



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO (P), KARANJA & KOOME, J.J.A)

CIVIL APPLICATION NO. 58 OF 2020 (UR 49/2020)

BETWEEN

WINFRED NKUENE KIRIMI.....APPLICANT

AND

JECINTA GAKII.....RESPONDENT

*(Being an application for injunction and stay of execution pending*

*the hearing and determination of an intended appeal against the*

*judgement of the High Court of Kenya at Meru (A. Onginjo J.,)*

*dated 24<sup>th</sup> January, 2019 in H.C.C Meru Succ. Cause No. 522 of 2012)*

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RULING OF THE COURT

[1] UPON CONSIDERING a protest or an objection filed in the High Court Meru Succession Cause No. 522 of 2012 by **Jacinta Gakii** (the respondent) claiming to have been married to the late **Francis Guantai Mungambi** (deceased) who died intestate on 8<sup>th</sup> November, 2010, the court below ordered as follows:-

**“This court declares that this property is free as an asset in the intestate estate and therefore liable to distribution. In the circumstances the estate of the deceased will be distributed to the petitioner, the protester/objector and the children of the deceased. LR Ntima/Igoki/5968 – 0.0371 acres. Due to its size – rents accruing shall be divided equally unless the beneficiaries agree on a suitable formula.**

**For LR Abogeta/Lower Chure/1167 the beneficiaries shall share it equally save that the matrimonial house which has now been occupied by the petitioner since the deceased died shall remain occupied by her. The costs of the cause shall be borne by each party.”**

[2] UPON being aggrieved, **Winifred Karimi Nkuene** (the applicant) filed a Notice of Appeal dated 25<sup>th</sup> January, 2019 and the instant notice of motion dated the 1<sup>st</sup> July, 2020 which is predicated on the provisions of **Rule 5 (2) (b)** of the Court of Appeal Rules seeking stay of execution of the aforesaid judgement and consequential orders dated the 12<sup>th</sup> May, 2020 until the intended appeal is heard and determined.

[3] NOTING that the application is supported by the grounds stated on the body thereto and further expounded by the matters deposed to by the applicant in the supporting affidavit sworn on 26th June, 2020, briefly, the applicant stated that in her capacity as the widow of the deceased, she applied and was granted the letters of administration of the deceased’s estate. However, the respondent protested to the confirmation and distribution of the deceased’s estate claiming to be a wife of the deceased.

[4] NOTING FURTHER the averments by the applicant that the respondent failed to prove that she was married to the deceased due to the existence of a monogamous marriage that was contracted between the applicant and the deceased who therefore allegedly lacked capacity to

enter into a customary marriage, and that notwithstanding, the court directed the deceased's property be shared with the respondent without taking into account the contributions made by the applicant as an equal partner; also bearing in mind that the respondent is moving with haste to have the aforesaid judgment implemented following the dismissal of the applicant's application for stay of execution on 12<sup>th</sup> May, 2020 and the fact that the court ordered the Deputy Registrar of the court to execute the transmission documents to give effect to the aforesaid orders; and that the applicant resides with her children in one of the properties which has been her matrimonial home and the other property is rented from where she derives a livelihood. The applicant contends that unless the order of stay of execution is granted, the two parcels of land will change ownership and in the event the appeal is successful, it will be rendered nugatory.

**[5] UPON CONSIDERING** the opposition to the application by the respondent which was by way of written submissions where it was argued that the applicant has not demonstrated what dangers she will suffer if the estate of the deceased is distributed to the beneficiaries; that the applicant has failed to give an account of the estate as the administratrix of the deceased and that the applicant filed the instant application as an afterthought merely to block the respondent from getting a share of the deceased estate.

**[6] BEARING IN MIND** this application proceeded by way of written submissions pursuant to the Court Practice Directions to mitigate the effect of the prevailing effects of the COVID 19 Pandemic, we have considered the application and the submissions by the respondent within the guiding principles on the jurisdiction of this Court to grant orders of stay of execution under **Rule 5(2)(b)** of this Court Rules.

**[7] COGNIZANT** that the power under the aforesaid rule is discretionary, but it is exercised strictly judiciously and with reason, not whimsically, and for an applicant to succeed, she/he must show that the intended appeal is one that is arguable and it is not frivolous and also to demonstrate that the appeal, if successful would be rendered nugatory in the absence of an order of stay; that much has been stated by this Court in many Rulings including the case of **Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR**, where this Court stated *inter alia*:-

**“That in dealing with Rule 5(2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's discretion to this Court.” The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”**

**[6] COGNIZANT** also that in determining whether the appeal is arguable or not, it should be appreciated that an arguable appeal, does not necessarily mean that the appeal or intended appeal must be one that ought to succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by the Court as was decided in **Dennis Mogambi Mang'are vs. Attorney General & 3 Others, Civil Application No. NAI 265 of 2011 (UR 175/2011)** where this Court held that: -

**“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration.”**

**[6] HAVING CONSIDERED** the instant application and the respondent's submissions within the above parameters, we note that the dispute before the High Court that gave rise to the judgment that is intended to be appealed against was in regard to the distribution of two properties belonging to the estate of the deceased; that at the center of the dispute is the issue of whether the respondent proved to the required standard that she was married to the deceased in the face of a monogamous marriage that is alleged to have existed between the applicant and the deceased; and also that the applicant claims to have contributed to the development of the two properties and that she resides in one as the matrimonial home while deriving an income from the other, to us these are arguable issues.

**[7] HAVING CONSIDERED** the second limb on the nugatory aspect that the court had ordered the Deputy Registrar to execute the transmittal documents; we are persuaded by the applicants' averments that the property may change hands and, in the event, that the appeal will succeed it will be rendered nugatory and in the event that the appeal fails the properties will be available for distribution as ordered by the court.

**[8] HAVING ESTABLISHED** the twin issues of the appeal being arguable and the nugatory aspect, we are inclined to allow the notice of motion dated 26<sup>th</sup> June, 2020 to the extent that an order of stay of execution of the judgement delivered on 24<sup>th</sup> January, 2019 and the consequential orders of 12<sup>th</sup> May, 2020 are hereby stayed until the appeal is heard and determined. We also direct that there should be no transfer, sale, alterations or any dealings with the property that may be detrimental until the appeal is heard and determined.

Costs of this application to abide the outcome of the appeal.

***Dated and delivered at Nairobi this 4<sup>th</sup> day of December, 2020.***

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**