IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), WARSAME & MUSINGA, JJ.A)

CIVIL APPLICATION NO NAI 173 OF 2014 (UR 135/2014)

BETWEEN

KAUSHUMU WAMBUI………......………………APPLICANT

AND

HAMISI OMARI…………………………..1ST RESPONDENT

AHMED OMARI…………..……………..2ND RESPONDENT

(An application for injunction pending the hearing of an intended appeal against the ruling of the High Court of Kenya at Nairobi (Musyoka, J) delivered on 15th November 2013 inSuccession Cause No. 1512 of 2006

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RULING OF THE COURT

Halima Njeri Omari died on the 20th August 2005. Omar Hamisi, who was her widower, applied for a grant of letters of administration intestate, which was issued on the 20th September 2006, and confirmed on the 18th July 2007. The grant was in respect of the properties known as LR Numbers 4953/933, 4953/931 and 4953/202 all situate within Thika Municipality of Kiambu County (hereinafter referred to as 'the subject properties'). In that grant, the subject properties were devolved to the said Omar Hamisi absolutely. The applicant came to realise that a confirmed grant had been issued and she filed an application in the High Court seeking orders, *inter alia*, that the grant be revoked and annulled. The application was based on the grounds that the grant was obtained by means of fraud, and concealment of material facts from the court.

In that application, the applicant described herself as the "husband" to Khadija Nyambura, who was the mother of the deceased Halima. The applicant averred that she and Khadija were, in a woman to woman marriage arrangement, married under Kikuyu customary law, and that the property in question originally belonged to the deceased Khadija. The applicant alleged that the property reverted to the deceased Halima after her mother's death, and that following the demise of the deceased, she (the applicant) ought to have gotten a share of the property, as it was held in trust for the children that she bore with her deceased

"husband".

That application was opposed by Ahmed Omar, the 2nd respondent herein. He was the son of Omar Hassan and step-son to the deceased Halima. The 2nd respondent claimed that the deceased was his step mother, and she was the only daughter of the deceased Khadija Nyambura Njuguna. He further stated that Khadija professed the Muslim faith and as such, could not have entered into a valid woman to woman marriage under Kikuyu customary law. He further claimed that the properties were registered in the name of the deceased Halima long after Khadija had passed on, and that as such, the properties in question do not form part of the estate of the late Khadija Nyambura.

In determining the application, Musyoka, J. sought the opinion of the Chief Kadhi on two issues: the first was whether or not two muslim women of the same ethnicity could contract a traditional woman to woman marriage, and have the same recognised under Islamic law; and the second was whether or not two women of the same ethnic community, one professing the Islamic faith and the other a non-Muslim, could contract a traditional woman to woman marriage that would be recognised under Islamic law. The opinion of the Chief Kadhi was that Islam only recognises one type of marriage: one initiated by a man to a woman. In his opinion, the kind of marriage that was claimed to exist by the applicant could not be recognised in Islam.

In determining the application, Musyoka, J., drawing from the opinion of the Chief Kadhi, held that the property comprised part of the estate of Halima Njeri; that there was no proof that there were any ceremonies of a woman to woman marriage, and that the proof of such a matter could only be through oral evidence. In addition, the learned judge held that even if there was proof of a customary marriage between the applicant and the deceased Khadija, the same would not be useful to the applicant since it would have clashed with Islamic law, and since the deceased had died a Muslim, as did her mother, her estate therefore fell for administration under Islamic law. Since such a marriage was therefore invalid, then there were no rights that could form a basis for a trust as had been urged by the applicant. On these grounds, the application failed and was dismissed by the learned judge.

This is the ruling that provoked the applicant to file a notice of appeal to this Court, in which she intends to appeal against the whole of that ruling. She has filed, as well, this application, pursuant to rule 5(2)(b) of this Court's Rules seeking an order in the main, that an injunction be issued restraining the respondents either jointly or severally, from evicting, interfering with the occupation, quiet possession and utilisation of the suit properties either by herself, the tenants, or any other persons occupying the suit properties, pending the hearing and determination of the intended appeal.

We have considered the application, the documents filed before this Court and before the High Court as well as the rival submissions of the parties. What the applicant is seeking is the discretionary power of this Court under rule 5 (2) (b) of this Court's Rules. Judicial discretion must be exercised in a judicious manner, and without any caprice or whim. In ***Republic V Kenya Anti-Corruption Commission & 2 Others*** ***[2009] KLR 31*** the duty to exercise discretion judiciously was set out as follows:

> ***"The law as regards the principles that guide the court in such an application brought pursuant to Rule 5 (2) (b) of the Rules are now well settled. The court exercises unfettered discretion which must be exercised judicially."***

It is upon the applicant to demonstrate that the discretion ought to be exercised in her favour. This has been stated in several decisions of this Court in the line of

Patel v Transworld Safaris Ltd ***[2004] eKLR (Civil Application No. Nai. 197 of***

2003) wherein it was held that:

> ***"In deciding the matter before it the Court exercises discretionary jurisdiction which discretion***

has to be based on evidence and sound legal principles. <u>The duty,obviously, squarely falls on the applicant to place such evidence before the court hearing his application.</u>" (emphasis ours)

Time and again, this Court has said that for orders sought under rule 5(2)(b) of the Court's Rules, the party seeking such orders must demonstrate that first the intended appeal is arguable, and secondly, of most importance, that if the orders sought are not granted, that the intended appeal would be an academic exercise with no prospect of aiding the applicant. These principles were reiterated by this Court in

<u>Republic V Kenya Anti-Corruption Commission & 2 Others (supra)</u> wherein it was held that:

> ***"The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb."***

The first and foremost issue is the competence of the intended appeal. The 2nd respondent contends that the notice of appeal, subject of the application under our determination, was filed out of time. We think that this is a pertinent issue which is so fundamental and foundational to an application under rule 5(2)(b). The ruling from which the applicant intends to appeal was delivered on 15th November 2013. In accordance with rule 74 of this Court's Rules, the applicant had fourteen days within which to lodge her notice of appeal; meaning that she ought to have lodged the notice of appeal by 30th November 2013. We have noted that the notice of appeal dated 7th January 2014 was lodged in the High Court on 16th January 2014. The notice of appeal, it appears, was therefore out of time. This however, is, for our purposes, a non-issue. In making a determination under rule 5(2)(b), the Court's function is not to determine whether or not there is a valid notice of appeal. We are aware that deficiencies in the notice of appeal can be corrected, and that the rules of this Court provide parties with remedies that can be exercised to their advantage. In ***<u>Peter Njuguna Njoroge v Zipporah Wangui Njuguna</u> [2013] eKLR (Civil Application No. Nai 91 of 2013 (Ur 61/2013))*** the Court was confronted with an objection that the notice of appeal was invalid as it had been filed out of time. The Court in considering the objection stated that:

> ***"In our view, we must avoid making a determination on that issue because the rules of this Court expressly provide the parties with solutions, which they are yet to invoke."***

We now turn to consider whether the applicant has met the threshold for the grant of an order of injunction. Mr Mathenge, learned counsel for the applicant argued that the intended appeal is arguable; since the issue in question was whether or not there was a valid marriage in place. He further urged us to consider that it is the applicant who is in actual possession of the estate and that she has been collecting rent from a part of the property, and yet, the court failed to consider her a dependant under the Law of Succession Act.

Mr Mungla, learned counsel for the respondents, on his part stated that the orders sought could not be granted since the appeal was not arguable. Counsel contended that there was a consent between the parties that questions regarding the validity of the purported marriage would be settled by the opinion of the Chief Kadhi, and that his opinion was never set aside or challenged. In addition, counsel submitted that the parties agreed that the matter would be determined by affidavit evidence, and that as a result of that agreement, the matter was conclusively determined and therefore, the appellant cannot challenge the decision. Mr Mungla further argued that the applicant never sought provision as a dependant under The Law of Succession Act, and that therefore no such prayer was canvassed before the High Court. In counsel's view, the applicant has failed to demonstrate how the appeal is arguable and as such, is not deserving of an order of injunction.

We appreciate that an arguable appeal does not necessarily mean an appeal that must succeed. In ***<u>Kenya Medical Lab Technicians & Technologists Boards v Prime Communications Limited</u> [2014] eKLR (Civil Application No.56 of 2013 (UR.36/2013))*** this Court delivered itself on this very point in the

following manner:

> ***"In considering whether an arguable appeal has been made out, it is not a requirement that that appeal will necessarily succeed. It is sufficient that the appeal appears one that will be fully argued before the Court ...***
>
> ***And besides, an appeal is considered arguable even if it raises a single bona fide [point] only."***

It is undisputed that the parties agreed to proceed by way of affidavit evidence. The parties also agreed to seek the opinion of the Chief Kadhi on the disputed marriage. There is no doubt in our mind that the Chief Kadhi rendered an opinion which was available to the parties before the trial court relied on it. The applicant chose not to challenge the opinion of the Chief Kadhi, that there could exist no woman to woman marriage that would be recognised under Islam, regardless of whether both women were from the same ethnic community. The applicant had a choice to challenge what she considered to be an adverse opinion, but she failed to do so. We think therefore an adverse inference can be drawn against the applicant. The question that comes to our mind immediately after such omission is whether the applicant, who acquiesced to the acquisition, adoption and reliance of the Chief Kadhi's opinion, can now be heard to mount a challenge on it before the Court of Appeal. We think it would be inappropriate for us to make a determination on that issue at this stage. Suffice it to say that the manner she proceeded with her case before the trial judge, has created some doubt as to the arguability of the intended appeal.

We now turn to the second limb that the applicant must satisfy, that is, whether if an injunction is not granted, the intended appeal would be rendered nugatory. The parties did not address us on how the appeal would be rendered nugatory. We are however aware that we must carefully weigh the competing claims of both parties before making our determination. See ***Reliance Bank Ltd v Norlake Investments Limited*** ***[2000] 1 EA 227***.

The applicant claims to be in possession of the subject properties, and has stated that even after the making of the grant, she has continued to collect rent from tenants situate thereon. The applicant has however not indicated to this Court, that should an injunction not be granted, how this would adversely affect her intended appeal. We are unclear as to whether she would be evicted from the subject properties, or whether she would be denied rent. This would be speculation based on her averments in the affidavit in support of her application. As we have stated above, the burden of demonstrating both limbs for the grant of the order of injunction rests squarely on the applicant; she therefore ought to have provided some material upon which this Court can exercise its discretion in her favour. She has failed to do so, and therefore is not deserving of the benefit of our discretion. In the premises the application is devoid of merit, and as such, we hereby order it dismissed. The respondents shall have the costs of the application.

Dated and delivered at Nairobi this 6th day of March, 2015

KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

D. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR