



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), KOOME & MUSINGA, J.J.A.)

CIVIL APPLICATION NO. E533 OF 2020

BETWEEN

ELIZABETH WANGARI NGUGI.....APPLICANT

AND

JANET MURUGI NJUGEL.....1ST RESPONDENT

PETER ROMANUS KAMUNYU.....2ND RESPONDENT

(Being an application for stay of execution pending the hearing and determination of

an intended appeal from the ruling of the High Court of Kenya

at Nairobi (Achode, J.) dated 30th November, 2020

in

H.C. Succ. Cause No. 103 of 1992)

RULING OF THE COURT

By a ruling dated 30th November, 2020 in H.C Succ. Cause No. 103 of 1992 Achode, J. dismissed the applicant's summons for rectification of the confirmed grant over the estate of Njungei Kamunyu (deceased).

Aggrieved by that decision, the applicant filed the current application for stay of execution of those orders as well as stay of further proceedings in the succession cause. The basis of the application has been stated in the application itself and written submissions to be that the applicant intends to challenge the aforesaid ruling on appeal to this Court as evinced by a notice of appeal to that effect; that the intended appeal is arguable; and that it would be rendered nugatory, if it succeeds after execution of the decree.

The respondents for their part have filed a replying affidavit and submissions in opposition to the application, in which they have insisted that the trial court never made any order capable of execution; that the applicant is a vexatious litigant who has brought numerous applications to the detriment of the rest of the beneficiaries; and that having been part of the consent endorsed by all the beneficiaries, it was in bad faith for the applicant to apply for the rectification of the grant.

Though we cannot trace the notice of appeal on record we believe it was filed because the applicant has alluded to it as annexed and marked EWN3. The respondents have too not complained.

Whether to grant the relief of stay of execution is a matter of judicial discretion guided by the two well-known principles; arguability of the appeal or intended appeal and whether the appeal or intended appeal, if successful will be rendered nugatory. It is settled too that for an application for stay to succeed it must simultaneously satisfy both principles; that an arguable appeal is not one which must necessarily succeed, but one which is not frivolous. We emphasise that, whether the application is for an order of stay of execution, injunction or stay of further proceedings, the above consideration are the same.

It has been settled by a long line of decisions by this Court that an order of stay of execution is not available where the decision to be

challenged is one that merely dismissed the action without making any positive order. See **Kanwal Sarjit Singh Dhiman vs. Keshavji Juvraj Shah** [2008] eKLR. Achode, J. in the ruling to be challenged, simply dismissed the applicant's motion for rectification without making any orders requiring the applicant to do or to abstain from doing any act. It is an order that is incapable of being executed.

Though it is not in our place at this stage to consider the likely merits of the intended appeal, looking at the manner the learned Judge exercised her discretion in the construction and application of section 74 of the Law of Succession Act to the summons for rectification, it is doubtful that the intended appeal will be arguable.

Ultimately, the application dated 28th December, 2020 having failed the test prescribed by **Rule 5(2)(b)** is accordingly dismissed with no orders as to costs being a matter involving family members.

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

W. OUKO, (P)

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR