IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), OKWENGU, & GATEMBU, JJ.A.)

CIVIL APPLICATION NO. 123 OF 2018

BETWEEN

LEAH WAMBUI KURIA

ROBERT MUCHUNU KURIA

PETER NJOROGE KURIA (*Suing as*

co-administrators of the estate of the late

***ROBERT MUCHUNU MUMBURA (Deceased)*.....APPLICANTS**

AND

JANE MUCHUNU *ALIAS* JANE WAHU KAMAU

ALIAS* JANE MUCHUNU ADAMS *(Executor of the Estate

of* ROBERT MUCHUNU *as well as Executor of the will of

MILKA NDUTA MUCHUNU *(Deceased)*.....1ST RESPONDENT

KIAMBU DISTRICT LAND REGISTRAR.....2ND RESPONDENT

(An Application for stay of the decision of the Probate and Administration Division

of the High Court of Kenya at Nairobi (L. Achode, J.) delivered on 20th June,

2016 in Succession Cause No. 2974 of 2005)

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RULING OF THE COURT

The applicants moved the High Court by an application under **Rule 45** of the Civil Procedure Rules, asking the court to review its earlier ruling, set it aside and reinstate the applicants' application dated 30th July, 2010 for a fresh hearing on merits. The applicants also prayed for stay of execution pending appeal, in the event the review application was rejected.

In their response, the respondents submitted that the application lacked merit and did not meet the requirements of **Order 45** aforesaid.

After considering the application and the rival positions taken by the parties, the learned Judge, (L. Achode, J.), found, **Order 45** is one of those provisions of the Civil Procedure Rules which have been imported by **Rule 63** of the Probate and Administration Rules into succession matters; and that an application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any other interested party. She however explained that such application must meet the substantive requirements set out in **Order 45** of the Civil Procedure Rules, namely, discovery of new and important matter or evidence, mistake or error apparent on the face of the record, or for

any other sufficient reason.

She found that these strictures were not met by the applicants; that no sufficient basis was laid to warrant the setting aside of the judgment; that **Rule 63 (1)** of the Probate and Administration Rules does not incorporate an order of stay of execution; that the application was not brought without unreasonable delay; and finally, that the applicant did not demonstrate the substantial loss he stood to suffer if the application was not granted.

Intent on moving to this Court to challenge the determination of their application, the applicants now present the instant application taken out pursuant to **Rule 5(2)(b)** of the Court of Appeal Rules, to stay the decision pending appeal. In an attempt to fulfil the requirements of that rule, the applicants have submitted that the appeal "has overwhelming prospects of success" (not quite a requirement of the rule); and that if the order of stay is not granted, they would "suffer irreparable damage and substantial loss" and render the result of the intended appeal nugatory. Again, only the last part of that sentence is a relevant ground for the application.

According to the respondents, the appeal is not arguable; that without a notice of appeal, the application is incompetent; and that the decision in question is incapable of execution.

An applicant moving under **Rule 5(2)(b)**, it is now established, must meet, what is commonly known as "the twin principles" of arguability of the appeal and nugatory aspect of that appeal. See **Reliance Bank Ltd (in liquidation) vs. Norlake Investments Ltd**., – Civil Appl. No. Nai. 93/02 (ur). An applicant must simultaneously satisfy the Court on both limbs.

In addition; the decision sought to be stayed must be a positive order capable of execution. See **Executive Estates Limited vs. Kenya Posts & Anor.** [2005] 1 E.A. 53. The Court draws its jurisdiction from the notice of appeal. See **Halai & Another vs. Thornton & Turpin (1963) Ltd.** (1990) KLR 365.

To start with, we have not been able to trace the notice of appeal on record, confirming the uncontroverted averment by the respondents, that none was filed or served. Secondly, what the High Court did was merely to dismiss the applicants' application. That dismissal was incapable of execution, hence a negative order.

The respondents have stated under oath, once again, without rebuttal, that the applicants have placed a caution on the parcels of land in question, which is the subject of Thika ELC No. 683 of 2017.

For these reasons, it should be clear that the intended appeal is not arguable, nor will it be rendered nugatory if it succeeded.

The application is bereft of merit, for those reasons. It is accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU (FCIArb)

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR