



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), ASIKE-MAKHANDIA & KANTAL, J.J.A.)

CIVIL APPLICATION NO. 367 OF 2018

BETWEEN

CHARITY WACEKE KIMARI APPLICANT

AND

FLORENCE WANGUI KIMARI..... 1ST RESPONDENT

SHEM KIHORO KIMARI2ND RESPONDENT

JEMIMAH JANE WACHEKE3RD RESPONDENT

(Being an application for stay of execution from the ruling of the High Court of Kenya at Nairobi (Onyiego, J.) dated 29th September, 2017 which was based on a ruling by the Honourable Justice Lenaola, J. of 27th January, 2012

in

Succession Cause No. 777 of 1985)

RULING OF THE COURT

The dispute between the parties in this motion revolves around the administration of the Estate of Kimari Gitere (deceased) who died intestate on 8th May, 1985. The letters of administration of the Estate were granted to Samuel Gitere Kimari, the deceased's son with his first wife, and Joyce Wangui Kimari, the deceased's 2nd wife, on 16th July, 1986 and confirmed on 10th December, 1993.

Subsequently, the above mentioned administrators were substituted with the 3rd respondent and the applicant, representing the 1st and 2nd houses, respectively.

Pursuant to an application dated 11th December, 2006, at the instance of the 3rd respondent, Lenaola, J., as he then was, by a ruling dated 27th January, 2012 revoked the confirmed grant and ordered for the deceased's Estate to be distributed afresh amongst the beneficiaries. Towards that end, the learned Judge nullified all the subsequent subdivisions and titles issued with respect to properties which had been listed in the petition for grant of letters of administration as forming part of the deceased's estate; and directed that the ownership and titles of those properties revert to the deceased's name.

A couple of years later, the applicant filed an application dated 26th July, 2016 while the 3rd respondent filed an application dated 1st August, 2016. While the applicant urged the High Court not to interfere with the initial distribution which in her view was fair as all the beneficiaries received their rightful entitlements and some had even sold their respective portions to third parties who were not parties to the suit. On the other hand, the 3rd respondent called for the surrender of the titles which were issued by the former administrators for their revocation and agitated for fresh distribution.

In the end, Onyiego, J. who was seized of the applications, by a ruling dated 29th September, 2017 allowed the 3rd respondent's application as prayed.

Intending to challenge the decision above before this Court, the applicant took out an application filed on 11th December, 2018 for an order of stay of execution of the rulings dated 29th September, 2017 and 27th January, 2012, pending the lodging and determination of the intended appeal.

Her application was premised on the grounds that the intended appeal was arguable; in that, the ruling dated 29th September, 2017 interfered with the proprietary rights of third parties who were neither parties to the suit nor given an opportunity to be heard; and that herself as well as the said third parties stand to suffer irreparable loss should the stay be denied.

Despite service of the hearing notice of the application, only the 1st respondent opposed it, arguing that the intended appeal was devoid of merit and was an abuse of the court process; that the ruling dated 27th January, 2012, made over 5 years before the next ruling, directed the re-distribution of the deceased's estate, a decision that was never challenged on appeal. What is more, the applicant had filed an application seeking review of that ruling, which application was dismissed on 28th September, 2017. As far as the 1st respondent was concerned, staying the ruling dated 27th January, 2012 would be tantamount to overturning the same without an appeal being lodged against the ruling; and that likewise, the ruling dated 29th September, 2017 which was based on the ruling dated 27th January, 2012 could not be stayed.

Finally, the 1st respondent argued that the application which was filed after an inordinate delay ought to be dismissed. The 1st respondent urged us to take into consideration that the suit having been filed in 1985 has been pending in court for the last 36 years and litigation must come to an end. In any event, the 1st respondent contended that the intended appeal was neither arguable nor would it be rendered nugatory if the order sought was not granted.

Our jurisdiction in such matters is set out in **Rule 5(2) (b)** of this Court's Rules despite being original is anchored on an appeal or an intended appeal to this Court; and that the intention to appeal has to be manifested by lodging a notice of appeal. In the absence of such a notice, the Court has no basis to entertain an application for stay. See **Safaricom Limited vs. Ocean View Beach Hotel Limited and 2 others** [2010] e KLR.

In this case it is common ground that the applicant lodged a notice of appeal against the ruling dated 29th September, 2017 outside the prescribed time frame under **Rule 75 (2)** of this Court's Rules; and that the applicant sought extension of time to file and serve the said notice in Civil Application No. 368 of 2018, which was denied by the single Judge on 5th July, 2019. Moreover, we cannot at this stage grant the said extension as the applicant implored us to do in her written submissions. This is because firstly, the decision rejecting the application for extension of time still stands as there was no reference to the full bench in terms of **Rule 55**.

It follows therefore that there is no proper notice of appeal against the impugned ruling which means that there is nothing for the current application to stand on.

Based on the foregoing, we find that the application filed on 11th December, 2018 lacks merit and is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JUNE, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

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