



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, MWERA & KIAGE, JJ.A.)

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

BETWEEN

DANIEL NJENGA MUIRURI

JOSEPH MWANIKI MUIRURI

MOSES WAINAINA.....APPLICANTS

AND

ESTHER NJERI MBURU

ANN WANGUI MUTHEE.....RESPONDENTS

Being an application for stay pending an appeal against the ruling in the High Court of

Kenya at Nairobi (Kimaru, J.) dated 7th May, 2013 and delivered on 7th May, 2013

in

H.C. SUCCESSION CAUSE NO.2099 OF 2007

RULING OF THE COURT

On 7th May, 2013, **Kimaru, J.** delivered a ruling following mediation regarding the distribution of the estate of one **Titus Muiruri Doge**, the deceased herein, in **Nairobi HC Succ. Cause No.2099/2007**. Before the learned Judge, were counsel for the administrator of the estate and the beneficiaries. The six (6) beneficiaries concerned were listed as:

- a. Ruth Wanjiru Muiruri – Widow
- b. Moses Wainaina Muiruri – Son
- c. Joseph Mwaniki Muiriri – Son
- d. Esther Njeri Mburu – Daughter

e. Ann Wangui Muthee – Daughter

(f) Daniel Njenga Muiruri – Son

A total of eight (8) assets comprised the estate of the deceased. They were all listed but what concerns us here is a commercial property situate in Thika Municipality. The ruling under review stated thus as regards that asset:

“(f) LR No. Thika Municipality No.4953/47, shall be valued by a valuer to be agreed upon by counsel of the parties herein or if there is no agreement the court shall appoint one. After the valuation, the said property shall be sold at the value or more and the proceeds from it divided equally between (sic) the six (6) beneficiaries of the estate of the deceased. For the avoidances of doubt Daniel Njenga Muiruri, Moses Wainaina Muiruri and Joseph Mwaniki Muiruri shall have the first right to purchase the same. The right must be exercised within ninety (90) days of the valuation of the property or in default the property shall be sold to any willing party.

(g) (i)

(j) Mention on 30th May, 2012 to confirm the appointment and the terms of reference of the valuers.”

An order was duly issued on 27th June, 2013. On 10th May, 2013 the present appellants lodged in the High Court a notice of appeal against the decision of the learned Judge and on 9th July, 2013 the notice of motion was filed in this Court under **Rule 5(2)(b)** of the Court’s Rules, with the main prayer:

i. That there be a stay of execution of the ruling of 7th May, 2013 pending the hearing and determination of the appeal herein, namely, Civil Appeal No.141/2013.

The grounds on which the said motion was based, the contents of the supporting affidavit thereof sworn by one of the appellants, **Daniel Njenga Muiruri**, and the arguments by **Mr. Masake**, learned counsel of the appellant/applicants were to the effect that the appeal was arguable and if the stay orders sought were not granted and eventually the appeal succeeded, the appeal would be rendered nugatory.

When the application was called out for hearing only **Mr. Masake** was present while **Mr. Waiganjo** learned counsel for the respondents did not appear. The affidavit of service returned and filed showed that **Mr. Waiganjo** was duly served with the hearing notice, but being absent **Mr. Masake** proceeded to argue the application.

Counsel told us that if the subject property, **Thika Municipality No.4953/471** was sold as ordered by the High Court the mother of the deponent, **Daniel Njenga Muiruri**, namely, **Ruth Wanjiru Muiruri**, would greatly suffer economically, because the said property was the only source of income on which she depended, being an elderly and sickly person. We heard further that the two respondents, daughters of Ruth and thus sisters of the deponent, were married. They lived away in their homes without caring for their mother.

As to the arguable appeal that will be presented **Mr. Masake** told us that the appellants would present a point of law based on **Section 28 of the Law of Succession Act** to the effect that the learned Judge failed to take in regard some peculiar aspects affecting the estate, when he delivered his decision. The alleged peculiar aspects were not stated at all. There being no draft memorandum of appeal on record **Mr. Masake**, nonetheless, implored us to find that the appellants had an arguable appeal and if the stay orders were not granted it would be rendered nugatory. The applicants did not place C.A. 141/2013 before us to glean from it the intended grounds of appeal. Neither was it explained to us why the widow, **Ruth** could not bring this motion herself or file an affidavit in support of the prayers therein.

In determining an application under **Rule 5(2)(b)** of our Rules, this Court has stated in many past

decisions that the applicant has to satisfy two conditions in order to be granted a stay of execution or issuance of an injunction pending appeal. The first condition is to present an arguable appeal at this stage. The next condition is to show the Court that if the orders sought are not granted the appeal, if it eventually succeeds, will be rendered nugatory.

Whether the appeal is arguable or not raising even a single bona fide ground raised is sufficient. (See ***Damji Pragji Mandavia vs Sara Lee Household & Body Care (K) Ltd Civil Application No. Nai.345/2004***). The appeal need not be one that must necessarily succeed, but one which ought to be argued fully before the Court and one which is not frivolous.

In the present matter, no attempt was made to place before us any grounds of appeal to determine whether they were arguable or not. The applicants did not favour us with any memorandum of appeal in any form and so we were unable to determine whether they had an arguable appeal. Neither did the motion on its face nor the supporting affidavit in its body mention any such ground.

In that state of affairs even as **Mr. Masake** argued that if we do not grant the stay orders the appeal could be rendered nugatory, there was no ground to go that far without presenting an arguable appeal. He contended that if the subject property was sold, that would mean economic prejudice to the widow (**Ruth**) but without placing before the court how such prejudice could befall her. The rents paid to her were not disclosed, neither was the value of the property itself stated. In any event she is one of the beneficiaries of the sale that Kimaru J. ordered. Then there are other beneficiaries including the respondents, definitely eager and waiting for their share of the sale proceeds. They filed replying affidavits opposing the motion.

Therefore, we find that the applicants have not shown that they have an arguable appeal, which will be rendered nugatory if the stay orders are not granted.

In sum we dismiss this application and direct that each side bear its own costs. They should then move to argue their Civil Appeal No.141/2013.

Dated and delivered at Nairobi this 24th day of October, 2014

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR