



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

APPLICATION NO. E050 OF 2023

– BETWEEN –

FATUMA ATHMAN ABUD FARAJ APPLICANT

– AND –

ROSE FAITH MWAWASI 1ST RESPONDENT

JUDITH MALELE MWAWASI 2ND RESPONDENT

MARLIN CORAM POWNALI 3RD RESPONDENT

(Being an application for stay of execution of the Judgment of the Court of Appeal (Gatembu, Nyamweya & Odunga, J.J.A.) dated 10th November, 2023 in Mombasa Civil Appeal No. E043 of 2023)

Representation:

Ms. Asli Osman for the applicant
(Ahmednasir Abdullahi Advocates, LLP)

Mr. Joseph Munyithya for the 1st and 2nd respondents
(Munyithya, Mutungi, Umara & Muzna Co. Advocates)

No appearance for the 3rd respondent

RULING OF THE COURT

[1] WHEREAS on 23rd January 2024 six (6) Justices of this Court, with *Ouko SCJ* being indisposed, in SC Petition No. 17 (E021) and 24 (E027) of 2022 (consolidated) -

Zehrabanu Janmohamed (S.C Suing as the Executrix of the Estate of the Late H.E. Daniel Toroitich Arap Moi) & Another vs. Nathaniel K. Lagat & 4 Others recused themselves from hearing any matters filed by the firm of M/S Ahmednasir Abdullahi Advocates LLP, or wherein Mr. Ahmednasir Abdullahi, SC appears either by himself, through an employee of his law firm, or any other person holding his brief, or acting pursuant to his instructions due to his persistent improper conduct towards the Court; and

[2] NOTING however, that prior to making the said order of recusal, this Court had on 23rd December 2023 issued interim *ex-parte* orders of stay of execution of the Court of Appeal judgment dated 10th November, 2023 in **Mombasa Civil Appeal No. E043 of 2023**, and stay of proceedings in **Mombasa HC Succession Cause No. 200 of 2015** pending the hearing and determination of the instant Motion, which orders have remained in force; and

[3] BEARING IN MIND that those orders were issued *ex-parte*, and the nature of the matter, we are constrained by necessity to proceed and make a full determination of this part-heard Motion. However, for the record, save for the present ruling and for the reasons above, our recusal in the ***Zehrabanu*** matter, shall apply with equal force to the main appeal being **SC Petition No. E035 of 2023** as long as the firm of M/S Ahmednasir Abdullahi Advocates LLP remains on record, or Mr. Ahmednasir Abdullahi, SC appears either by himself, through an employee of his law firm, or any other person holding his brief, or acting pursuant to his instructions; and

[4] COGNISANT that **Mombasa HC Succession Cause No. 200 of 2015**, was filed at the instance of Rose Faith Mwawasi (the 1st respondent) and Judith Malele Mwawasi (the 2nd respondent) following the demise of Salim Juma Hakeem Kitendo who died intestate on 22nd May, 2015; and that Fatuma Athman Abud Faraj (the applicant), the 1st respondent, and Marlin Coram Pownali (the 3rd respondent), not only claimed to be the deceased's widows, but also that their respective children are beneficiaries of the deceased's estate. However, the applicant disputed this claim contending, that the 1st respondent's marriage with the deceased was marred with

fraud while, on the other hand, the 3rd respondent lacked capacity to solemnise a subsequent marriage with the deceased on account of a previous subsisting monogamous marriage with another man. Furthermore, that one of the 1st respondent's children namely, SSJHK, was not sired by the deceased while the other three were born out of wedlock hence they were deemed as illegitimate children under Islamic law; and that the 3rd respondent's child who was born about six months after the celebration of her alleged marriage with the deceased was not entitled to the estate; and

[5] BEARING IN MIND that the High Court (*Onyiego, J.*), by a judgment dated 25th March, 2022 found that, the distribution of the deceased's estate was subject to Islamic law; only the applicant and the 1st respondent were the deceased's widows; the 1st respondent's first child, SSJHK (minor), was not a beneficiary to the estate; and where a child is born out of wedlock by a deceased male Muslim, he/she is entitled to be treated as a dependent or beneficiary of the deceased's estate by virtue of Section 29 of the Law of Succession Act (Cap 160 Laws of Kenya). Towards that end, the court issued the following orders:

