



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KARANJA, KIAGE & SICHALE, JJA]

CIVIL APPLICATION NO. 399 OF 2019

BETWEEN

JOSEPHINE GAKII RUKARIAAPPLICANT

AND

NANCY NYAWIRA NJAGI RESPONDENT

(Being an application for stay of any further proceedings and any consequential orders in Succession Cause No. 1287 of 2007 pending the hearing and final determination of an intended appeal from part of the judgment of the High Court of Kenya at Nairobi (**M. Muigai, J**) dated **2nd April, 2019**)

IN

SUCCESSION CAUSE NO. 1287 OF 2007 IN THE MATTER OF THE ESTATE OF PETER ELIUD NJERU NJAGI (DECEASED)

RULING OF THE COURT

The applicant, **Josephine Gakii Rukaria** has filed a Notice of Motion dated **20th December, 2019** under Rule 5 (2) (b) of the Court of Appeal Rules seeking the following orders that:

“

1. Spent.

2. Pending the hearing and determination of the application herein a stay of proceedings in High Court of Kenya at Nairobi Probate and Administration Cause Number 1287 of 2007 be granted.

3. Pending the hearing and determination of the Appeal herein a stay of proceedings in High Court of Kenya at Nairobi Probate and Administration Cause Number 1287 of 2007 be granted.

4. Pending the hearing and determination of this application, a stay of execution of any orders flowing from any proceedings taken subsequent and consequential to the judgment and decree issued on the 2nd April, 2019 in High Court of Kenya at Nairobi Probate and Administration Cause Number 1287 of 2007 be granted.

5. Pending the hearing and determination of the Appeal herein a stay of execution of any orders flowing from any proceedings taken subsequent and consequential to the judgment and decree issued on the 2nd April, 2019 in High Court of Kenya at Nairobi Probate and Administration Cause Number 1287 of 2019 be granted.

6. Costs be provided for”.

The motion was supported by the applicant’s affidavit sworn on **20th December, 2019** in which she deponed that:

· On **24th May, 2007**, she petitioned for letters of administration intestate in High Court of Kenya at Nairobi Succession Cause Number 1287 of 2007, in her capacity as a wife of the deceased (**Peter Eliud Njeru Njagi**) and **Nancy Nyawira Njagi** (the

respondent herein) opposed the application on the basis that she (the applicant) was not a wife of the deceased.

- In a judgment delivered on **2nd April, 2019, Muigai, J** found that the applicant was a wife of the deceased and appointed her as one of the administrators of the estate of the deceased together with **Nancy Nyawira Njagi** (the respondent), **Anthony Kinyua Njagi** and **Dr. Joseph Kiambu Njagi**.

- The court made further orders that:

“

(i) Nairobi Block 32/806 Ngummo Estate, L.R. No. 100846 Karen, Gaturi/Githimu 3541, 3542, 3538 and 3537 known as Njeru Kathangu Court – 16 houses for rent, are assets of the deceased and the objector and (sic) shall remain with the objector and her four (4) children and are not part of the assets available for distribution.

(ii) Susan Mwendwa Njeru will be a beneficiary of the deceased’s estate subject to DNA sibling testing confirmation”.

- She was aggrieved by part of the said judgment and has filed a Notice of Appeal and requested for typed proceedings.

- She is now seeking a stay of the said judgment pending the hearing and determination of the appeal.

- If stay of execution is not allowed and the matter proceeds to distribution, she will suffer substantial loss as her daughter **Susan Mwendwa** who has not yet been confirmed as a beneficiary will be denied her share of the deceased’s properties.

On **3rd March, 2020**, the motion came up for plenary hearing before us.

In support of the application, **Mr. Ngángá**, learned counsel for the applicant, with intent to appeal against part of the judgment stated that the judge erred in distributing property to the respondent and her four (4) children to the exclusion of the applicant and her daughter (**Susan Mwendwa Njeru**); that the judge having found that the applicant was a wife of the deceased and one of the administrators of the deceased’s estate, erred in distributing property known as Nairobi Block 32/806 Ngummo Estate, L.R No. 100846 Karen, Gaturi/Gathimu 3541, 3542, 3538 and 3537 (the deceased’s property) to the respondent and her four (4) children to the exclusion of the applicant and her daughter; that the judge erred in ordering distribution of the property while the issue of the applicant’s daughter as a beneficiary to the estate was still pending determination; that the DNA report in respect of the applicant’s said daughter was filed and as per the letter dated **7th**

August, 2018, there was no objection to the report.

On the nugatory aspect counsel stated that if the matter was to proceed to distribution the applicant will lose out in the deceased’s properties singled out for the benefit of the respondent and her children and finally, that the respondent, through a replying affidavit admits to have filed a confirmation of grant to be heard on **23th March, 2020**.

