IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, SICHALE & OTIENO-ODEK, JJA)

CIVIL APPLICATION No. NAI. 294 of 2018 (UR 235/2018)

BETWEEN

AMINA SHIRAZ YAKUB.....APPLICANT

AND

DAVID BABURAM JAGATRAM.....RESPONDENT

(Being an application for stay pending the hearing and determination

of an intended appeal against the Ruling and order of the

High Court at Nairobi (A. Aroni J.) dated 4th October 2018

in

HC Succession Cause No. 325 of 2016)

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RULING OF THE COURT

1. One of the paradoxes of life is the immense potential of human beings to do good and the capability to do evil. Life casts the mould of conduct which will someday be adjudged decent or wicked. At times fate and coincidence conspire to produce unlikely facts and events.

2. The applicant, ***Amina Shiraz Yakub,*** is a daughter-in- law to the respondent, ***David Baburam Jagatram*** . The respondent is father to ***Jimmy Paluram Jagatrum Baburam*** (now deceased and husband to the applicant). In his

Will, the deceased appointed the applicant and respondent as joint administrators. As a product of marriage between the applicant and the deceased, two biological children were sired. The applicant has been charged with murder of the deceased. In the charge sheet, it is alleged that on the night of 26th July 2015, the applicant with another person, murdered the deceased.

3. By an application dated 7th June 2018, the respondent as one of the administrators of the Estate of the deceased moved the High Court to stay confirmation of grant of letters of administration issued on 19th October 2017 in favour of both the applicant and the respondent. The respondent also sought orders to

stay the distribution of the Estate of the deceased pending the determination of the criminal murder case against the applicant. Other orders were sought by the respondent *to wit* a determination that the Estate of the deceased has only two beneficiaries namely ***Mina Jummy Paluran Baburan*** (Mina) and ***Junaid Jimmy Paluram Baburan*** (Junaid) who are the two biological children sired between the deceased and the applicant herein ***Ms Amina Shiraz Yakub***. The respondent also sought an order for removal of ***Layla Naheed Abdullatif*** (Layla) a daughter of the applicant as beneficiary of the Estate of the deceased because the said Layla is not a biological daughter of the deceased and both her biological parents are alive.

4. A crucial and contentious aspect of the orders sought before the High Court was that the cash assets of the Estate of the deceased of over Ksh. 60 million be collected, consolidated and deposited with a reputable asset management company for and on behalf of the two biological children of the deceased; that a provision for maintenance of the two biological children be made.

5. Before the High Court, the applicant opposed the application as lacking in merit; that she is innocent of murder until proven guilty; she is entitled to the personal effects and household goods of the deceased and a life interest in the residue of the Estate; that in the unlikely event she is convicted, her life interest will cease by operation of law and therefore the Estate of the deceased is unlikely to suffer any irreparable damage; that as regards Layla, the deceased treated her as one of his children, paid her school fees and other expenses and listed her as one of his beneficiaries in his Life Insurance Policy and that Layla is a beneficiary and has equal interest in the Estate of the deceased as her siblings.

6. Upon hearing the parties, the learned Judge (Aroni, J.) in a ruling dated 4th October 2018, issued the following orders while expressing as follows:

> ***"Justice of the case militates towards a stay of confirmation and distribution pending hearing and determination of the criminal case currently facing the widow. With liberty for the children to apply as dependents.***
>
> ***From the record, it is not lost that there is bad blood between the two administrators, which may not augur well for purposes of administration. Mistrust & anger are exhibited by the respective pleadings. The most reasonable way of managing the Estate will be to allow a third party to do so. I therefore direct and order that the parties do agree within the next ten (10) days of today's date on a reputable asset Management Company to collect, consolidate and manage the said assets until further orders of the court.*** *(Emphasis supplied)*

7. Aggrieved by the ruling and orders of the court, the applicant has moved to this Court seeking stay of the ruling and orders of the learned judge.

8. By Notice of Motion dated 18th October 2018, the applicant seeks two main orders from this Court:

> "(a) Stay *of the ruling and orders issued on 4th October 2018 pending the hearing and determination of the intended appeal.*
>
> (b) *Stay of further proceedings in the High Court Succession Cause No, 325 of 2016 pending the hearing and determination of the intended appeal."*

9. The application for stay is supported by an affidavit dated 18th October 2018 deposed by the applicant. The applicant contends that the learned judge made the orders despite ***Article 50 (2)*** of the Constitution that guarantee presumption of innocence; the stay of confirmation of grant adjudges the applicant guilty of the charge of murder; the judge erred in failing to appreciate the respondent did not adduce evidence that the Estate of the deceased will suffer waste if the grant of letters of administration is confirmed; the judge misread ***Section 35*** of the **Succession Act** by implying the applicant is entitled to inherit the assets of the deceased absolutely; the judge ignored that the applicant is entitled to life interest in the Estate; the proposed third party administrator of the Estate will only add costs and expenses and cost a fortune to the

Estate; it is not clear where the court drew the inference that the relationship between the two administrators is beyond repair and redemption to warrant appointment of an asset management company; the ruling of the learned judge has occasioned a great failure of justice to the applicant and that it is in the interest of justice that the orders sought should be granted. In conclusion, the applicant urged she has an arguable appeal and the intended appeal shall be rendered nugatory if the stay orders sought are not granted.

10. In opposing the instant application, the respondent relied on submissions filed before the learned judge and on points of law.

11. At the hearing of the application, learned counsel ***Ms Asli Osman*** appeared for the applicant while learned counsel ***Mr. George Okello*** appeared for the respondent.

12. Counsel for the applicant reiterated the grounds in support of the application as stated on the face thereof and in the supporting affidavit. The applicant repeated that appointment of a third administrator for the Estate of the deceased will burden the Estate with additional administration costs and this shall deplete the Estate; that the cost implication for the third administrator is unclear and any costs and expenses of the third administrator are irrecoverable expenses to the Estate and that a third administrator will only cause confusion to the administration process. Both parties conceded that the bulk of the Estate of the deceased is in cash of over Ksh. 60 million; the applicant proposed the cash assets be placed in a fixed deposit account in the joint names of the administrators but this proposal was rejected; that a draft memorandum of appeal has been annexed to the supporting affidavit showing the intended appeal is arguable and that if stay is not granted; a third administrator will have been appointed rendering the appeal nugatory.

13. Counsel for respondent opposed the instant application raising a technical objection that the order sought to be stayed has not been attached to the supporting affidavit; that before this Court is the ruling of the Probate Court dated 4th October 2018; and that this Court does not stay rulings but orders; the failure to annex the impugned order renders the instant application fatally defective. On the issue of maintenance, it was submitted the applicant is a person of means and does not require sustenance from the Estate of the deceased; that the only persons who need maintenance are the two biological children of the deceased; that the intended appeal will not be rendered nugatory as the cash assets of the Estate will be invested by a reputable asset management company; that whether the appeal succeeds or fails; the cash assets of the Estate will still be available; that if stay is not granted, the cash will continue to be held at the Middle East Bank (K) Limited where it was deposited by the deceased and that the Bank will continue to levy bank charges and monthly ledger fees leading to depletion of the cash asset and thus it is in the best interest of the Estate that the cash assets be managed by an asset management company. For the foregoing reasons, the respondent urged us to dismiss the application for stay.

14. We have considered the instant application and submissions by learned counsel. The application is grounded on ***Sections 3A*** and ***3B*** of the **Appellate Jurisdiction Act** and ***Rules 5 (2) (b)*** and ***42*** of the **Rules** of this Court. At the outset, we point out that days are gone when this Court was a technical Court whereby failure to attach an order or decree appealed against would render an application or appeal fatal. This being an application under ***Rule 5 (2) (b)*** of the **Rules** of this Court, we must be satisfied of the twin guiding principles that the intended appeal is arguable; it is not frivolous and that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory – see **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838**; **J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088** and **Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported)**.

15. We remind ourselves dicta in the case of **Trust Bank Limited and Another vs. Investech Bank Limited and 3 Others Civil Application No. Nai. 258 of 1999** (unreported) where the following passage appears:

> **"The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is**

arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case ….”

16. In the draft memorandum of appeal, the applicant avers that the learned judge erred in law by failing to take into consideration the presumption of innocence embodied in ***Article 50 (2)*** of the Constitution**;** the judge erred in failing to address herself to the fact that the respondent did not adduce any evidence indicative of the prejudice to be suffered if confirmation of grant is made; the judge did not sufficiently address herself to the provisions of ***Section 35*** of the **Succession Act;** the judge erred and failed to appreciate the orders made had the overall effect of halting the conclusion of succession cause pending before the trial court thereby adversely affecting the three children; the judge erred in law in finding there is need for a third administrator for the Estate of the deceased; the judge failed to take into account the financial implications of appointing a third administrator and that the interest of the three minor children were not taken into account by the learned judge when issuing the impugned orders.

17. We agree with the applicant that despite the murder charge against her, the presumption of innocence applies and she is innocent until adjudged otherwise. We are alive to the rule that no person shall benefit from his/her own wrong. Under succession and inheritance law, a murderer cannot inherit from the deceased whom he/she has killed. This is what is known as the “slayer or forfeiture rule.” The rule precludes an individual who has unlawfully killed or aided, abetted, counselled or procured the death of another person from benefiting in consequence of the killing. (See **Cleaver vs. Mutual Reserve Fund Life Association CA ([1892] 1 QB 147;** see also Privy Council decision in **Kenchava Kom Sanyellappa Hosmani and Anr. vs. Girimallappa Channappa Somasagar reported in AIR 1924 PC 209).**

18. For succession and inheritance purposes, it was authoritatively stated ***In the*** **Estate of Crippen** ***[1911]*** where Sir Samuel Evans J. in declining to grant letters of administration to the convicted murderer expressed himself as follows:

“no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence.”

19. Comparatively, **In Mata Badal Singh and Ors. vs. Bijay Bahadur Singh and Ors. reported in 1956 Allahabad 707**, a Division Bench of the Allahabad High Court held as follows: -

“A murderer is disqualified from succeeding to the estate of his victim upon the principles of justice, equity and good conscience. Further, a murderer should be treated as non-existent qua the estate of the murdered person that is to say no title to the estate of the murdered person can be claimed through the murderer.”

20. In the New South Wales case of **Re Pedersen, (Unreported, Supreme Court of New South Wales, Holland J, 17 June 1977) 2–3;** an issue arose as to whether a murderer can be administrator of the Estate of the deceased. Justice Holland noted this possibility and expressed:

“The office of executor does not necessarily give the appointee a beneficial interest in the estate and it may be a question whether the murder or manslaughter of a testator is an automatic disqualification from the office of executor of the testator’s estate as well as being a disqualification from taking any interest in it. Whatever be the answer to that question, it is unthinkable that a court could exercise its powers so as to permit a testator’s murderer to administer his victim’s estate.”

21. In line with the foregoing decisions, we are cognizant that the “slayer and forfeiture rule” has been incorporated in the provisions of ***Section 96 (1)*** and ***(2)*** of the **Succession Act, Cap 160 Laws of Kenya** which provide as follows:

"(1) Notwithstanding any other provision of this Act, a person who, while sane, murders another person shall not be entitled directly or indirectly to any share in the estate of the murdered person, and the persons beneficially entitled to shares in the estate of the murdered person shall be ascertained as though the murderer had died immediately before the murdered person.

(2) For the purpose of this section the conviction of a person in criminal proceedings of the crime of murder shall be sufficient evidence of the fact that the person so convicted committed the murder. "

22. In the instant matter, we have perused the draft memorandum of appeal. It is trite that demonstration of the existence of even one arguable point will suffice in favour of the applicant. (See **Kenya Railways Corporation vs. Edermann Properties Ltd., Civil Appeal No. NAI 176 of 2012** and **Ahmed Musa Ismael vs. Kumba Ole Ntamorua & 4 others, Civil Appeal No.NAI.256 of 2013)**. Our perusal of the draft memo reveals that some arguable points have been raised by the applicant. Two arguable points stand out, for example, if the judge erred in her consideration of ***Section 35*** of the **Succession Act** and whether there is justification for a third administrator. Based on these two examples, we are satisfied the intended appeal is arguable. It is also arguable whether the intended appeal shall be rendered nugatory if stay orders sought are not granted.

23. The applicant submitted the appeal shall be rendered nugatory as a third administrator will have been appointed; the appeal shall be nugatory because the costs and expenses of the third administrator will be irrecoverable by the Estate. Conversely, the respondent submitted whether the intended appeal succeeds or fails, the same will not be rendered nugatory as the cash assets of the Estate will have been invested through a reputable asset management company. As regards the interest of the biological children of the deceased, the respondent submitted the trial court took this into account and made an order granting liberty to the children to apply as dependents.

24. We have considered whether the intended appeal shall be rendered nugatory if the stay orders sought are not granted by this Court. Pivotal is the order for appointment of a third administrator for the Estate of the deceased. In making the order for a third administrator, the judge exercised her discretion in determining the best interest for the Estate taking into account the existing murder charge against the applicant, the alleged bad blood between the joint administrators and their filial relationship. This Court has often times stated it will not interfere with the exercise of discretion by a trial court. Sir Clement De Lestang V-P in **Mbogoh & Anor vs. Shah [1968] EA 93** stated thus:

*"**I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should have taken into consideration and in doing so arrived at a wrong conclusion**."*

25. The legal and evidentiary burden to prove the nugatory aspects of the intended appeal rests on the applicant. The applicant has not been able on balance on probability to demonstrate to our satisfaction that the intended appeal shall be rendered nugatory if stay orders are not granted. Other than mere allegations, the applicant has not *prima facie* demonstrated to our satisfaction that appointment of a third administrator shall render the intended appeal nugatory since administration expenses must be charged to the Estate notwithstanding the identity and persona of the administrator. The applicant has also not satisfied us that the learned judge erred in the exercise of her discretion in issuing the orders made on 4th October 2018. Accordingly, the applicant has not satisfied the second limb for grant of a stay order under ***Rule 5(2) (b)*** of the **Rules** of this Court.

26. In the final analysis, we arrive at the conclusion the Notice of Motion dated 18th October 2018 has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 8th day of March, 2019

E.M. GITHINJI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR