon. The Government Chemist gave the parties two options. The first one was to exhume the remains of the deceased which had significantly degenerated due to lapse of time; and the other was sampling of DNA from the biological mothers and all their biological children.

7. It is evident that the sampling proposed by the applicant is a variation of the two options given by the Government Chemist. We entertain some doubts whether the applicant's suggestion, being of a lay person, can override an expert's suggestion regarding the most appropriate way of carrying out the DNA sampling. Consequently, we are not satisfied that the intended appeal is arguable.

8. Having so found, it would be superfluous to consider the second limb that requires to be demonstrated in a **rule 5(2) (b)** application, that is the nugatory aspect. Suffice it to say that even if we were to do so, the applicant did not properly explain how the intended appeal would be rendered nugatory unless we stay further proceedings of the succession cause.

9. We find this application devoid of merit and dismiss it with costs to the respondent.

Dated and delivered at Nairobi this 21st day of May, 2021.

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Signed

DEPUTY REGISTRAR