



IN THE COURT OF APPEAL
AT NYERI
(CORAM: OMOLO, GITHINJI & NYAMU, J.J.A)

CIVIL APPLICATION NO. NAI. 196 OF 2010 (UR. 140/2010)

BETWEEN

MWONGERA MUGAMBI RINTURI 1ST APPLICANT
FESTUS GUANTAI MUGAMBI 2ND APPLICANT

AND

JOSPHINE KAARIKA 1ST RESPONDENT
FLORENCE IMATHIU 2ND RESPONDENT
ADVENTURE TECHNOLOGY CO. LTD. 3RD RESPONDENT

(An application for injunction and Stay of Orders under rule 5 (2) (b) Court of Appeal Rules in the intended appeal against Ruling/Orders of High Court of Kenya at Meru (Kasango, J) dated 28th May, 2010

in

H.C. Succession Cause No. 213 of 1997

RULING OF THE COURT

This is a **rule 5 (2) (b)** application brought by the two applicants seeking an injunction and stay orders against the ruling of the High Court of Kenya (Hon. Lady Justice Mary Kasango) dated 28th May, 2010.

The ruling of the High Court granted the following orders!

(1) I hereby annul the grant issued to Festus Guantai Mugambi and Stephen Mwongera Mugambi Rinturi.

(2) I hereby appoint Florence Kinaitore Imathiu and Josephine Kaarika as joint administratrixes of this estate. To that end, I order a grant to be issued to them.

(3) I order that the grant issued to Florence Kinaitore Imathiu and Josphine Kaarika be confirmed in terms of the judgment of 1st April, 2009.

(4) There shall be no orders as to costs in respect of the Chamber Summons dated 16th July, 2009

The factual background to this matter is that when the late Perminus M'Mugambi Rinturi died in 1985, a Succession Cause No. 396 of 1987 pertaining to the deceased's estate was instituted. By a consent order recorded by the High Court (Juma, J.) on 9th July 1998 Mr Charles Guchera Mugambi, Grace Nkoroi

M'Mugambi and Mwongera Mugambi were appointed joint administrators of the estate. The Succession Cause dragged on for 22 years due to the institution of many interlocutory applications. However, on 17th September, 2007 the first set of administrators were by a further consent order replaced by two joint administrators namely, Festus Guantai Mugambi and Stephen Mongera Rinturi. Thereafter an application was filed in court to revoke the appointment of the two administrators and to replace them with Josphine Kaarika and Florence Imathiu and by a ruling dated 18th May, 2010 the two administrators were replaced as set out in the above orders by Lady Justice Kasango. It is this order that the application before us seeks to stay. However, by a further order dated 21st July 2011 Florence Kanaitore Imathiu was appointed as a sole administrator by Lady Justice Kasango. Prior to the 18th May 2010 application, the Honourable Mr. Justice Emukule by a judgment dated 1st April 2009 had given a judgment in the Cause, the substance of which was to distribute the estate to two houses of the deceased and to another which the Judge called "*the shadow house.*"

The reasons given for the revocation of the appointment of Festus Guantai Mugambi and Sephen Mwongera Rinturi were inactivity and failure to account and to administer the estate.

When the application for stay came for hearing before us the applicants were represented by Mr. Kioga, advocate. The 1st and 2nd respondents were represented by A. G. Riungu, advocate and Gikunda Anampiu, advocate respectively.

In brief, Mr. Kioga's submissions were to the effect that the two administrators were intermeddling with the estate by selling some of the properties owned by the deceased and if stay orders were not granted the intended appeal could be rendered nugatory. In particular, Mr. Kioga submitted that any transfer of properties would defeat the intended appeal.

On his part, Mr. Riungu submitted that the application for stay had been overtaken by events, namely the fact that the deceased's estate had already been distributed pursuant to the orders made in the comprehensive judgment of Emukule, J on 1st April, 2009 and secondly, by a further ruling of 21st July, 2011 by the Hon. Lady Justice Kasango, in which she appointed Florence Kinaitore Imathiu as the sole administrator and thirdly, by the fact that following the distribution, the properties were being transmitted to the beneficiaries and the process was expected to be finalized within a few weeks.

We have considered rival submissions are set out above. We agree with Mr. Riungu, the learned counsel for the 1st respondent that if any orders of stay or injunction were given they would affect the distribution and transmission of the estate's assets to the detriment of the beneficiaries of the estate in a situation where the administration has taken over 22 years. In addition, what is before us is not a challenge to the judgment of 1st April, 2009 or the latest ruling on administration, namely, the order dated 21st July, 2011 appointing Florence Kinaitore Imathiu as the sole administrator. In other words, it has not been demonstrated to us that there were any pending appeals against the said judgment and ruling. In the circumstances, we are of the view that this Court should decline to grant orders which cannot be enforced because they have been overtaken by events or give orders which could result in subverting other valid orders of other competent courts. In the light of the above reasons, we consider that the applicants have not demonstrated that they have an arguable appeal and no draft memorandum was exhibited or clear reasons given that there is an arguable appeal in the face of what appears to have been a thirteen year inaction by the respondents to account and to distribute the estate leading to the revocation of their appointment, and culminating in the appointment of Florence Kinaitore Imathiu in July 2011 as a sole administrator. In addition, it has also not been demonstrated that the intended appeal was likely to be rendered nugatory since there is nothing to show that the judgment on distribution has been challenged by way of appeal. Furthermore, the current position is that there is only a sole administrator who is doing distribution and transmission of the assets to the beneficiaries as set out in the judgment of the honourable Mr Justice Emukule and the judgment itself is not under challenge in the intended appeal.

The above notwithstanding, it is our view that, we are, above all, required to approach the application for stay with a sense of proportionality and balance. Thus, we think it would be disproportionate to grant a stay or an injunction on the application of the two applicants or beneficiaries and stop a process which

has the support of the majority beneficiaries of the estate estimated to be over 30 in number. It has also not been demonstrated that all the other beneficiaries are not happy with their shares as ordered in the judgment of the Honourable Justice Emukule. Besides the well known requirements under **Rule 5(2)(b)**, as a Court, we have a statutory duty to apply the overriding objective in the matter before us. The critical issues discussed above demonstrate that the administration of this estate has been going on since 1985 and it is only in the recent past, following the appointment of the current administrator in the last one or two years, that some progress by way of distribution and transmission has been recorded. We have no doubt that the effect of a stay order would stall the progress achieved so far, and the intended beneficiaries who have been waiting for finality for over two decades frustrated further by it. We think that in the circumstances, the principle of proportionality which is one of the aims of the overriding objective demands that we tilt the scales in favour of the greatest number of the beneficiaries by refusing a stay. Furthermore, a stay order would occasion considerable delay, which in the circumstances would go counter to the overriding objective of according the proceedings expeditious disposal.

All in all, we are of the view that it would be unjust to grant the application. The application is hereby dismissed. We order that the costs shall be in the appeal. It is so ordered.

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

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR