IN THE COURT OF APPEAL

AT NYERI

(CORAM: KIAGE, SICHALE & KANTAI, JJ.A.)

CIVIL APPLICATION NO. 47 OF 2017

BETWEEN

NJERU NJAMIU.....1ST APPLICANT

ISAIAH MWANIKI.....2ND APPLICANT

NJAGI NJAMIU.....3RD APPLICANT

VERSUS

NJERU NJAMIU.....1ST RESPONDENT

NJUE NJAMIU.....2ND RESPONDENT

JOTHAM KARUKA .....3RD RESPONDENT

(Being an application for stay of execution of the order of the High Court of Kenya at Embu (F.M. Muchemi, J.) dated 7th February, 2017

in

Succession Cause No. 50 of 2003)

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RULING OF THE COURT

In the matter before the High Court of Kenya, Embu, being **Succession Cause No. 50 of 2003** – **In the Matter of the Estate of Kiura Katheri alias Kiura Njamiu (deceased)** – the applicants herein **Njeru Njamiu, Isaiah Mwaniki** and **Njagi Njamiu** were the applicants. They had applied for revocation or annulment of a grant dated 8th December, 2011 issued to the 1st and 2nd respondents Njeru Njamiu and Njue Njamiu, the parties' names being similar because they are relatives. The summons was heard by **F. Muchemi, J.,** who in a ruling delivered on 7th February, 2017 found the same to be unmerited and dismissed it . The applicants filed a Notice of Appeal against those findings. In a Notice of Motion said to be brought under **Rules 47 (1)** and **5(2) (b)** of the **Rules of this Court** we are asked in the main to order a stay of execution of the said ruling until an intended appeal is heard and determined. In grounds in support of the Motion and in a supporting affidavit sworn at Embu by the 3rd applicant it is stated, amongst other things, that the applicants and the respondents are brothers from two families or houses; that the deceased did not personally own a parcel of land subject of the succession cause; that the land belonged to the clan and had been shared out on 23rd September, 1960 to members of the clan; that the respondents received 14 acres of land but that the applicants, being children at that time did not receive land but that 7 acres of land was allocated to their house to be held by the deceased; that upon the death of the deceased the respondents took the said 7 acres:

> ***"……. obtained a grant and shared it between themselves and applicants each being given 0.07 of an acre snatched from applicant 7 acres as they cannot live among 2nd family ….."***

It is also stated that the applicants had lived on the land for over 60 years; that members of the 2nd house were over 60 in number and were threatened with eviction if orders of the High Court intended to be appealed were not stayed by this Court pending appeal. The Motion came up for hearing before us on 4th June, 2018 when the applicants were represented by learned counsel **Mr. P.N. Mugo**. The 2nd and 3rd respondents were present in court and acted in person, stating that they had authority of their brother, the 1st respondent, to proceed on their own behalf and on behalf of that brother who was said to be at home, unwell. Mr. Mugo gave a history of the matter as we have summarized in this ruling submitting that orders of the High Court had led to an injustice where the respondents were unjustly enriched by getting their original allocations but also benefitting by getting an extra 0.07 acre of land. According to counsel, this latter land had been sold by the respondents to people he did not name.

The respondents in opposing the Motion stated that the High Court was right to order the land to be subdivided in a way where all the children of the deceased received a share of the land. They asked us to dismiss the motion.

The principles which govern applications in this Court for stay of execution pending appeal are now well known. For an applicant to succeed in such an application he must demonstrate that there is an arguable point in the appeal if filed, or in the intended appeal, as the case may be. If such an applicant shows that there is an arguable appeal he must, in addition, demonstrate that the appeal, or intended appeal, would be rendered nugatory, absent stay – see, for a full discussion of those principles the case of **Stanley Kangethe Kinyanjui v Tony Ketter & 2 Others [2013] eKLR,** where the following passage appears:

> *"(i) In dealing with rule 5 (2) (b) (applications) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge's discretion to this Court. See RUBEN & 9 OTHERS v NDERITU & ANOTHER [1989] KLR 365.*
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> *(ii) The discretion of this Court under rule 5(2) (b) to grant stay or injunction is wide and unfettered, provided it is just to do so.*
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> *(iii) The Court becomes seized of the matter only after the notice of appeal has been filed under rule 75. HALAI & ANOTHER v THORNTON & TURPIN (1963) LTD [1990] KLR 365.*
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> *(iv) In considering whether the appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. DAVID MORTON SILVERSTEIN v ATSANGO CHESONI, Civil Application No. NAI 189 of 2001.*
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> *(v) An applicant must satisfy the Court on both the twin principles.*
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> *(vi) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. DAMJI PRAGJI MANDAVIA v SARA LEE HOUSEHOLD & BODYCARE (K) LTD, Civil Application No. NAI 345 of 2004.*
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> *(vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. JOSEPH GITAHI GACHAU & ANOTHER v PIONEER HOLDINGS (A) LTD & 2 OTHERS, Civil Application No. 124 of 2008.*
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> *(viii) In considering an application brought under rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. DAMJI PRAGJI (supra).*
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> *(ix) The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. RELIANCE BANK LTD v NORFLAKE INVESTMENTS LTD [2002] 1 E.A. 27 at page 232.*
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> *(x) 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 party aggrieved.*
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> *(xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. INTERNATIONAL LABORATORY FOR RESEARCH ON ANIMAL DISEASES v KINYUA, [1990]*
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> *KLR 403."*

We have considered the record of the Motion, the affidavit in support and the submissions made before us.

At paragraphs 20 and 21 of the ruling intended to be appealed the learned Judge found that the applicants' mother had filed a protest against issue of a grant to the respondents but that the said protest was abandoned. The applicants did not file a protest. At paragraph 21 of the ruling:

> *"The proceedings show that the applicants were present during the proceedings when the orders for confirmation were made*

and many other times when the case was on-going. Non-disclose (sic) of facts may occur when the case is being heard exparte or where one person or family unit is unrepresented. In this cause, all the family members in both houses were present in court and participated in the proceedings."

The learned Judge found that all family members including the applicants participated fully in the proceedings and that the applicants did not file a protest against issue of a grant in the matter.

As we have already seen the applicants say in the Motion and the affidavit in support that the land subject of the proceedings before the High Court has been sold to unnamed third parties.

From the material placed before us we cannot see any arguable point in the intended appeal. The applicants participated fully in the proceedings before the High Court. They were granted an opportunity to challenge the issue of a grant but did not do so. As properly found by the learned Judge the applicants cannot turn around to say that they wish to appeal a ruling in a succession cause where they were participants and the grant resulting from the proceedings was a result of what the whole family – including the applicants – had agreed.

We cannot see any arguable point in the intended appeal and, that being our finding, we need not consider the second limb of the principle we have set out on whether the intended appeal would be rendered nugatory.

There is no merit in the application and we accordingly dismiss it. As the parties are family let each side meet their own costs of the Motion.

Dated and delivered at Nyeri this 31st day of July, 2018.

P.O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR