IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MWILU, KIAGE & M'INOTI, JJ.A.

CIVIL APPLICATION NO. NAI 235 OF 2014

BETWEEN

PETER KARUMBI KEINGATI…..……...…….…….....1ST APPLICANT

JOHN NGUGI KEINGATI…….……...2ND APPLICANT

JAMES KARANJA KEINGATI……..……...…..3RD APPLICANT

PHILIP GITURO KEINGATI……..…….....4TH APPLICANT

SIMON GATHU KEINGATI……..……....5TH APPLICANT

AND

DR ANN NYOKABI NGUTHI…..…….…....1ST RESPONDENT

ELIZABETH NJERI MWATHI……..……....……..2ND RESPONDENT

LUCY WANJIRU KANDU…….....….3RD RESPONDENT

REGINA MARION GOKO…….…….....4TH RESPONDENT

TERESIA NDUTA KEINGATI Administrator, Estate of

KeingatiWaiharoKeingati…….……....5th RESPONDENT

(Application for stay of proceedings pending the hearing and determination of an appeal from the ruling and order of the High Court of Kenya at Nairobi, (Kimaru, J.) dated 31st July 2014

in

HC SUCC. C.NO. 1140 OF 1990)

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RULING OF THE COURT

The dispute that has given rise to the application before us relates to the estate of ***Keingati Waiharo Keingati (Deceased)***, late of Ndumberi, Kiambu, who died on **3rd March 1990**. The five applicants, ***Peter Kirumbi Keingati, John Ngugi Keingati, James Karanja Keingati, Philip Gitau Keingati*** and ***Simon Gathu Keingati***, are all brothers and the sons of the deceased. The 1st to 4th respondents, ***Dr. Ann Nyokabi Nguithi, Elizabeth Njeri Mwatha, Lucy Wanjiru Kandu*** and ***Regina Wairimu Goko*** are also the daughters of the deceased and therefore the sisters of the applicants. The 5th respondent, ***Teresia Nduta Keingati*** is the widow of the deceased and the mother of the applicants and the respondents.

By a grant of letters of administration intestate of the estate of the deceased issued on ***20th December 1990,*** the 5th respondent was appointed the administratrix of the estate of the deceased. In 1996, the applicants applied for revocation of the grant, which in the meantime had been confirmed on ***3rd October 1991***. By a ruling dated ***28th March 1996***, the High Court revoked the grant after finding that it had been irregularly and unprocedurally confirmed.

Thereafter, the parties devoted their energies in internecine squabbles and skirmishes that have held up the distribution of the estate for the better part of twenty years. Matters came to a head when the applicants moved the High Court in March 2014 to completely exclude their sisters from the distribution and sharing of the estate of the deceased.

The rather bold grounds, at this day and age, upon which the sons sought to exclude their sisters from sharing the estate of their father were that the sisters were all married and well established; that in accordance with the tenets of *Kikuyu* customary law of succession, married daughters never inherit their fathers' properties; that such married daughters are only entitled to inherit from the families where they are married; that the Constitution of Kenya, 2010 had expressly recognized, elevated and given pride of place to culture and customary law; that the courts in Kenya were under a constitutional duty to uphold and apply customary law; that unless the tenets of *Kikuyu* customary law of succession were applied in the distribution of the estate of the deceased, the sons stood to be disadvantaged and discriminated against; and that conversely the daughters stood to be advantaged by inheriting twice, from their father and from their husbands' families.

In a considered rulingdated 31st July 2014, ***Kimaru, J.*** who evidently was not impressed by the applicants' maneuver to edge out their sisters from their father's estate, held that the sons as well as the daughters were all children of the deceased within the meaning of the ***Law of Succession Act*** and therefore entitled to a share of the estate of the deceased. Accordingly, he dismissed the applicants' application and directed all the parties to file their proposals for the distribution of the estate within 30 days of the ruling, for consideration by the court.

Aggrieved by the ruling, the applicants lodged a Notice of Appeal dated 8th August 2014 and followed it up with the application now before us, seeking to stay further proceedings in the High Court pending the hearing and determination of their appeal.

The application, purportedly taken out under ***"Order 5(2) (b) and 1(2) and 42 Court of Appeal Rules"*** and "***Section 64 of the Registration of Titles Act Cap 281",*** is supported by an affidavit sworn on 9th September 2014 by the 1st applicant deposing to the issues that we have set out above. It may be noted in passing that beyond being taken out under virtually unknown procedural provisions and instruments,the Registration of Titles Act has been repealed since May 2012.

Before us, ***Mr. Njiru***, learned counsel for the applicants submitted that the applicants had already filed their appeal, being ***Civil Appeal No. 284 of 2014***, against the ruling of the High Court. It was argued that unless this Court stayed further proceedings in the High Court, the estate of the deceased was likely to be distributed to all the children of the deceased, including the married respondent daughters, thus rendering the appeal nugatory, if it ultimately succeeded.

In counsel's view, the appeal raises novel and weighty constitutional issues, in particular on the place of customary law in Kenya after the promulgation of the Constitution of Kenya, 2010. ***Articles 11*** and ***45 (4) (b)*** of the Constitution, which respectively make provision on culture and personal laws, were relied upon in support of the view that since 2010, customary law had been hoisted onto a constitutional pedestal of reverence and respectability.

It was further urged that since the Constitution recognized customary law, the estate of the deceased should be distributed in accordance with *Kikuyu* customary law of succession, which allowed inheritance by sons only, to the exclusion of the married daughter. As far as counsel was concerned, such customary law was not discriminative of the married daughters because they were supposed to inherit from their husbands' families. Indeed, it was argued, it was the Law of Succession Act that was discriminative against sons because it allowed married daughters to inherit twice while sons inherited only once.

Relying on the decision of the Constitutional Court of South Africa in ***NONKULULEKO LETTA BHE & OTHERS V MAGISTRATE, KHAYELITSHA, CASE CCT 43/03,*** it was submitted that in Kenya, as in South Africa, the Constitution envisages a place for customary law in the legal system and that by virtue of that constitutional recognition, customary law must be accommodated as part of the law of Kenya, not merely tolerated.

For the 1st to 4th respondents, ***Mr. Kigotho***, learned counsel, opposed the application on the basis of an affidavit sworn by the 1st respondent on 27th February 2015. It was contended that the appeal was not arguable and raised no issues of constitutional significance. In counsel's view, the very tenets of customary law that the applicants were invoking were discriminatory against the respondents by reason of their sex as daughters and status as married daughters, which was offensive to the equality provisions of the Constitution.

It was finally submitted that the intended appeal, were it ever to succeed, would not be rendered nugatory because the 1st to 4th respondents had no intention of alienating whatever share they were given from their father's estate. The same would still be available, as it would continue being held in trust for them by their mother, the 5th respondent.

For the 5th respondent, ***Ms. Kamau,*** learned counsel, joined the other respondents in opposing the application. In her affidavit sworn on 17th November 2014, the 5th respondent deposed that various properties of the estate had already been transferred to the applicants as their shares of the estate. It was only after selling off those properties, it was argued, that the applicants turned around and devised strategies to completely disinherit their sisters. We were urged to find that the applicants' appeal was founded on notions that were completely inconsistent with the provisions and values of the Constitution, and to that extent the appeal was not arguable.

We have carefully considered the application, the draft memorandum of appeal, the ruling of the High Court, the submissions of respective counsel and the law. To be entitled to stay of the proceedings before the High Court, the applicants must satisfy us, first, that they have an arguable appeal, and second, that unless the proceedings in the High Court are stayed, the appeal will be rendered nugatory. These principles have been stated and restated by this Court time without number. (See ***GITHUNGURI V. JIMBA CREDIT CORPORATION LTD (NO. 2) [1988] KLR 838, J. K. INDUSTRIES LTD. V. KENYA COMMERCIAL BANK LTD. [1982 – 88] KAR 108,*** and ***EXCLUSIVE ESTATES LTD V. KENYA POSTS & TELECOMMUNICATIONS CORPORATION & ANOTHER (2005) 1 EA 53).***

This Court has described an arguable appeal, not as one that must invariably succeed, but one that raises a *bona fide* legal point that deserves consideration. To that extent, to constitute an appeal one that is arguable, it does not have to raise a multiplicity of issues. Even one single bona fide issue will suffice. (See ***KENYA TEA GROWERS ASSOCIATION & ANOTHER V. KENYA PLANTERS & AGRICULTURAL WORKERS UNION, CA NO. NAI 72 OF 2001).***

In ***AHMED MUSA ISMAEL V KUMBA OLE NTAMORUA & 4 OTHERS, CA NO. 256 OF 2013,*** this

Court explained that the purpose of considering whether an appeal will be rendered nugatory is:

> ***"to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succor by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual."***

Regarding what would render a successful appeal nugatory, the Court expressed itself as follows in ***STANLEY KANGETHE KINYANJUI V. TONY KETTER & 5 OTHERS, CA NO 31 0F 2012***:

> ***"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"***

Lastly, the applicant will not be entitled to the relief of stay of proceedings if he establishes an arguable appeal, but fails to show that if it is successful it will be rendered nugatory. The two considerations go hand in hand and must both be satisfied. (See ***PETER MBURU NDURURI V JAMES MACHARIA NJORE, CANO. 29 OF 2009 (UR 14/2009).***

This Court has stated that in determining whether an applicant has presented an arguable appeal, it will not minutely delve into the issues, to avoid embarrassing the bench that ultimately hears the appeal. However, to the extent that we must determine whether there is an arguable appeal disclosed, we cannot avoid determining, on *prima facie* basis, whether indeed an arguable appeal is disclosed. A finding at this stage that an arguable appeal is disclosed or that none is disclosed does not bind the Court when it finally hears the appeal. Many are the times when on first impression an appeal is certified arguable and a relief under rule 5(2)(b) granted, only for the matter to be found bereft of merit upon the hearing of the appeal. The converse is also true. We shall accordingly bear these matters in mind.

As far as an arguable appeal is concerned, the applicants' draft memorandum of appeal impugns the decision of the High Court on the ground that it wrongly found that *Kikuyu* customary law of succession which is recognized by ***Articles 11 (1)*** and ***45(4) (b)*** of the Constitution, is not applicable in the distribution of the estate of the deceased. The learned judge is also faulted for finding that *Kikuyu* customary law was discriminatory against married daughters of a deceased person and therefore in violation of the Constitution.

What the applicants call novel and weighty constitutional issues are really not new in our jurisdiction. The same issues have been raised and considered by the High Court and this Court in a number of previous decisions. Thus for example, in ***IN RE ESTATE OF LERIONKA OLE NTUTU, HC. SUCC. C. NO. 1263 OF 2006***, the sons of a deceased *Masai* man sought to exclude their sisters from inheriting their father's estate, arguing that the estate should be distributed in accordance with *Masai* customary law, which, like in the present case, recognized inheritance by sons only. In rejecting the argument, ***Rawal, J.,*** as she then was, upheld the application of the Law of Succession Act and stated:

> ***"It cannot be disputed that as per the provisions of the Act, the children include sons and daughters and the Act does not discriminate between female and male children of the deceased. It is now well established under our jurisprudence that there cannot be any discrimination also between the married and unmarried daughters."***

The same issue had earlier been raised in ***RONO V. RON O (2008) 1 KLR (G&F) 803***, which ended up, on appeal, in this Court. Although in that case the High Court had allowed daughters to inherit their father's estate, nevertheless it gave them a smaller share than their brothers on the basis that they stood to gain an unfair advantage if they married and inherited from their new families.

This Court held that the estate of the deceased, who had died after the ***Law of Succession Act*** had come into force, was to be distributed under that Act, which did not discriminate between sons and daughters. The Court rejected the argument that customary law was applicable. The Court further relied on the former Constitution as well as international human rights instruments such as the ***Universal Declaration***

of Human Rights, the ***International Covenant on Civil and Political Rights***, the ***International Covenant on Economic Social and Cultural Rights***, the ***Convention on the Elimination of All Forms of Discrimination Against Women*** and the ***African Charter on Human and Peoples' Rights*** and concluded that there was no basis in the circumstances of that case for giving daughters a smaller share of their father's estate, let alone totally excluding them from inheritance. Accordingly all the children of the deceased, both sons and daughters, were given equal shares of the estate.

Those decisions predated the promulgation of the Constitution of Kenya, 2010 which has been described as a very progressive and transformative charter; a potent instrument for the reconstruction of our society. Although, *prima facie,* the Constitution recognizes culture and systems of personal law, it also has very strong pro-equality and non-discrimination provisions such as ***Article 27*** which among other things, declares that all persons are equal before the law and have the right to equal protection and equal benefit before the law; that equality includes the full and equal enjoyment of all rights and fundamental freedoms; that women and men have the right to equal treatment, including the right to equal opportunities in public, economic, cultural and social spheres; and prohibits direct or indirect discrimination on any ground including sex, marital status or culture.

The aforementioned provisions are further underpinned by the national values and principles of governance, which the Constitution demands must guide the interpretation or application of the Constitution, laws (including customary laws), and policies. The relevant national values and principles of governance that the Constitution holds dear include human dignity,equity, social justice,inclusiveness,equality,human rights, non-discrimination and protection of the marginalized.

But perhaps a clearer indication of the new constitutional dispensation's inclination, in the event of any conflict between its pro-equality and non-discrimination values and those of customary laws and cultural practices, is provided by ***Article 2(4)***, which declares:

> ***"Any law, <u>including customary law</u>, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid." [Emphasis added].***

As we understand it, the provisions of the Constitution on non-discrimination and equality are meant to address, not abstract and theoretical postulates, but very real problems of discrimination, exclusion and marginalization rooted in and perpetuated by the realities of our society, including our cultures and customary laws and practices. The applicants will be contending that customary law excludes married daughters from inheriting their father's estate because such daughters will inherit from the families where they are married. Hence they should not inherit twice. On the other hand the Law of Succession Act makes no distinction between sons and daughters. So the Act puts sons at a disadvantage, as the daughters will inherit twice while the sons only inherit once. Accordingly, it is submitted, the Law of Succession Act is contrary to the Constitution in that it discriminates against sons. Customary law must, in the circumstances,be given primacy over the Law of Succession Act because under it both sons and daughters inherit only once.

The arguments are based on many assumptions that are, in our opinion,*prima facie* questionable. Why is there an underlying and unstated assumption that in this day and age in Kenya, *Kikuyu* daughters will only marry in *Kikuyu* families from which they will inherit? Suppose they chose to get married into a community, any community in the world, where the rules of succession are completely the reverse of Kikuyu customary practices? Suppose they married, as happens every day, into families that have absolutely nothing to be inherited? Does a son inherit twice when he inherits from his father and his wife inherits from her family? Somehow the applicants have adeptly, if dubiously, framed customary practices as the paragons of equality and equity.

It is also not clear to us whether the applicants' arguments founded on the application of customary law are really not a red herring. The deceased died in 1990, long after the ***Law of Succession Act*** came into force. By ***section 2(1)*** of the Act, the provisions thereof constitute the universal law of Kenya in all cases of intestate or testamentary succession to estates of persons dying after the commencement of the Act.

The decision to formulate and adopt a universal succession law for Kenya was informed by a deliberate policy to achieve some level of uniformity and equity in succession matters.

Where necessary, the Succession Act provides for continued application of customary law in succession matters in specified Districts. The District of the deceased, Kiambu District, is *not* one of the areas where customary laws of succession still apply.

There is nothing in the Constitution to suggest that reference therein to culture, customary and personal laws was intended to substitute the universal law of succession of Kenya, with customary law. That would be an absurd assertion, which could easily be extended to, for example, replacing the universal penal law of Kenya with customary penal laws.

Before we leave this issue, it is important to make a few comments on the decision of the Constitutional Court of South Africa in ***NONKULULEKO LETTA BHE & OTHERS V MAGISTRATE, KHAYELITSHA, (supra)*** which was relied upon by the applicants. That decision does not stand for the propositions the applicants claim it does. The case involved the constitutionality of provisions of the Black Administration Act and the regulations made thereunder providing for distribution of intestate estates of deceased Africans in accordance with "Black law and customs", and the constitutionality of the principle of male primogeniture in succession under customary law.

Langa, DCJ, writing for the majority, affirmed that the Constitution of South Africa had embraced customary law, but he was also very categorical that such recognition was only as long as customary law was consistent with the Constitution. The Deputy Chief Justice expressed himself thus:

> ***"It bears repeating, however, that as with all law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights."***

Other observations pertinent to the application of customary law within a constitutional and normative framework founded on equality and non-discrimination were made in that case

that are relevant to this application and which profoundly contradict the applicants' assertions. For example, it was noted that, properly understood, customary rules of succession were less concerned with the distribution of the estate of the deceased but more with the preservation and perpetuation of the family unit. To that extent, the male heirs did not merely inherit the assets of the deceased; they also acquired important obligations to maintain and support the other members of the family.

However, the Court noted that circumstances had changed so much, thus undermining the very rationale of customary succession rules. The Court captured the changed circumstances as follows:

> ***"The setting has however changed. Modern urban communities and families are structured and organized differently and no longer purely along traditional lines. The customary law rules of succession simply determine succession to the deceased's estate without the accompanying social implications, which they traditionally had. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family, which would include the spouse of the deceased as well as other dependants and descendants. He often simply acquires the estate without assuming, or even being in a position to assume, any of the deceased's responsibilities. In the changed circumstances, therefore, the succession of the heir to the assets of the deceased does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family and dependants of the deceased."***

The result has been distortion of customary law rules of succession to the extent that they have lost their intrinsic rational value and have been brought into direct conflict with the values of the Constitution and its provisions on equality and non-discrimination.

Ultimately the South African Constitutional Court found the succession rules under customary law to be in conflict with the provisions of the Constitution on human dignity, equality and non-discrimination, in the following terms:

> ***"[91] The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) 114 of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.***
>
> ***[92] The principle of primogeniture also violates the right of women to human dignity as guaranteed in section 10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property. Its effect is also to subject these women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex and gender. Their dignity is further affronted by the fact that as women, they are also excluded from intestate succession and denied the right, which other members of the population have, to be holders of, and to control property."***

Back to the application before us the applicants, of course, cannot be begrudged their right to have their day in this Court although as we have endeavoured to demonstrate above, we harbour fundamental doubts whether the appeal is arguable in view of the provisions of the Constitution.

The decisive factor in this application however, is whether, if the appeal is successful, it will be rendered nugatory, in the sense that it will not be possible to restore the applicants to the position they are in today or to reasonably compensate them.

In the application before us, the value of the share each beneficiary is likely to get from the High Court is easily ascertainable. The 5th respondent has deposed in her replying affidavit, which has not been controverted, that the applicants have previously happily offloaded into the Kenyan property market, their shares of the properties that had earlier been transferred to them from the estate. That suggests that whatever is inherited by the daughters of the deceased, if any, will have specific monetary value and can be sold or bought in the property market. That by itself belies the argument that the applicants cannot be compensated, or adequately compensated, if their appeal succeeds.

But perhaps more important in considering whether the applicants' appeal will be rendered nugatory, is what the 1st applicant has deposed to in his affidavit in support of the application, which was sworn on behalf of all the other applicants. He deposed rather categorically that the sisters are propertied and well-established persons. The respondents have not denied that. The real significance of that information, at least for purposes of this application, is not to show that the respondents are not entitled to inherit from their father as the applicant's appear to assume: it is to show that if the appeal succeeds, the respondents have sufficient means from which the applicants can get recompense.

We have said enough to show that we are not satisfied that we have before us an application which satisfies both considerations under ***rule 5(2)(b)*** of the Court of Appeal Rules. In the event, we find that the application is not meritorious and the same is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 24th day of April, 2015.

P. M. MWILU

JUDGE OF APPEAL

P. O.KIAGE

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR