



IN THE COURT OF APPEAL
AT NAIROBI
CORAM: GICHERU, OMOLO & KEIWUA, JJ.A.
CIVIL APPLICATION NO. NAI 209 OF 2001 (109/01 UR)

BETWEEN

PETER KAMAU NJUGUNA APPLICANT

AND

STEPHEN MAGICHU }

JOSEPH WARARI }..... RESPONDENTS

JULIUS NJOROGE }

FRANCIS MAGICHU }

(Being an application for stay of judgment of the High Court of Kenya at Nairobi (Ang'awa J)
dated 3rd December, 1998

in

SUCC. CAUSE NO. 1014 OF 1993)

RULING OF THE COURT

We readily agree with Mr Kariuki for the applicant that in an application for stay under **Rule 5 (2) (b) of the Court's rules**, the two principles the court applies are that:-

(i)the appeal or the intended appeal is one which is arguable and

(ii)unless the stay sought is granted, if the appeal or the intended appeal were to succeed, that such success would be rendered nugatory.

The order made by Ang'awa, J. on 23rd December, 1998 and which the applicant wants us to order a stay of was made in **Succession Cause No. 1014 of 1993** . The order concerned land known as **GITHUNGURI/IKINU/320** , and the same is registered in the name of the applicant, **Peter Kamau Njuguna** . Ang'awa, J., however, found in her judgment that the land in dispute formed part of the estate of the late Njuguna Kibuthu, and consequently though the applicant was registered as its owner, he was so registered as a trustee for the rest of the family of the late **Njuguna Kibuthu**. That is the decision the applicant wishes to challenge on appeal and we are told the applicant has already lodged his appeal pursuant to the extension of time granted to him on 23rd March, 2001, by a single member of this Court. Mr Mburu for the respondents, insisted before us that the appeal already filed is incompetent because it

was filed outside the time as extended by O'Kubasu, J.A. on 23rd March, 2001, but we do not think we can determine within the current motion the validity or otherwise of the appeal, particularly in view of Mr Kariuki's spirited contention that the appeal was filed within the time enlarged by the Court.

We must, however, not lose sight of the fact that though Ang'awa, J. has ruled that the disputed land forms part of the estate of the late Njuguna Kibuthu, the distribution of the estate the land included, can only be done in accordance with the provisions of the **Law of Succession Act Cap 160 of the Laws of Kenya. Section 71 (1) of that Act** states:

"After the expiration of a period of six months, or such shorter period as the court may direct under sub - section (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets."

Land is obviously a capital asset and before the grant made to Peter Kamau Njuguna (the applicant), Stephen Magichu and Francis Magichu Njuguna is confirmed, by the superior court which issued it, the three persons to whom the grant was made have no legal authority to distribute the capital assets left behind by Njuguna Kibuthu. Mr Kariuki for the applicants admits as much and he further agrees that the grant of letters of administration has not in fact been confirmed.

But Mr Kariuki says that in spite of the fact that the capital assets of the estate cannot be distributed because the grant has not been confirmed, the respondents have nevertheless moved onto the land and have sub-divided it or are intending to sub-divide the same. Our view of the matter is that the judgment of Ang'awa, J. dated the 23rd December, 1998 does not authorise the doing of any of the things allegedly being done. Naturally, there is nothing to stop the parties agreeing on the sub-division to enable the superior court know the respective identities and shares of all persons beneficiary entitled to the estate - see the proviso to **Section 71 (2) of the Act** . But identifying shares is not the same thing as taking over those shares. Shares can only be taken over after the grant has been confirmed and in this case it is admitted that no confirmation has taken place. If the respondents are acting contrary to law, then the proper forum for such complaints is the superior court whose orders the respondents would be breaching. What we are saying is that in the absence of confirmation of the grant of the letters of administration the orders made by Ang'awa, J. are incapable of being executed and, accordingly, there is really nothing for us to stay. That being so, the question of an arguable appeal whose success will be rendered nugatory does not really arise.

The law does not allow the respondents to execute the orders of Ang'awa, J. when the grant of letters of administration has not been confirmed. In our, view, this application is unmerited and we order that it be dismissed. We, however, make no order as to its costs.

Dated and delivered at Nairobi this 13th day of July, 2001.

J. E. GICHERU

JUDGE OF APPEAL

R. S. C. OMOLO

JUDGE OF APPEAL

M. OLE KEIWUA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR