



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & ASIKE-MAKHANDIA, J.J.A.) CIVIL APPLICATION NO. NAI 338 OF 2018

BETWEEN

SUSAN MUKONYO KAMUI.....APPLICANT

AND

JENNIFER WAIRIMU NJOGU.....RESPONDENT

*(Being an Application for stay of execution of the Ruling and Order of the High Court of Kenya at Machakos (Nyamweya, J.) delivered on 16th October 2017 in HC Succession Cause No. 58 of 2001)*

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RULING OF THE COURT

1. Before this Court is an application dated 12th November, 2018 brought under **Rules 5(2)(b)** and **43** of the Court of Appeal Rules, seeking an order for stay of execution of the Ruling and Order of the High Court of Kenya at Machakos (Nyamweya, J.) delivered on 16th October, 2017 in Machakos Succession Cause No. 58 of 2001.

2. A brief background of this case is that the applicant, being a wife of one Kamui Mavuti (hereinafter referred to as “the deceased”) was issued with a grant of letters of administration intestate in respect of his estate.

3. The Respondent herein, who alleged to be the second wife of the deceased under Kamba customary law, subsequently sought to revoke the said grant on grounds that the grant was obtained fraudulently by the making of a false statement, and without seeking the consent of other persons with equal priority. Further, that the estate was already the subject matter of Administration Cause No 184 of 2000 before the Public Trustee.

4. Upon consideration of the matter, Nyamweya, J. issued the following orders:

*“1. The grant of letters of administration intestate issued to the Applicant with respect to the estate of the Deceased be revoked.*

*2. Any distribution, transfers and dispositions of any kind to and/or the Applicant herein of the property of the Deceased, and any other subsequent dealings with the said properties be and are hereby declared unlawful and null and void and shall be cancelled forthwith.*

*3. A new grant of letters of administration shall issue to the Applicant and Respondent as joint administrators of the estate of the Deceased.*

*4. The Applicant shall within 60 days of the date of this ruling file in Court and serve the Respondent with an account of all dealings with the properties of the Deceased from the date of the said Deceased’s death until the date of this ruling.*

*5. The joint administrators shall thereafter file a fresh summons for confirmation of grant within 60 days.*

*6. The status quo that shall obtain as regards the properties and assets belonging to the estate of Deceased pending the confirmation of grant of administration shall be that the applicant and Respondent shall continue to be in possession and occupation of the properties and assets they currently occupy; and that the Applicant and Respondent shall not sell, transfer, lease, undertake any further developments on, or in any manner dispose of or waste the said properties and assets.*

*7. There shall be no order as to costs.”*

5. Following a violation of the aforementioned orders by the applicant, the respondent filed a Notice of Motion seeking orders that: the rents collected from all the premises of the deceased's estate be shared equally between the respondent and applicant pending the confirmation of grant of letters of administration; and that the applicant and respondent be appointed as joint administrators of the estate of the deceased. The application was predicated on grounds that; the applicant had been collecting all the rental income and applying it to her benefit yet the ruling of Nyamweya J delivered on 16th October, 2017 ordered that both the applicant and respondent be joint administrators.

6. Ultimately, the learned Judge issued the following orders:-

a) A bank account in the name of both administrators be opened within 30 days alternatively deposit of same cash to be going to court every month if parties fail to open an account within 30 days.

b) Kshs 94,400/= be deposited in the account every month or court as the case may be with effect from September 2018.

c) Any withdrawal and or expenditure should be done with the consent of both administrators. In event of disagreement with court leave.

d) The Applicant should file accounts from the date of her first appointment to date, within 30 days period, failure to which her administrator ship shall stand revoked.

7. The applicant was aggrieved prompting the instant application on grounds that she expeditiously filed a Notice of Appeal as against the ruling of 16th October 2017; that if stay is not granted, the ruling of 20th September, 2018 will be operative and in turn the applicant's right to fair hearing will have been infringed upon; and that the said intended appeal has very high chances of success.

8. Before going into the substance of the application, it is noteworthy that when the instant application came up for plenary hearing, the Court expressed doubt as to whether the respondent was served with the hearing notice . On record is an affidavit of service sworn on 22nd March, 2021 by Wasolo Priver, the applicant's counsel, in which he states that he served the hearing notice on the 16th day of March 2021. It is not clear why the said affidavit was sworn only a day before the hearing date of the application, creating an impression that it was an afterthought.

9. This Court in **James Kanyita Nderitu v. Maries Philotas Ghika & Another, Civil Appeal No. 6 of 2015** expressed itself thus:-

***“The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo V Attorney General [1986 – 1989] EA 456). The Supreme Court of India forcefully underline the importance of the right to be heard as follows in Sangram Singh V Election Tribunal, Kotch, AIR 1955 SC 664, at 711:***

***“There must be never present to the mind the fact that our rules of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”***

10. The issue of service of Court documents forms a critical cog in the wheels of any given legal process; it is an important component in the administration of justice. Where there exists doubt as to whether an affected party was served or not, as is the case here, the court will be slow to make any orders against such party.

11. Even if we were to assume that the application was served as counsel for the applicant would want us to believe, we are doubtful that this application meets the threshold for Rule 5(2) (b) applications. We say so because, even assuming that there is a single arguable ground of appeal to satisfy the ground on arguability, the applicant has dismally failed to demonstrate the nugatory aspect as required by the rules.

12. The learned Judge ordered that the rent collected from the estate be deposited in a joint account to be opened in the name of both parties, failing which the money should be deposited in court. This order along with the other orders ensure preservation of the deceased's estate pending the hearing and determination of the intended appeal. There is therefore nothing to be rendered nugatory in the event the appeal ultimately succeeds.

13. In conclusion therefore, we find this application totally devoid of merit and dismiss it accordingly with costs in the intended appeal.

**Dated and delivered at Nairobi this 7th day of May, 2021.**

**W. OUKO, (P)**

**JUDGE OF APPEAL**

**W. KARANJA**

**JUDGE OF APPEAL**

**ASIKE – MAKHANDIA**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**