In opposing the application, **Miss Kogai**, learned counsel for the respondent relied on a replying affidavit sworn on **27th February, 2020** by **Nancy Nyawira Njagi** in which it was contended that the applicant has not satisfied that she has an arguable appeal which will be rendered nugatory if an order of stay is not granted; that the properties in question namely, Nairobi Block 32/806 Ngummo Estate is a joint property between the deceased and the respondent having been jointly purchased in 1980/1981 after the respondent took a loan from HFCK to pay for the purchase; that LR No. 100/46 Karen is a matrimonial home where the respondent has lived with her children since 1987, having contributed to its purchase in **April, 1986** as she was then working as a nurse hence she holds a life interest thereon; that the trial court did not distribute the deceased’s property but simply excluded property which had been erroneously included in the list of assets as the deceased’s estate and finally, that the applicant did not contribute to the acquisition or improvement of any of the deceased’s property.

On the nugatory aspect, counsel stated that the estate of the deceased is wasting away and will continue to waste if stay is granted as there will be no administrators.

Mr. Alex Joshua Njeru, a beneficiary of the deceased’s estate appearing in person relied on his affidavit sworn on **18th February, 2020** and stated that the applicant made no contribution to the acquisition or improvement of the deceased’s estate.

We have considered the record, the rival oral arguments made before us, the authorities cited and the law. As always, our jurisdiction under **Rule 5(2)(b)** is discretionary and fairly wide. In the judicious exercise of this discretion, however, the Court must be satisfied on the twin principles, firstly, that the intended appeal is not frivolous or is arguable; and secondly, that if the orders sought are not granted, the success of the intended appeal will be rendered nugatory. These principles were aptly summarized in the case of **Stanley Kang’ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR** as follows :

“

i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge’s discretion to this court. See *Ruben & 9 others v Nderitu & Another (1989) KLR 459.*

ii) The discretion of this court under Rule 5(2) (b) to grant a stay or injunction is wide and unfettered provided it is just to do so.

iii) *The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai & Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365.*

iv) *In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. David Morton Silverstein v Atsango Chesoni. Civil Application No. Nai 189 of 2001.*

v) *An applicant must satisfy the court on both of the twin principles.*

vi) *On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care(K)Ltd,Civil Application No. Nai 345 of 2004.*

vii) *An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Joseph Gitahi Gachau & Another v. Pioneer Holdings(A)Ltd. & 2_others. Civil Application No. 124 of 2008.*

viii) *In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.*

ix) *The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.*

x) *Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.*

xi) *Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniosity, the onus shifts to the latter to rebut by evidence the claim”. International Laboratory for Research on Animal Diseases v. Kinyua, [1990] KLR 403.*

In considering arguability it is sufficient if an applicant demonstrates that the intended appeal is not idle and it is sufficient if a single arguable point is established. It is arguable whether property registered in the deceased's sole name and occupied by one of the parties can be excluded from the list of assets of a deceased person. We are satisfied that the applicant has satisfied the 1st limb of arguability.

On the nugatory aspect, in the dispositive part of the judgment, **Muigai, J** rendered herself as follows:

“1. The objection proceedings and petition are compromised in terms of the list of beneficiaries above, list of assets available for distribution as cited above and appointment of administrators of the estate above.

2. The administrators may consider valuation of assets to aid fair equitable distribution of assets available for distribution to all beneficiaries of deceased's estate.

3. The administrators jointly to consult agree and file summons for confirmation with written consents of beneficiaries on the proposed mode of distribution.

4. Any party aggrieved by the summons to file protest to be heard and determined by the Family Court.

5. Any party may exercise right of Appeal to Court of Appeal.

6. The matter be heard in Family Division of the High Court on confirmation of grant.

7. Each part to bear own costs”.

It is important to point out that following from the above dispositions, the applicant is one of the administrators. In our view, in the event that the administrators do not agree on the mode of distribution and on whether the applicant's daughter is a beneficiary, the succession dispute will move to the confirmation stage where the Succession Court will hear evidence. This is likely to take long, more so bearing in mind that the proceeding this far have taken close to 12 years. However, of much more importance is that it is possible to value the assets of the deceased and anyone who will have received less can be compensated. Hence, we do not think that the intended appeal shall be rendered nugatory, absent stay.

In view of the fact that the applicant has not satisfied the two limbs being conditions precedent before an order of stay is granted, we find that this motion is for dismissal. Accordingly, the motion dated **20th December, 2019** is dismissed.

Costs shall abide the outcome of the intended appeal.

Dated and Delivered at Nairobi this 10th Day of July, 2020.

W. KARANJA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR