



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: MUSINGA, J. MOHAMMED & KANTAL, J.J.A.)**

**CIVIL APPLICATION NO. 33 OF 2020**

**BETWEEN**

**TERESIA MWAKITHI.....APPLICANT**

**AND**

**JEMA KARIMI.....RESPONDENT**

***(Being an application for injunction and stay of execution pending hearing and determination of an intended appeal from the Judgment of the High Court of Kenya at Meru (Gikonyo, J.) dated 18th December, 2019***

**in**

**HC. Succession Cause No. 15 of 2007)**

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**RULING OF THE COURT**

1. The applicant's Notice of Motion dated 8th May, 2020 seeks an injunction to restrain the respondent from interfering with the estate of **Justus M'Muriithi M'Bagiri** (deceased) and stop implementation of the Meru High Court decision dated 18th December, 2019 pending hearing and disposal of an intended appeal. He also sought stay of execution of the said judgment pending the intended appeal.
2. In the impugned judgment, the High Court held that the applicant was not a wife of the deceased; that she moved into the deceased's rental property as a tenant; that the respondent was the only wife of the deceased, the two having contracted a monogamous marriage; and that therefore the applicant was not entitled to any share of the deceased's estate as she was not a dependant thereof.
3. The applicant, being aggrieved by the trial court's decision, intends to appeal to this Court and has filed a notice of appeal.
4. In the draft memorandum of appeal, the applicant intends to argue, *inter alia*, that the learned judge erred in his interpretation of the evidence that was adduced; and accepting contradictory evidence and thereby arriving at the wrong conclusion.
5. The applicant contends that the intended appeal is arguable; and unless this Court grants the orders sought, the intended appeal, if successful, will be rendered nugatory as the deceased's estate may be fully shared out among the other beneficiaries by the time the appeal is disposed of; that she would be evicted from the only place she recognizes as her residence; and that she will not be able to collect the rent which she has always collected.
6. The respondent opposed the application, submitting that the intended appeal is not arguable; that the trial court was right in holding that the applicant was not a wife or beneficiary of the deceased's estate and neither did she have any child with the deceased; that the intended appeal shall not be rendered nugatory if the orders sought are not granted; that the applicant's intention is to delay finalization of the matter so that she can continue to collect rent from the deceased's tenants, currently she is collecting over Kshs.100,000/= per month; and that she has no intention of evicting the applicant as long as she continues to pay rent. On those grounds we were urged to dismiss the appeal.
7. We have carefully considered the application and the submissions made by counsel. The principles that guide this Court in an application of this nature are now well settled. The Court exercises unfettered discretion which must be exercised judicially. The applicant must firstly satisfy the court that the intended appeal is arguable, and secondly, the applicant must also demonstrate that if the orders sought are not granted the intended appeal, if successful, will be rendered nugatory. See **HELLEN MAKONE v BRENDA MICHIEKA [2013] eKLR**.

8. An arguable appeal is not one that must succeed, it is one that is not frivolous and requires the Court's full consideration.

Looking at the nature of issues that are intended to be raised, we do not entertain any doubt that the appeal is arguable. We shall say no more on that ground lest we embarrass the bench that shall hear the appeal.

9. Turning to the second limb of the twin principles, we agree that unless the orders sought are granted, the deceased's estate will be fully distributed in terms of the impugned judgment and there is no telling what the beneficiaries may do with their respective portions before the appeal is heard and determined. They may dispose of it to third parties such that even if the appeal were to succeed, there is nothing that can go to the applicant. It is therefore necessary that this Court intervenes.

10. However, the applicant should also not waste the estate or use it in a manner that is detrimental to the interests of the other beneficiaries. The applicant did not dispute the respondent's contention that currently she is collecting rent amounting to over Kshs.100,000/= per month.

This is money that should be secured for the benefit of the deceased's estate during the pendency of the estate. The trial court appointed and confirmed an administrator to the estate of the deceased. The property of the deceased vests in the appointed administrator as held by the learned judge.

11. We think the learned judge was right in stating that only the administrator should collect the rent and income from the deceased's estate which should be accounted for in terms of the law.

12. Regarding residence of the applicant, the respondent deponed that she has no intention of evicting the applicant as long as she continues to pay rent for the premises she occupies; which we think is reasonable.

13. In view of the foregoing, we hereby partially allow the application and make the following orders:

*(a) Pending hearing and determination of the applicant's intended appeal, the respondent, her employees, servants and/or agents are restrained from distributing the following properties that form part of the deceased's estate – Nyaki/Mulathankari/589, Ntima/Igoki/1227 and Nyaki/Mulathankari/1274.*

*(b) Pending hearing and determination of the applicant's intended appeal, the respondent, her employees, servants and/or agents are restrained from evicting the applicant from the residence that she is currently occupying, provided that the applicant shall, with effect from 1st January, 2021 pay such reasonable rent for the premises as shall be determined by the administrators of the deceased's estate.*

*(c) The intended appeal be filed and served within thirty (30) days from the date hereof.*

*(d) Each party to bear its own costs of the application.*

**Dated and delivered at Mombasa this 18<sup>th</sup> day of December, 2020.**

**D.K. MUSINGA**

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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.*

**DEPUTY REGISTRAR**