



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: J. MOHAMMED, J.A. (IN CHAMBERS)

CIVIL APPLICATION No. NAI 158 OF 2013 (UR 107/2013)

BETWEEN

DANIEL NJENGA MUIRURI

JOSEPH MWANGI MUIRURI

MOSES WAINAINA.....APPLICANTS

AND

ESTHER NJERI MBURU

ANNE MWANGI MUTHEE.....RESPONDENTS

(An application for stay of execution pending an appeal against the ruling of the High Court at Nairobi (Kimaru, J) dated 7th May, 2013

in

H.C.S.C. NO. 2099 OF 2007)

RULING

Before me is an application under **Rule 47(5) of the Court of Appeal Rules**. The applicants filed a Notice of Motion application dated 9th July, 2013 brought pursuant to **Rule 5 (2) (b) of the Rules**.

The genesis of this application is a succession dispute over *inter alia* **L.R NO. THIKA MUNICIPALITY NO. 4953/471** (suit property). The suit property is registered in the name of **TITUS MUIRURI DOGE** (deceased), the father to both the applicants and respondents herein. The High Court (Kimaru, J) on the 7th May, 2013, distributed the estate of the deceased among the beneficiaries. The learned Judge ordered that the suit property be valued by a valuer to be agreed upon by counsel for the applicants and the respondents and failing agreement, by a valuer to be appointed by the court. After valuation, the suit property was to be sold and proceeds therefrom divided equally between the appellants, respondents and

their mother (the deceased's widow). The court also directed that the applicants were to have the first right to purchase the suit property which right was to be exercised within 90 days of the valuation of the suit property.

The applicants being aggrieved with the said ruling, filed a Notice of Appeal on 10th May, 2013. They also filed an application under **Rule 47** dated 9th July, 2013 and a Notice of Motion dated 9th July, 2013 under **rule 5 (2) (b) of the Rules** seeking stay of execution of the decree pending the hearing and determination of the intended appeal. The application for urgency came before Hon Mr Justice S. Gatembu Kairu, JA on 11th July, 2013, but the same was declined in the first instance prompting the applicants to apply, pursuant to **Rule 47 (5) of the Rules of this Court**, that the certificate of urgency be heard *inter partes*.

The application for hearing *inter partes* was listed before Hon Mr Justice S. Gatembu Kairu, JA on 23rd September, 2013. There was no appearance for the applicants and the single Judge declined to certify the application dated 9th July, 2013, as urgent.

The applicants filed a further application under **Rule 47** dated 8th May, 2014, supported by the affidavits of Ogesa Antony Onalo Advocate and the 1st applicant, Daniel Njenga Muiruri. I declined to certify the application urgent and the applicants applied for hearing *inter partes* under **Rule 47 (5)**.

When this matter came up before me for hearing *inter partes* on 6th June, 2014, learned counsel Mr Ogesa Onalo, appeared for the applicants while learned counsel Mr Gachau Mwangi appeared for the respondents. Mr Onalo reiterated the grounds in support of the application. He urged the single Judge to certify the matter urgent to facilitate the hearing of the application for stay pending appeal because, firstly, the suit property sought to be protected is the only sole income generating asset of the Estate of the deceased which the deceased's ailing widow depends on. Counsel faulted the learned Judge for distributing the deceased's assets and failing to take into account that the deceased's widow depended on the suit property which property if sold, will cause her [the widow] untold suffering and will render the appeal nugatory.

Further, that the learned Judge gave is an order for valuation of the suit property and that the suit property be sold and proceeds therefrom shared equally between the beneficiaries of the Estate of the deceased. Counsel submitted that based on that order, the respondents had already taken steps to execute the order by seeking to value and sell the suit property. He further submitted that an application for revocation of Grant is pending in court on grounds that a crucial document in support of the Grant was fraudulently obtained.

In response, Mr Mwangi opposed the application for urgency. Regarding the alleged forged document, counsel submitted that investigations were carried out and the matter is pending determination. He submitted that the respondents are innocent until proved guilty as provided for under **Article 50 of the Constitution**.

On the question of urgency, counsel submitted that this matter has previously been before this court on the question of urgency. That when this matter came before *Gatembu Kairu, JA*, there was no appearance on the part of the applicants and the single Judge declined to certify the matter urgent.

Counsel submitted that it is incorrect on the part of the applicants to state that the suit property is the sole income generating asset of the estate as there exists **Grant No. 27081** comprising of 100 acres, which is part of the Estate of the deceased. He further submitted that the applicants have been ordered on several occasions to render the accounts relating to the suit property as far back as 2010 but they have refused and or failed to render the same. He submitted that there is no urgency displayed by the applicants and therefore the court should find the application a further attempt to delay the respondents from benefiting from the suit property and from enjoying the fruits of the judgment.

In reply, Mr Onalo submitted that if the application is not certified urgent, the respondents will execute the only income generating asset and the intended appeal will be rendered nugatory in the

event that the intended appeal is successful.

I have considered the application, the grounds in support of the application, the affidavits, the submissions by the learned counsel and the law. **Rule 47 (5) of this Court's rules** provides:

“The refusal by the Judge to certify an application as urgent under this rule shall not be subject to a reference to the court under rule 55, but the applicant may apply informally for the matter to be placed before a single Judge for hearing inter partes.”

All that I have been called upon to do after hearing the rival arguments is to determine whether the pending application is urgent or not. I have thus been called upon to exercise my judicial discretion in favour of either stand. The principles that guide me in the exercise of my judicial discretion have now been crystallized by case law. These are that my exercise of judicial discretion is wide and unfettered, with the only fetter to it being that I have exercise it upon reason and judiciously. See the case of **CMC HOLDINGS LIMITED V NZIOKI, (2004) 1 KLR 173**. There is also a requirement that such discretion be exercised based on sound reason rather than whim, caprice or sympathy. See the case of **BAGALLO V CHRISTIAN CHILDRENS FUND, (2004), 2 KLR 73**. It must also be exercised in the interests of justice for both parties to the litigation. See the case of **GUTHIAKA V NDURURU, (2004) 2 KLR 67**.

I have borne in mind all the above principles and applied them to the rival arguments herein.

I note from the record that the respondents have obtained an order from the High Court dated 30th October, 2013, with the effect that the OCS, Thika Police Station was to provide security to the valuers to facilitate the valuation of the suit property.

I further note from the record that when the application under **Rule 47 (5)** came before Hon Mr Justice S. Gatembu Kairu, JA for *inter partes* hearing on 23rd September, 2013, counsel for the applicants were misled by the particulars of the cause list and appeared at the Hon single Judge’s chambers after their application had been mentioned.

In the premises, I am satisfied that a case has been made out by the applicant to warrant that the application by way of notice of motion dated 9th July, 2013, be heard as a matter of urgency. It is so ordered. Costs in the application.

Dated and delivered at Nairobi this 20th day of June, 2014.

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR