IN THE COURT OF APPEAL
AT NYERI
(CORAM: BOSIRE, WAKI & AGANYANYA, JJ.A.)
CIVIL APPLICATION NO. NAI. 337 OF 2009 (UR 232/09)

BETWEEN

FREDRICK MUKUA NJIGORU ………………..……... APPLICANT

AND

KUDJETA WAMUGO NJIGORU ……………………. RESPONDENT

(An application for stay of execution pending the lodging, hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Embu (Karanja, J) dated 24th September 2009 in

H.C. SUCC. CAUSE NO. 280 OF 2007
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RULING OF THE COURT

The parties in this application are joint administrators of the estate of **Njigoru Muya Katheri**, the deceased. Among the properties comprised in the deceased's estate is plot **No. 330** Embu Township from which rental income is receivable. The property is presently registered in the parties' joint names, but Fredrick Mukua Njigoru, was as at 24th September, 2009 managing the property and all rents from it were being paid to him.

By an order dated 12th March 2009 the High Court at Embu, ordered him to file a statement of accounts for the period 1996 up to the date of that order. He was granted 45 days to do so. It is quite clear from the scanty material before us that he did not comply with that order. Consequently he filed an application in the same court seeking an extension of time to do so. The application was called up for orders on 18th June 2009, when Mr. Njiru Mbogo, counsel then on record for Kudjeta Wamugo Njigoru, the respondent in the motion before us, informally applied for the management of the property to be given to her. Learned counsel, submitted, ***inter alia***, that the property was at risk of being auctioned for non-payment of money owed because the applicant, as manager, was not honouring a loan repayment arrangement. Mr. Okwaro, who was on record for the applicant responded that a formal application in that regard was necessary to enable him know how to respond to the request.

The Judge seised of the matter, W. Karanja J., without much ado made the following order:

"COURT: I appreciate that Mr. Njiru is making an informal application from the bar. I have nonetheless seen the statements in question. It is clear that the deceased's estate is not doing very well and is at the rise *(sic)* ***of auction. The property in question was left to the executor administratrix. If the same continues to be wasted the loss is hers and definitely not on the co-executor. In all fairness let her be given her estate. If she runs it down then she has nobody to blame. I will therefore in the***

interest of justice order that the management of the property in question reverts to the executrix immediately even as the rest of the issues are being sorted out. I do not need to be formally moved to make that order given the circumstances surrounding this matter and the risk of having executrix thrown out of her home."

It is the above order which the applicant, by this application, expressed to be brought under **rules 42**, and **52** (but we believe rule **5(2)(b)** was intended) of the Court of Appeal Rules, wants stayed, pending the hearing and determination of an intended appeal against it. A similar application made before the High Court was dismissed and that notwithstanding **rule 5(2) (b)** of this Court's Rules confers original jurisdiction to grant the order such dismissal notwithstanding. The principles which guide the court in applications under the aforesaid rule are two fold. First, to succeed the applicant must show his appeal or intended appeal is arguable. Secondly, and in addition, that unless he is granted a stay or injunction as the case might be, his appeal or intended appeal if successful, would be rendered nugatory.

Mr. Waweru for the applicant in his submissions before us stated that the applicant has already lodged his appeal, to wit **Civil Appeal No. 320 of 2009**, and the applicant needs an order of stay to obviate the management of the property going to the respondent. The applicant would want to continue managing the property; otherwise an independent estate manager should be appointed to manage it.

Mr. R.N. Mugo, advocate appeared for the respondent. Curiously he stated that he did not have a copy of the application with him, and contended that the respondent's erstwhile advocate had not given him the copy which had been served on him by the applicant's counsel. The learned advocate conceded that he had not taken any steps to obtain a copy thereof from the court or from the applicant's counsel. And so when he informally applied for adjournment on that account the request was promptly declined. Thereafter all he said was that the applicant's appeal is a non-starter as no leave to appeal had been sought or obtained before the appeal was filed. But whether or not the aforesaid appeal is a non-starter, shall be a matter for the bench that will eventually hear it.

The main ground raised for challenging the aforesaid order was that it was made when the matter was listed to come for mention and without affording the applicant ample opportunity to respond to it and without prior notice of the intention to apply for transfer of the management of the property from him to the respondent. That ground clearly raises an arguable point, namely whether or not the court could, in the circumstances properly make the order as it did.

On the nugatory aspect, both parties are administrators of the estate of the deceased, and as the matter stands we are not furnished with the evidence as to why the applicant was initially appointed as manager of the property. The learned Judge's order as worded, suggests that the applicant has no interest in the property and only the respondent stands to lose if the administration of the property is not given to the respondent. A copy of the certificate of lease shows that both parties are proprietors of the leasehold interest, by way of transmission. The applicant has been managing the property since 1982, as is ***prima facie,*** apparent from the certificate of lease. Considering the nature of the relationship between the parties, the length of time the applicant has been managing the property, and in view of the circumstances under which the impugned order was made, the balance of convenience is in favour of letting the applicant continue managing the estate. He has to file monthly accounts in court showing the money receivable, how much he receives each month and the disbursements. The accounts must be filed by the 15th of each succeeding month, with a copy to the respondent. In default of filing any one instalment of the Accounts the High Court shall be at liberty to appoint an independent manager to manage the property on payment to him of fees at the rate ordinarily payable in the area. The costs of this motion shall abide the outcome of **Civil Appeal No. 320 of 2009**.

Dated and delivered at Nyeri this 2nd day of December, 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR