IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO.87 OF 2008 (UR 50/2008)

RUTH NYAMBURA CHUCHU……….............................….....….……….1ST APPLICANT

ZIPPORAH WANGUI CHUCHU……............................……….………..2ND APPLICANT

FLORENCE NJERI CHUCHU………...............................……..……….3RD APPLICANT

AND

STEPHEN MUNGAI GITHU alias STEPHEN GATHOGA CHUCHU……RESPONDENT

(*An application for stay of execution of orders of the ruling and/or order of the High Court of Kenya at Nairobi (Gacheche, J) dated 8th April 2008*

in

H.C.Succession Cause No. 1379 of 2006)

****

RULING OF THE COURT

Ruth Nyambura Chuchu (*hereinafter Ruth*), **Zipporah Wangui Chuchu** (*hereinafter Zipporah)* and **Florence Njeri Chuchu** (*hereinafter Florence*), have moved this Court by Notice of Motion application dated 7th May 2008 filed under **Rule 5(2)(b)** of the Court of Appeal Rules, praying for orders that:-

"(a) …………………………………

(b) THAT upon hearing interpartes the execution of the ruling and orders of Hon. Lady Justice Jeanne Gacheche made on the 8th day of April 2008 be stayed pending hearing and determination of the intended appeal to this court against such orders.

(c) THAT the costs of this application be provided for.

WHICH APPLICATION is based on the grounds:-

(i) THAT the applicants herein were and are still dissatisfied with the ruling and/or orders made on 8th April 2008 and have since then lodged a Notice of Appeal to the Court of Appeal challenging the entire ruling and/or order which Notice was lodged on 10th April, 2008.

(ii)   THAT the ruling and the orders of 8.4.2008 is fundamentally flawed and an Appeal to this court raises fundamental point of law and fact to wit:-

(a)   Whether or not a court of law can issue orders against persons not parties to the proceedings

(b)   Whether or not the court had jurisdiction to issue orders not sought for, argued and/or canvassed.

(c)   Whether or not the ruling of 8.4.2008 was a ruling ***stricto sensu*** *on the application before the court dated 27.11.2006.*

(iii) THAT the intended appeal is not frivolous and if stay is not granted the appeal if successful may be rendered nugatory.

The three applicants are widows of the late **Solomon Chuchu Wataku** *alias* **Chuchu Wataku Gathimba**, (*deceased*) who died on 9th March 2006. They petitioned the superior court for a grant of letters of administration intestate to the estate of the deceased, and were issued with a temporary grant on 25th September, 2006. The same has not been confirmed.

On 27th November 2006, one **Stephen Mungai Githu**, *alias* **Stephen Gathoga Chuchu** (*hereinafter the objector*), filed in the superior court, "**Summons for Revocation or Annulment of Grant**". He wanted the temporary grant revoked (or annulled) on the grounds that:-

"1. The Administratrix fraudulently concealed from the court the existence of the applicant as the son and heir of the deceased with equal priority.

2. The Administratrix are advanced in years and may not proceed diligently with the very vast estate.

3. There appears to be no willingness to grant the applicant his proportionate share of the estate as the heir of the deceased".

The application was supported by his affidavit dated 27th November, 2006, in which he averred, *inter alia*, at paragraphs 5 and 6 thereof,

"5. THAT I bring this application as the son of the late SOLOMON CHUCHU WATAKU and seek for the revocation of the grant and a re-issue of the same to include myself as the son of the deceased.

6. THAT prior to his demise the deceased recognized and accepted me as his son although he did not marry my mother, Abigael Nyachoba".

The objector's averments were denied by Ruth in her replying affidavit dated 9th March 2007, sworn on her own behalf and on behalf of Zipporah and Florence.

The superior court (Gacheche, J) after considering the submissions of the advocates representing the parties herein on 10th March 2008, delivered a ruling on 8th April 2008, which reads in part:-

"STEPHEN MUNGAI GITHU who I shall now refer to as '*the applicant*' has deposed that though the three petitioners and other family members who knew him well and who regarded him as a son to the deceased had initially agreed to accommodate him as one of the beneficiaries to the estate, the three were later to renege on their agreement and that they concealed the material fact in their petition thereby denying him his rightful share of the estate.

The three have denied his claim in its entirety.

I have considered the pleadings herein. I have taken the submissions of both counsel into account and as I discern it, the main issue for determination is whether this applicant who also claims that he was a dependant of the deceased, was a son of the deceased and if so whether he should benefit from the estate.

As stated earlier the applicant had deposed that the family of the deceased had initially agreed to accommodate him as a beneficiary, which fact has not been specifically controverted by the three.

Be that as it may, both parties have deposed at length on the issue of paternity, but in my humble opinion, an issue of paternity such as the one before me may not be easily determined conclusively from affidavit evidence.

The applicant has also deposed to the effect that he would be willing to undergo a DNA test to prove his filial relationship with the deceased. One of the petitioners who deposed in reply on behalf of the other two has not opposed the idea.

But even if he had not offered to undergo the test, I am aware that the court is by virtue of sections 22 and 23 of the Civil Procedure Act, empowered to act on its own motion and to call a witness to give evidence or to produce documents or other material objects, and in my humble opinion, and in the interests of justice I do order that the applicant do undertake a DNA test which should determine his paternity conclusively. The petitioners shall be therefore (*sic*), be required to nominate five named sons of the deceased who shall offer samples for the said test. The names of the said five who must be local residents shall be supplied to court within the next seven days.

Dated and delivered at Nairobi this 8th day of April 2008.

JEANNE GACHECHE

JUDGE"

The applicants were aggrieved by the superior court's ruling and hence their application to this Court as already stated.

During the hearing of the application before us, Mr. Njuguna, learned counsel for the applicants, submitted that the applicants have an arguable appeal because the learned judge of the superior court never made a ruling after having heard arguments of the advocates representing the parties. He posed the question, "Were the orders granted by the Judge consistent with the application before her?" He wondered whether **sections 22** and **23** of the Civil Procedure Act relied on by the learned Judge in her ruling, had any relevance in this matter, and submitted further that for a court to order a party, who is not a party to the proceedings to take a DNA test, is clearly a misdirection.

On the nugatory aspect, Mr. Njuguna submitted that if a stay is not granted, the superior court's order directing that a DNA test be taken will have been effected, and this cannot be reversed, if the appeal succeeds. He saw no prejudice which the objector is likely to suffer if a stay is granted.

Mr. Mwaniki, learned counsel for the objector opposed the application for a stay of the orders of the superior court, and submitted that his client volunteered in the superior court to undergo a DNA test to prove that he was a son of the deceased. That in the circumstances, the learned Judge was right in ordering him to undergo a DNA test as well as, "five named sons of the deceased who shall offer samples for the said test", as this was the second best option, in the absence of the deceased.

Mr. Mwaniki submitted further; that none of the "*five named sons of the deceased*", have challenged the learned Judge's order on the taking of a DNA test and that it is the applicants who are aggrieved, yet the order was not directed to them. He said that this makes their appeal not arguable so it cannot succeed.

The Notice of Motion having been brought under **rule 5(2)(b)** of this Court's Rules, it is trite law that

whoever seeks orders under that rule must satisfy the Court on two principles, namely that the appeal or intended appeal is arguable, i.e. that it is not frivolous, and secondly, that if the application is not allowed, the success of the appeal or intended appeal as the case may be will be rendered nugatory. Both principles must be satisfied for the order to issue.

From the pleadings on record, the ruling of the learned judge and the submissions of the applicants' counsel, we are satisfied that the intended appeal is indeed arguable. Furthermore, we are in agreement with Mr. Njuguna, learned counsel for the applicants that if the five named sons of the deceased undergo DNA tests as ordered by the learned Judge, this would be irreversible, so that even if the intended appeal succeeds, the same would be rendered nugatory. The applicants have therefore satisfied the two principles required in an application under **rule 5(2)(b)** of the Court of Appeal Rules. In the result, we allow the application dated 7th May 2008, and order a stay of execution in terms of prayer **(ii)** of that application.

The costs of the application shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 24th day October of 2008.

E. O. O'KUBASU

………………………………

JUDGE OF APPEAL

E. M. GITHINJI

……………………………..

JUDGE OF APPEAL

J. ALUOCH

…………………………….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR