



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO, (P), KARANJA & KOOME, JJA)

CIVIL APPLICATION NO. 64 OF 2020

BETWEEN

VIOLET CIAMBAKA SABARIAPPLICANT

AND

PHARES GITARI NJERU..... 1ST RESPONDENT

CHARLES MUTEGI NJERU..... 2ND RESPONDENT

ROBERT NJOKA NJERU.....3RD RESPONDENT

(Being an application for a stay of execution pending the determination of an intended appeal from the Ruling of the High Court of Kenya at Chuka (R.K. Limo, J.) delivered on 27th May, 2020

in

Missc. Succession Cause No. 21 of 2018)

RULING OF THE COURT

In the High Court at Chuka, Limo, J determined two applications, one of which sought for the confirmation of grant of probate and the other was asking that court for leave to appeal and to stay orders issued on 13th February, 2020.

In the orders of 13th February, 2020, the learned Judge had found that the applicant was not a dependant of the deceased because her late husband, Erastus Mwalimu, through whom she based her claim of dependency, was neither a child nor a dependant of the deceased.

With that, the Judge allowed the summons for confirmation of grant and dismissed the prayers for leave to appeal and stay of execution.

But apprehensive that if execution of the decree were to proceed, she would be disinherited, the applicant invoked **Rule 5(2)(b)** of the Court of Appeal Rules and took out a motion for stay of execution, in which she argued that the intended appeal is arguable, the main question being, whether her husband was the deceased's son.

The only objection raised by the respondents is that the notice of appeal was lodged out of time as the decision intended to be challenged was rendered on 13th February, 2020 and the notice of appeal filed on 2nd June, 2020, way after the 14 days prescribed by **Rule 75(2)** of the Court of Appeal Rules.

Applying the now well-known principles under **Rule 5(2)(b)** of the Court of Appeal Rules which have been applied in numerous case, including **Nguruman Limited vs. Shompole Group Ranch & Another** [2014]eKLR, we are of the view that without first obtaining leave to challenge the decision rendered on 27th day of May, 2020 and having filed the notice of appeal out of time and without leave, the arguability of the appeal is highly doubtful.

Both the leave and the notice of appeal are jurisdictional issues and the legs on which an application under **Rule 5(2)(b)** stands and without

which the Court would down tools.

Having failed to satisfy us on this first limb, we are not obliged to consider the second limb. This was emphasized by the Court thus in the case of **William Lerikan Konchellah & another v Julius Tabarai Ole Maito Tampushi** [2014] eKLR

“The applicant has to demonstrate two matters to the satisfaction of the court. Both must be proved and proof of one only will not be enough to secure the orders of stay as sought here”.

In the end, we find this application has no merit. We accordingly dismiss it with no orders as to costs.

Dated and delivered at Nairobi this 4th 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