REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 41 of 2006

FRESIAH MUGURE MAINA ……..……. 1ST APPLICANT

JOSEPH SANGALE MAINA ……..……. 2ND APPLICANT

PETER KIMANI MAINA ……..…….……. 3RD APPLICANT

JOSEPH LEMAIYAN MAINA ……..……. 4TH APPLICANT

AND

JOSEPH TOBIKO PERTET ……..……... 1ST RESPONDENT

STEPHEN LEIYAN PERTET ……..……. 2ND RESPONDENT

(Application for stay of execution pending appeal against the Ruling of the High Court of Kenya at Nairobi (Lady Justice Martha Koome) dated 3rd February, 2006

in

H.C.SUCC. CAUSE NO. 1525 OF 2000)

****

RULING OF THE COURT

This is an application under ***rule 5(2)(b)*** of the Court of Appeal Rules (the Rules) in which the four applicants (***Fresiah Mugure Maina***, ***Joseph Sangale Maina***, ***Peter Kimani Maina*** and ***Joseph Lemaiyan Maina***) are seeking a stay of execution of the ruling by the superior court (Koome, J.) delivered on *3rd February, 2006*. This application is brought on the following grounds:-

"***1. The applicants have filed an appeal.***

2. The applicants have an arguable appeal.

3. If the ruling is not stayed, the intended appeal shall be rendered nugatory as the substantive (sic) shall have been eroded.

4. The respondents are in the process of sealing the Will and distributing the estate."

In support of the application was an affidavit sworn by ***Fresiah Mugure Maina***, the 1st applicant, who

stated that she had been duly authorized by the other three applicants, to swear on their behalf.

The dispute herein started as a *Succession Cause No. 1525 of 2000* in the matter of ***the Estate of Maina Ole Peret*** in which ***Joseph Tobiko Pertet*** and ***Lemaiyan Pertet*** (the respondents in this application) petitioned the High Court for the Grant of Probate of the written will of the late Maina Ole Pertet who died on the *23rd April, 2001*. The applicants herein filed objection to the said petition and filed an answer to the petition. They cross-petitioned for the Letters of Administration interstate in their capacity as widow and sons respectively of the deceased. The matter in the High Court was determined by way of oral evidence. In our view, the main issue before the superior court was whether the will allegedly made by the deceased was valid or not. The applicants took the position that the will was not valid as the deceased was not only impaired by old age but was also very sick and hence could not make a testamentary disposition. The learned Judge of the superior court considered all the evidence placed before her and proceeded to state as follows:-

"***As the law states that the burden of proving that the WILL was not properly drawn, executed and the capacity of the deceased to make a WILL lies with the objectors, they ought to have summoned the said Advocate in court to cross-examine him on whether he witnessed the deceased signature. Secondly, if they did not desire to call the said Advocate, there was no evidence that was availed from a hand-writing expert to controvert the signature of the deceased and that of Mr. Njenga Mwaura Advocate.***

I also looked at the medical report by Professor Lule and the evidence taken in court. This witness does not certify that the deceased was not in full control of his mental faculties.

Having so stated, the learned Judge held that the will was valid. The learned Judge then proceeded to make what she considered to be reasonable provisions for the 1st applicant by ordering that *she (1st applicant)* be given ***one (1) acre*** and ***Shs.100,000/=*** out of the deceased's estate.

Being dissatisfied by that decision, the applicants filed a notice of appeal on *7th February, 2006* followed by this application for stay of the orders of the superior court.

The application for stay of execution was argued before us on *2nd May, 2006* when Mr. Njuguna, the learned counsel for the applicants, urged us to grant the orders of stay. He relied on the affidavit of the 1st applicant and the draft Memorandum of Appeal. It was Mr. Njuguna's submission that his clients had an arguable appeal.

On the nugatory aspect of the intended appeal, it was Mr. Njuguna's view that if stay was not granted, the appeal would be rendered nugatory as beneficiaries to the land may sell it which would be difficult or impossible to recover in the event that the appeal is successful.

Mr. Mukoma, the learned counsel for the respondents, opposed the application by relying on the replying affidavit of the 1st respondent. It was Mr. Mukoma's contention that the intended appeal was not arguable as the will could not be challenged since the doctor who had been treating the deceased had found the deceased to be normal. Mr. Mukoma reminded us that it was only the 1st applicant who asked for provision to be made while the other applicants did not ask for anything.

The jurisdiction exercisable by this Court under ***rule 5(2)(b)*** of the Rules is now settled. It is original and discretionary. For the applicants to succeed, they must satisfy the twin guiding principles that the intended appeal is not frivolous or is arguable and that unless a stay is granted, the appeal or intended appeal if successful, would be rendered nugatory:- See ***GITHUNGURI V. JIMBA CREDIT CORPORATION LTD (No.2) [1988] KLR 838 J.K. INDUSTRIES LTD V. KENYA COMMERCIAL BANK LTD (1982-88) 1 KAR 1688*** and ***RELIANCE BANK LIMITED (IN LIQUIDATION) V. NORLAKE INVESTMENTS LIMITED – Civil Application No. 98 of 2002 (unreported)***

We have considered the rival submissions of counsel who appeared before us and as we have endeavoured to show, the dispute relates to the estate of one, Maina Ole Pertet. The deceased made a will

which was challenged by the applicants, who were of the view that he *(the deceased)* was not only impaired by old age but was too sick to make a testamentary disposition. The respondents were, of course, of the contrary view that the deceased made a valid will. Having considered the way the learned Judge dealt with the matter we remind ourselves that this is not the appeal and we must therefore avoid the temptation of expressing views as to the success or otherwise of the intended appeal. But assuming that the intended appeal is arguable, how would it be rendered nugatory if this application for stay of execution is refused? There was an order to the effect that *one acre of land* and *Shs.100,000/=* out of the estate be given to the widow, ***Fresiah Mugure Maina***. It is interesting to note that Fresiah Mugure Maina is the 1st applicant in this application. It is also to be noted that the deceased had provided for all the children although not equally. For these reasons, we do not see how refusal of this application would render the intended appeal nugatory. There is no evidence placed before us to show that any of the beneficiaries intends to dispose of his share of the land apart from Mr. Njuguna's bare assertion that it is possible they may do so.

For the foregoing reasons, we find that this application lacks merit and we order that the same be and is hereby dismissed. Since this is a family dispute, we order that the costs of the application shall abide the intended appeal. These shall be our orders.

Dated and delivered at Nairobi this 5th day of May, 2006.

R.S.C. OMOLO

…….

JUDGE OF APPEAL

E.O. O'KUBASU

…….

JUDGE OF APPEAL

W.S. DEVERELL

……

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR