



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE MUSINGA & GATEMBU, J.J.A)

CIVIL APPLICATION NO. NAI 323 OF 2018 (UR 261/2018)

BETWEEN

KENNEDY KARIUKI MWANGI.....APPLICANT

AND

PETER NJOMO MWANGI.....RESPONDENT

(An Application for stay pending Appeal from the Ruling and Orders of the

High Court of Kenya at Nairobi (Reuben Nyakundi, J) dated 3rd October, 2018

in

HC Succession Cause No. 17 of 2017)

RULING OF THE COURT

1. The applicant, Kennedy Kariuki Mwangi, has by an application dated 19th October 2018 under Rule 5(2)(b) of the Court of Appeal Rules, applied for an order to stay further proceedings in HCSC No. 17 of 2017 Kajiado, pending the hearing and determination of his intended appeal against a ruling of the High Court delivered in that cause on 3rd October 2018.

2. The brief background is that, Agnes Nyambura Githinji, deceased, to whom the succession proceedings in High Court relate, died on 1st April 2014. She was survived by three children, namely, James Irungu Mwangi, Peter Njomo Mwangi (the respondent), and the applicant, all adult persons. A grant of letters of administration intestate in respect of the estate of the deceased was issued to the respondent, Peter Njomo Mwangi, on 27th of April 2015.

3. Prior to confirmation of that grant, the applicant petitioned the High Court under Rule 13 of the Probate and Administration Rules for proof of an oral will. He contended in that petition that the deceased had made an oral will by which she bequeathed to him her property known as plot number 65, Kitengela, an income generating asset on which stands rental units. According to the applicant therefore, that property is not available for distribution as part of the intestate estate of the deceased.

4. The applicant's petition was contested. After conducting a hearing, the High Court dismissed it in a ruling delivered on 3rd October 2018. In dismissing the applicant's petition, the Judge stated, "*I just do not believe that the deceased left an oral will capable of being enforced by this court*". The court went on to state that the utterances allegedly made by the deceased on 8th February 2014 which according to the applicant constituted the oral will,

"do not meet the legal threshold set out in section 9 of the Law of Succession Act enabling them to be considered as an oral will of the deceased.

5. Aggrieved by the ruling, the applicant lodged a notice of appeal and has in the meantime made the application now before us to stay the proceedings in the lower court to pave way for the hearing and determination of the intended appeal. To succeed, he has a duty to demonstrate that the intended appeal is arguable and that if we do not grant the order that he seeks, the intended appeal will be rendered nugatory. As it was stated by this Court in ***Ishmael Kaguny Thande v Housing Finance of Kenya Limited [2007] eKLR:2***

“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

6. Urging the application before us, learned counsel for the applicant, Mr. Aloo, submitted that in addition to the issues contained in the draft memorandum of appeal, the ruling of the learned Judge was contradictory in that he determined that the requirements of a valid oral will had been met yet proceeded to question whether the suit property had indeed been bequeathed; and that the learned Judge introduced and considered extraneous matters outside of the law. On the nugatory requirement, counsel submitted that there was an intention to distribute the deceased’s properties, including the suit property as part of the intestate estate which will result in the property being out of his reach should the appeal succeed.

7. Opposing the application, Mr. J.T Kithinji, learned counsel for the respondent, referred to the respondent’s replying affidavit and submitted that the intended appeal is not arguable; that the issue of the oral will was raised too late in the day; that the entire estate of the deceased is intestate and available for distribution to all the beneficiaries; that the applicant has not demonstrated how the intended appeal will be rendered nugatory if the application is declined; and that if the same is allowed, it should be on terms that rental income from the property should be preserved as it is the only income generating asset of the estate.

8. We have considered the application and the submissions. With regard to the question whether the applicant has demonstrated that the intended appeal is arguable, in his draft memorandum of appeal, the applicant asserts that the Judge considered extraneous matters outside the provisions of Section 9 of the Law of Succession Act in determining the question of validity of oral wills. It is also said that the Judge made contradictory findings in respect of the utterances attributed to the deceased. Bearing in mind that an arguable appeal is not one that must necessarily succeed and that a single issue is sufficient (see *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd Civil Application No. NAI 345 of 2004* and *Joseph Gitahi Gachau & another v Pioneer Holdings (A) Ltd & 2 others, Civil Application No. 124 of 2008*) we do not think that the intended appeal is frivolous. It is indeed arguable.

9. As to whether the intended appeal will be rendered nugatory unless we grant the order sought, in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR* this Court stated that:

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the aggrieved.”

10. The applicant maintains that the deceased bequeathed the suit property to him and that it does not therefore form part of the intestate estate of the deceased and should not, therefore, be distributed; that should the property be distributed before the appeal is heard, it will be futile to pursue the appeal. We think there is merit in that argument and that the property should be preserved.

11. We are therefore inclined to grant, which we hereby do, an order in terms of prayer 1 of the applicant’s application dated 19th October 2018 with the result that proceedings in Kajiado HCSC No. 17 of 2017 are hereby stayed pending the hearing and determination of the appeal from the ruling given on 3rd October 2018. The order for stay of proceedings is conditional upon:

- a. Effective from the date of delivery of this Ruling, all rent derived from the property Plot No. 65 Kitengela shall be deposited in a joint interest-earning bank account to be opened in the names of the advocates for the parties.
- b. That the applicant shall within forty-five (45) days from the date of delivery of this ruling file and serve the memorandum and record of appeal.

In default of compliance by the applicant with any of these conditions, the order of stay of proceedings shall stand automatically discharged.

That costs of the application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 5th day of April, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR