



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, VISRAM & J. MOHAMMED, J.J.A)

CIVIL APPLICATION NO. 178 OF 2018 (UR 146/2018)

BETWEEN

WALLACE KOGI MWAURA 1ST APPLICANT

PAUL KARANJA 2ND APPLICANT

AND

TIRUS KAMAU MBURU (as the administrator ad litem of the estate of

MIRIAM MUTHONI MBURU (DECEASED) 1ST RESPONDENT

SALOME WAMBUI GITAU 2ND RESPONDENT

(An application for stay of execution of the judgment of the High Court of Kenya at Nairobi (Musyoka, J.) dated 4th May, 2018 and the confirmed grant of probate dated 23rd May, 2018

in

H.C Succession Cause No. 3002 'A' of 2003

RULING OF THE COURT

1. The applicants herein have approached this Court under **Rule 5(2)(b)** of the **Court of Appeal Rules** (the Rules) seeking an order of stay of execution, which they believe will preserve the substratum of the intended appeal against a judgment dated 4th May, 2018 of the High Court in Succession Cause No. 3002 'A' of 2003.

In particular, they seek stay of execution of the:

a) Judgment dated 4th May, 2018 and

b) Confirmed grant of probate dated 23rd May, 2018 issued in favour of the 2nd respondent.

2. In support of the application, the 1st applicant deposed that the intended appeal is arguable in that, the learned Judge (Musyoka, J.) erred in dismissing the application for revocation of the grant of probate issued to the respondents. In doing so, the learned Judge failed to appreciate that the Zipporah Njeri Mwaura (deceased) lacked the mental capacity to make the will dated 30th November, 1988. In addition, that she had no capacity to bequeath Gatamiayu/Kamuchege/415 (suit parcel) as she held the same in trust for the applicants. Unless stay is granted, the applicants will suffer irreparable loss since they will be disinherited of the suit parcel and what is more, the 1st applicant and his family will be deprived of what they have known to be their home. The 1st applicant also deposed that the intended appeal would be rendered nugatory.

3. A synopsis of the pertinent facts will place the application in question in context. Following the demise of the deceased, who happened to be the applicants' mother, on 23rd February, 1991, the 1st and 2nd respondents being her daughter-in-law and granddaughter respectively, applied for grant of probate over her estate. Apparently, the deceased had died testate having left behind a will dated 30th November, 1988.

The respondents were issued with the said grant but before the grant could be confirmed the 1st applicant filed a petition seeking the revocation of the same.

4. He sought revocation on the grounds that the grant had been obtained fraudulently and without disclosure of material facts. It was the applicants' position that at the time the deceased is alleged to have uttered the will she was sickly and senile, hence incapable of making a valid will. In any event, the deceased held the suit parcel in trust for the applicants as well as other members of the family. Expounding on how the trust came to be, the applicants maintained that they together with their late father bought various portions of the suit parcel but the same could not be registered in their names. This was because at the time, the adjudication process barred an individual from holding more than one parcel of land. It was for that reason that the applicants and their late father agreed to have the suit parcel registered in the deceased's name.

5. As would be expected, the respondents put up a spirited fight denying the applicants' allegations. They were steadfast that at the time the deceased made the will she was in full control of her faculties and understood the purport of the said will. Moreover, the deceased had not made provision for the applicants in her will since they had been bequeathed another parcel of land to the exclusion of other beneficiaries. The respondents even went as far as calling the advocate who prepared the will to give evidence with respect to the deceased's state of mind at the material time.

6. Upon weighing the evidence tendered by the parties, the learned Judge (Musyoka, J.) in the impugned judgment rendered himself as follows:

“I feel constrained to believe the testimony of the legal professional, Nicholas Kiania Njau. He said that he was with the deceased at the material time. He took her instructions from her personally, was present when she executed the will and he himself attested her signature and executed the document in her presence as an attesting witness. He said that as an experienced advocate he was careful to take note of the deceased's state of mind. He was subject to vigorous cross examination, but that did not dent his testimony. I am satisfied that deceased did appear before Kiania Njau, instructed him and executed a will in his presence. I do not see any basis for doubting his testimony. There is nothing on record to suggest that the deceased was not of sound mind and did not know what she was doing.

...

The only thing left for me to determine at this point is whether a will that disposes of property that is alleged not to belong to the deceased can lead to nullification of the will... I have carefully read and considered sections 5,6,7,8,10 and 11 of the Law of Succession Act, which deals with the formal validity of written wills. There is nothing in those provisions which suggest that disposal by will of property which does not belong to the deceased invalidates his will. Such a circumstance only leads to failure of the gift, which merely renders the will ineffective, but not invalid.

The conclusion that I have come to is that the deceased did have the requisite testamentary capacity to make the will ...”

7. It is this decision that the applicants wish to challenge in an appeal to this Court as evidenced by a notice of appeal dated 7th May, 2018. Nonetheless, the grant was subsequently, confirmed on 23rd May, 2018 in favour of the 2nd respondent.

8. Emphasising on the arguability of the intended appeal, Mr. Arusei, learned counsel for the applicants, submitted that the annexed memorandum of appeal raised several issues that required to be considered by this Court. One of them being that the will was not witnessed by two people as required by the law. According to him, should the grant of probate be confirmed the suit parcel would be disposed thus defeating the intended appeal. At the very least, counsel urged us to issue orders maintaining *status quo*.

9. Opposing the application, the 2nd respondent deposed that the applicants never successfully challenged the validity or legality of the deceased's will by way of evidence or otherwise. She reiterated that the applicants had earlier on been given a parcel measuring 6 acres to the exclusion of other beneficiaries by their late father. In her view, if the appellants felt that they had been left out as beneficiaries they should have invoked the provisions of **Section 26** of the **Law of Succession Act** for reasonable provision from the deceased's estate. The matter at hand has been the subject of litigation for a period of over 30 years and has seen the demise of some of the beneficiaries of the deceased's estate before the transmission of their respective gifts under her will. As such, the balance of convenience tilts in favour of declining to issue the stay sought.

10. In his address, Mr. Madegwa, learned counsel for the respondent, contended that the intended appeal was frivolous. He also postulated that the said appeal would not be rendered nugatory should the stay not be granted. In that regard, counsel argued that the grant has been confirmed. He asserted that the 2nd respondent had no intention of disposing the suit parcel.

11. We have considered the arguments put forth on behalf of the parties as well as the scope of our jurisdiction under **Rule 5(2)(b)** of the Rules. Before acceding to an application under the **Rule 5(2)(b)**, we have to satisfy ourselves of two principles. Firstly, that the applicants have demonstrated that they have an arguable appeal or an appeal that is not frivolous, and secondly, that if the orders sought are not granted, the intended appeal will be rendered nugatory, if it eventually succeeds.

See ***Reliance Bank Ltd. (in liquidation) vs. Norlake Investments Ltd.*** [2002] 1 EA 227. It is also settled that the applicants are required to satisfy the twin principles. See ***Peter Paul Mburu Ndururi vs. James Macharia Njore*** [2009] eKLR.

12. Being careful not to make final determinations which would otherwise embarrass the Court when it is seized with the intended appeal, we are not convinced that the intended appeal is arguable. This is because, the applicants claim is with respect to the suit parcel which in the event that it is found not to have comprised of the deceased's estate the effect would be invalidation of the gift granted under the deceased's

will and not invalidation of the will itself.

13. On the nugatory aspect, we must weigh the competing positions of the parties and having done so, we find that the balance of convenience tilts in favour of us declining to exercise our discretion in favour of the applicants. To begin with the grant of probate has already been confirmed contrary to the applicants' contention.

Therefore, it would not be in the benefit of the deceased's estate or the beneficiaries thereunder to stay the distribution process. Furthermore, the applicants have also not demonstrated that in the event the intended appeal succeeds that they would not be capable of being compensated by damages. See *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR.

14. The upshot of the foregoing is that the application lacks merit and is hereby dismissed. Costs of the application shall abide by the outcome of the intended appeal.

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

E.M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR