IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & OUKO, JJ.A)

CIVILAPPLICATION NO. 11 OF 2017

BETWEEN

MONICA WANJIKU THUO..... 1ST APPLICANT

JOSEPH JULIUS GITAU NJUGUNA

AND OTHERS…....……..…….……2ND APPLICANT

AND

ANNABEL WAMBUI MWAURA (DECEASED) …..... 1ST RESPONDENT

PATRICIA WANJIKU MWAURA……..…..… 2ND RESPONDENT

(An Application for Stay of Execution from the Ruling and Orders of the High Court of Kenya at Nairobi (W Musyoka .J) dated the 20th day of January 2017 in Succession Cause No. 1568 of 1994)

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RULING OF THE COURT

Paul Mwaura Thuo was by any standard a man of means, as we shall shortly demonstrate. After his death on 29th March, 1994, two competing interests to his estate emerged. First, by his sister Monica Wanjiku Thuo, her son Joseph Julius Gitau Njuguna(the 1st and 2nd applicants) on the one hand and those who claimed to be his wife and daughter (the 1st and 2nd respondents) on the other hand. The 1st respondent subsequently passed away on 6th May 2010 and the 2nd respondent appointed the administratrix of her estate. The only evidence of their marriage are family photographs of the deceased, the 1st and 2nd respondents, a letter from the Department of Immigration dated 7th September, 1989 confirming that the deceased, as her husband was the surety when the former applied for a passport. The letter also confirmed that with the consent of the deceased, the Department issued to the 1st respondent a passport. Evidence of joint properties owned by the deceased and the 1st respondent (LR. 209/2389/99 Pangani) and a second property jointly owned by the deceased, 1st and 2nd respondents (LR No. Ngenda/Gituru/81) was adduced. Additionally, personal accountable documents were produced as exhibits before the court by the 2nd respondent such as, birth certificate, national identity card, passport and letters written to the 2nd respondent by the deceased.

On the ground that she was the only surviving child of the deceased, and following the death of the 1st respondent, the 2nd respondent applied and was appointed the administratrix of the estate of the deceased. However, when she took out summons for confirmation of the grant, she was confronted by two affidavits of protest by the applicants. The applicants denied both the 1st and 2nd respondents as the wife and a biological daughter of the deceased and insisted that the deceased was not married. But without prejudice to the above, the applicants stated that even if she was a daughter of the deceased, the deceased had sufficiently provided for her; that before his death he took them in and lived with them for three years and that he maintained them as his own family members. They further averred that when the deceased fell ill, he wrote a will dated 30th December, 1993 in which he appointed the 1st applicant the sole executor and bequeathed to her his entire estate in contemplation of death. The

applicants stated that after his death, they took possession of the estate and all the documents of title. It was the applicants' case that the respondents only surfaced upon the death of the deceased.

Having lived on the estate of the deceased for over twenty years on his invitation and strength of the written will of the deceased, the applicants prayed that they be declared to be entitled to the entire estate comprising, LR 209/975/53 Mathare United Farmers Company Ltd, Plot No 466 Cieko Estate, Plot No. 24 Kenyatta Site Molo, Plot No. 8480/1/2047 Ruaraka Sabuni, Plot No. 593 Ngundu Farmers Co. Ltd, Ngenda/Gituru/81, Plot No. SS 147 Garisa Road New Roysambu Housing Ltd, Jiji Muthengi & Estate Agents. It was also alleged that he bequeathed shares in; Gema Holdings Certificate No. 002248, East African Breweries Nos. 0254040, 7983, 90942, 0153365, 0190762 all 20 shares, Barclays Bank Shares 108952; Two Motor Vehicles Registration No. KPG 556 and KYO 54 Monies in E.A.B Society A/c No. [Particulars Withheld] Post Bank A/C No. [Particulars Withheld], Ngara KCB Eastleigh A/c No. [Particulars Withheld], Barclays Bank Harambee Avenue [Particulars Withheld] and Monies held by Kamere & Co. Advocates being sale proceeds of Properties LR/209/1924 Pamba Road Pangani, LR 36/VII/376 Juja Road Eastleigh and LR 36/1/63 Muyuyu Road Eastleigh. They considered the properties they occupied as their only home.

The respondents, for their part maintained that they were the only dependants of the deceased, being his widow and child and denied allegations that the applicants were taken in by the deceased who left his entire estate to them.

The applicants were categorical that the 1st applicant is married and her husband is alive. According to them the question of who the deceased's heirs were was settled by the decision of **Dulu, J** and that of **Bosire J** (as he then was) releasing to the 2nd respondent the body of the deceased for burial. These decisions have not been challenged on appeal or set aside. **Dulu J**, by a ruling delivered on 16th December, 2011, had found that the Will in question was invalid on the grounds that it was forged, the testator lacked capacity and it was made in suspicious circumstances by Gatimu Advocate and yet the advocate on record for the applicants, the firm of Kamere & Co. Advocates was all along the deceased's advocates. In the circumstances, the learned Judge concluded that the deceased died intestate. He also found that the respondents were his wife and daughter, respectively; that the 2nd respondent was born during the cohabitation of the 1st respondent and the deceased; and that at any rate, the deceased treated her as his child, hence, there was no need to require her to undergo a deoxyribonucleic acid (DNA) test. The Judge was of the view that the only recourse for the 1st respondent was to file a separate claim to specify her interest in the estate by proposing the mode of distribution of the estate.

Musyoka J, in determining the application for confirmation on the basis of these averments in the impugned ruling agreed with **Dulu J**. on the question of those entitled to inherit the estate and the validity of the Will. From that determination, the learned Judge was convinced that the deceased never gifted any portion of the estate to the applicants. He was of the view that it was unnecessary to conduct a DNA test to establish the 2nd respondent's paternity since she was born during the period the deceased and the 1st respondent cohabited as husband and wife; and that, in any case, the deceased had treated her as his child. The Judge faulted the applicants for failure to comply with the decision of **Dulu, J** to file a cause to prove their claim to the estate as dependants.

Guided by the provisions of Part V of the Law of Succession Act, the learned Judge ultimately rendered himself as follows;

> **"The deceased herein was survived by a child but no spouse. Distribution in such circumstances is governed by section 38 of the Act, ……the entire intestate estate ought to devolve wholly upon her as per the provisions of section 38 cited above. ……As the estate is for distribution only to the administrator as the sole surviving child of the deceased as per section 38 of the Act, any other claimant has to come as a dependant as defined under section 29 of the Act. ...The protestors have not moved the court under section 26 of the Act. There is no application before me brought under section 26, and the administrator has not been given an opportunity to confront an application properly brought under that provision. What is before me is an application for confirmation of grant, and I am bound to deal with it within the confines of the provisions of section 71 of the Act……there is no basis for me to find that the protestors were dependants of the deceased and to make provision for them in the circumstances…..In view of everything that I have stated above, it is my conclusion that the protestors are not beneficially entitled to the estate of the deceased."**

For those reasons, the two protests were dismissed, the grant confirmed and a certificate of confirmation issued.

Those conclusions aggrieved the applicants who have, by a notice of appeal, evinced that intention to challenge, strangely, not only the decision of **Musyoka, J** but even that of **Dulu, J** rendered earlier on 16th December, 2011.

In the meantime, they have instituted the instant application pursuant to **sections 3(2), 29, 31, 93(1)** and **(2)** of the Law of Succession Act and **Rule 5(2) (b) 41** and **42** of the Court of Appeal Rules to preserve the estate pending the lodgement, hearing and determination of the intended appeal.

The application is premised on the grounds that the impugned decision does not take into consideration the interests of the applicants who have lived on some of the deceased's properties for many years and spent fortunes to develop and improve them; that the 2nd respondent has vowed to evict them upon confirmation of the grant, apart from the threats to sell some of the properties; that the applicants had filed an application to review the appointment of the 2nd respondent as the administratrix of the estate; that the intended appeal is meritorious and the applicants are likely to suffer eviction from the properties they have occupied for over 25 years, should this application fail and should the 2nd respondent dispose of the properties before the determination of the intended appeal.

The 2nd respondent, in contesting the application, has accused the applicants of fraud and wastage of the estate by unlawfully collecting rent from some properties and selling others. In her opinion, the intended appeal will not be arguable because of the consistency in the decisions of the courts holding that the 1st respondent was the widow of the deceased and the 2nd respondent his only child; and the failure of the applicants to prove their claim to the estate. On the allegations that the intended appeal will be rendered nugatory should it succeed after this application is rejected, the 2nd respondent insisted that no such lose will be occasioned as the applicants are not entitled to any portion of the estate; and that the applicants have not only filed applications challenging the decisions by the two judges but also brought an originating summons, No. 201 of 2017 in the Environment and Land Court in which they are claiming by adverse possession of the very properties comprised in the estate.

By the force of **Articles 164(3)** of the Constitution, **section 3** of the Appellate Jurisdiction Act and **Rule 5(2) (b)** of the Court of Appeal Rules, the Court can entertain an appeal from the decision of the High Court in a probate and administration cause. See **Floris Pierro V. Giancario Falasconi** Civil Appeal No. 145 of 2012 (UR).

In **Stanley Ng'ethe Kinyanjui V Tony Ketter & 5 others**, Civil Application No. 31 of 2012, this Court examined its jurisdiction under **Rule 5(2)** (b) and summarised the jurisprudence enunciated in its various

decisions. We find no purpose in rehashing those principles that are well-known, save to stress that **Rule 5(2) (b)** grants this Court wide discretionary powers to grant a stay or injunction, subject only to two conditions; that the applicant's appeal or intended appeal is arguable and secondly, that if the order of stay is not granted and the appeal was to succeed, the appeal will be rendered nugatory. The burden is cast upon the applicants in this application to satisfy both principles.

In considering this application, we are alive to the fact that this is not an appeal, hence we cannot make definitive or final findings of either fact or law as doing so may embarrass the ultimate hearing of the main appeal.

The applicants have prayed for stay of the issuance of the certificate of confirmation. This is not available, having already happened. The applicants, in addition, applied that the distribution of the estate be stayed or the *status quo* be maintained pending the determination of the intended appeal.

We remind ourselves that we cannot make any definitive determination on any of the matters in contention. From the draft memorandum of appeal, the applicants will be challenging the decision of the learned Judge for holding that the 2nd respondent was the sole heir of the deceased and the applicants strangers to the estate; for relying on the ruling of **Dulu, J** regarding the validity of the will; for ignoring pending applications by the applicants for review of some of the orders; for holding that it was fatal for the applicants not to move the court under **section 26** of the Law of Succession Act; for confirming the distribution of assets without ascertaining that they belonged to the deceased; and for ignoring the enormous financial investment made by the applicants in developing and refurbishing some of the properties. These, we respectfully hold, are not idle concerns. They are not frivolous and so we are satisfied that the first limb of the twin principles has been met.

We, however, do not think that the confirmation of the grant in favour of the 2nd respondent will render the intended appeal nugatory. We bear in mind that the applicants have invoked **section 38** of the Limitations of Actions Act to be declared the owners of some of the properties by adverse possession. They have also made applications for review and setting aside. But more importantly, a grant can be revoked at any stage.

Without satisfying the second condition, the application must fail. We accordingly dismiss it with an order that costs will be in the intended appeal.

Dated and delivered at Nairobi this 24th Day of November, 2017.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR