



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SICHALE, J. MOHAMMED & KANTAL, JJA.)

CIVIL APPLICATION. NO. 312 OF 2018

BETWEEN

ANNA MUTHONI GITHINJI.....APPLICANT

AND

LUCIA WANJIKU GITHINJI.....RESPONDENT

(Being an Application for stay of the orders of the High Court pending the lodging, hearing and determination of an intended Appeal from the Judgment of the High Court of Kenya at Nairobi, (Mrs. M.W. Muigai, J.) dated 17th September, 2017

in

MILIMANI HIGH COURT SUCCESSION CAUSE NO. 820 OF 2009)

RULING OF THE COURT

It is prayed in the Motion brought under **Rule 5(2) (b)** of the **Court of Appeal Rules** that, pending hearing and determination of the applicant's intended appeal, there be a stay of all further proceedings in **Milimani High Court Succession Cause No. 820 of 2009**. In grounds in support of the application and in a supporting affidavit of the applicant, **Anna Muthoni Githini**, it is stated *inter alia* that unless we grant stay of the said proceedings the respondent (**Lucia Wanjiku Githinji**) is likely to obtain grant of administration before the substantive appeal is heard... "*rendering the Appeal nugatory and occasioning loss and prejudice to the Applicant...*"; that the appeal is arguable because the Judge failed to allow the applicant's application where it was prayed that the Court review, vacate and/or vary the orders of 15th February, 2016; that the Judge failed to appreciate the uncontroverted evidence contained in an affidavit of the applicant sworn on 29th October, 2009 or authorities cited; that the Judge should have found that the applicant was the wife of the deceased. Further, that the applicant is the widow of the late **Gibson Githinji Gitonga** to whom she got married in 1995 as per an affidavit produced before the High Court; that the deceased was estranged from the respondent and moved in to live with the applicant in a house in Thika where the two ran a business; that she (*the applicant*) was a second wife and beneficiary of the estate of the deceased; that the respondent had applied for grant of letters of administration intestate which grant was made on 21st September, 2009; that the fact that she was the 2nd wife of the deceased was known to the respondent. Further, that the applicant filed an application to set aside the grant or revoke it and also filed a separate suit but the High Court determined that she was not entitled to share in the estate of the deceased.

There are so many other things said in the 33 page supporting affidavit but they are not necessary for a determination of an application of this nature.

There was no affidavit in reply when we considered the motion virtually on 23rd March, 2021 due to the current global COVID 19 pandemic,

We have noted the "*Summons for setting aside/revocation of confirmation of grant*" filed at the High Court of Kenya, Nairobi, in Succession Cause No. 820 of 2009 dated 27th September, 2018. The prayers sought were in the main that the orders of the said Judge made on 17th September, 2018 be stayed and that the court be pleased to review, modify, vary or set aside the judgment delivered on 17th September, 2018 and a subsequent finding that the applicant (*Anna Muthoni Githinji*) was a wife to the deceased and therefore entitled to share in the estate. The Judge found that:

"In the instant case a review was sought to introduce the Diary/Notebook written by deceased which the former advocate refused/declined to produce in Court during Trial. It was new evidence that could not be discovered then because it was in the

custody of the former advocate and could not be retrieved as the Petitioner thought that it would be disclosed and waited until Trial ended and the Notebook/Diary was not produced.

Secondly, there was an error on the record, the Court did not consider that the omitted facts on record and law did not confirm a valid Kikuyu customary law marriage between the deceased and Objector. The exposition of law was/is the same only that pertinent evidence was omitted/not disclosed during Trial i.e Ruling of burial Dispute of the deceased of 17th March 2009. Now that it is filed in

Court by the Objector in the application to reconstruct the Court file as proceedings were removed/lost and not found to date and annexed various relevant documents; the said Ruling was apt as to evidence adduced then and now and casts doubt on Objector's valid marriage to the deceased and the Children being biological of the deceased.”

The Judge reviewed a judgment delivered on 15th February, 2016 and the grant issued on 21st September, 2009 revoked in that judgment was reinstated, it being held that the respondent (*Lucia Wanjiku Githinji*) was the widow of the deceased and she and her children (*with the deceased*) were the beneficiaries of the estate of the deceased.

We are asked to stay execution of that judgment and orders.

The principles that apply in an application of this nature are well known.

For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable which is the same as saying that it is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay – see the case of **Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR**.

The High Court found on evidence that the applicant was not a widow of the deceased; that her children were not borne with the deceased. It was also found that the applicant was not entitled to a share of the estate of the deceased.

On our own consideration we have not discerned any arguable point in the intended appeal and being of that view we need not consider whether the intended appeal would be rendered nugatory if we do not grant stay.

The Motion dated 1st November, 2018 has no merit and is dismissed with no order on costs.

Dated and delivered at Nairobi this 4th day of June, 2021.

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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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