“

i. *That it is hereby declared and ordered that the objector (the applicant herein) and the 1st petitioner (the 1st respondent herein) are widows of the deceased and therefore beneficiaries entitled to a share of the estate in accordance with Islamic sharia law. (sic)*

...

iii. *The children of the objector known as ASJM (Son), ASJM (Son), BSJM (Son) and MSJM (Daughter) being children born within wedlock are heirs hence beneficiaries to the estate entitled to a share in accordance with the Islamic sharia law. (sic)*

...

v. *The fate of the three children sired by the 1st petitioner and the interested party (the 3rd respondent herein) whose*

paternity is in dispute shall be subjected to a DNA test after extracting samples from their bodies and compared with those extracted from the bodies of at least two of the objector's children whose paternity is not in dispute. (sic)

vi. *For avoidance of doubt, the children to be subjected to DNA test are HSJK (child to the interested party), LSK, TSK and HK (children of the 1st petitioner).*

...

viii. *Parties to agree on which of the two children of the objector will donate DNA samples for examination before a mutually agreed laboratory. (sic)*

ix. *... a fresh grant do issue to the 1st petitioner and objector jointly.”; and*

[6] APPRECIATING that the applicant and the 3rd respondent challenged the High Court's decision in the Court of Appeal, **Mombasa Civil Appeal No. E043 of 2022**, and the said court (*Gatembu, Nyamweya & Odunga, J.J.A.*) by a judgment dated 10th November, 2023 (the impugned judgment) upheld the High Court's decision save for the issue of DNA testing. The appellate court found that the issue of DNA sampling had neither been raised by any of the parties nor should it have been the basis upon which the children's entitlement to the deceased's estate was determined. Accordingly, the court set aside the order relating to DNA testing and substituted it with an order that the applicant's, 1st and 3rd respondents' children are entitled to benefit from the estate of the deceased either as dependants or beneficiaries. The court also remitted the matter back to the High Court for determination of the respective entitlements of the beneficiaries; and

[7] UPON PERUSING the Notice of Motion dated 14th December, 2023 and filed on 18th December, 2023 by the applicant pursuant to Sections 21 & 23A(1)(a) of the Supreme Court Act (Cap 9B Laws of Kenya) and Rules 31 & 32 of the Supreme Court Rules, 2020 seeking *inter alia* orders that -

“ ...

- d) *THAT this Honourable Court be pleased to issue a stay of execution of the judgment and order of the Court of Appeal at **Mombasa Civil Appeal No. E043 of 2023** pending the hearing and determination of the applicant’s appeal against the said judgment.*
- e) *THAT this Honourable Court be pleased to issue an order for stay of proceedings at the **High Court Mombasa Succession Cause No. 200 of 2015** pending the hearing and determination of the applicant’s appeal.*
- f) *THAT this Honourable Court be pleased to issue any other order that it deems just and expedient.*
- g) *THAT the costs of the application be in the cause.”; and*

[8] UPON CONSIDERING the affidavit sworn by the applicant in support of the Motion and her submissions of even date to the effect that, she has filed an appeal before this Court, **SC Petition No. E035 of 2023**, challenging the impugned judgment; the said appeal is arguable as the Court of Appeal failed to appreciate the provisions of Article 24(4) of the Constitution and Section 2 (3) of the Law of Succession Act; in that, the distribution of the deceased’s estate is subject to Islamic law, and as such, illegitimate children cannot inherit from the said estate; the Court of Appeal totally misapprehended the fact that Article 27 of the Constitution which enshrines the right to equality and freedom from discrimination is subject to the limitation/qualification under Article 24(4) of the Constitution in so far as the distribution of the estate of a deceased Muslim is concerned; and that the Court of Appeal’s decision was tantamount to finding that Article 27 reigned supreme over the explicit provisions of Article 24(4) of the Constitution; and

[9] TAKING INTO ACCOUNT the applicant’s contention that the Court of Appeal had remitted the matter back to the High Court for distribution of the deceased’s

estate in terms of the impugned judgment, and in turn, the respondents have since filed an application dated 11th November, 2023 before the High Court for such distribution; therefore, she is apprehensive that the deceased's estate will be distributed before the appeal herein is determined rendering the appeal nugatory; that the issues raised in the appeal also have a significant bearing on public interest; and that the Motion had met the parameters for granting the orders sought as delineated in ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others***, SC Applic. No. 5 of 2014; [2014] eKLR (***Gatirau Munya Case***); and

[10] UPON EXAMINING the replying affidavit sworn by the 1st respondent on 30th April 2024, on her own behalf and the 2nd respondent, the gist of which is that following the High Court judgment, the said court (*Mutai, J.*) vide a ruling dated 3rd August, 2023 directed that school fees for the applicant's children as well as a monthly upkeep for the applicant in the sum of Kshs. 340,000 be drawn from the deceased's estate pending further orders of the court; that the said orders undermine the rights of the other beneficiaries to the said estate since only the applicant and her children are currently benefiting from the estate; that from August, 2023 to April, 2024 the applicant had collected a sum of Kshs. 2,720,000, excluding the amount paid as school fees for her children; the applicant seeks a blanket stay of the High Court proceedings, and there ought to be a balance between the rights of all the beneficiaries; and therefore, this Court should also stay the execution of the aforementioned orders of the High Court of 3rd August, 2023; and

[11] NOTING that on 23rd December, 2023 this Court issued *ex-parte* interim orders of stay of execution of the impugned judgment and stay of the High Court proceedings, ***High Court in Succession Cause No. 200 of 2015*** pending the determination of this Motion; and

[12] FURTHER NOTING that this Court's jurisdiction regarding issuance of interim orders in the nature of stay of execution and proceedings is aptly delineated under Section 23A of the Supreme Court Act; and that the rationale for such orders

is to preserve the subject matter of the appeal pending the resolution of the contested issues as appreciated in ***Board of Governors, Moi High School, Kabarak & Another vs. Bell & 2 Others*** (Petition 6 & 7 of 2013 & Civil Application 12 & 13 of 2012 (Consolidated)) [2013] KESC 12 (KLR); and

[13] UPON DELIBERATIONS on the Motion and the rival arguments, **WE OPINE** as follows:

- i. The parameters within which this Court may issue orders of stay of execution and proceedings are well settled. An applicant, in that regard, is required to establish that his/her appeal is arguable, and that unless the orders sought are granted, the appeal would be rendered nugatory in the event it succeeds. However, an additional criterion arises where the matter in question has a public interest connotation and in such a case, an applicant is required to also establish that it is in the public interest that the order of stay be granted. See ***Gatirau Munya Case***.
- ii. Having considered the grounds of appeal as advanced in this Motion as well as set out in the applicant's appeal, we find that the question of the interpretation of Article 27 *vis-à-vis* Article 24(4) of the Constitution as it pertains to the distribution of the estate of a deceased Muslim calls for our consideration. Therefore, without delving into other grounds and/or the merits of the applicant's appeal, we find that **SC Petition No. E035 of 2023** is arguable. See ***Kampala International University vs. Housing Finance Company Limited*** (Petition (Application) 34 (E035) of 2022) [2023] KESC 5 (KLR).
- iii. On the nugatory aspect, we are persuaded that the deceased's estate may be distributed in terms of the impugned judgment, the subject of the appeal before this Court, **SC Petition No. E035 of 2023**, which is pending determination. Consequently, we find that the applicant's appeal may be rendered nugatory unless the orders sought are granted. In any event, nothing

has been placed before us to demonstrate that any action(s) taken pursuant to the impugned judgment would be capable of being reversed should the appeal be successful.

- iv. Besides, we are alive to the fact that the determination of the issue(s) in dispute in the applicant's appeal will have a significant bearing on the distribution of the estates of Muslims who die intestate. In the circumstances, we are convinced that it is in the public interest to issue the orders sought.
- v. Be that as it may, we cannot overlook the 1st and 2nd respondents' contention that by dint of the High Court's ruling dated 3rd August 2023, the applicant and her children have solely been benefiting from the deceased's estate to the exclusion of other beneficiaries. Having weighed the said concern coupled with the fact that the applicant has not denied drawing such amounts from the estate despite the *ex-parte* interim orders issued by this Court, we find that it is necessary to strike a balance between the rights of all beneficiaries in order to preserve the estate as well to ensure equality of arms between the parties.
- vi. Consequently, we find that the Motion has met the threshold of granting the stay orders sought. In addition, we find that it is also in the interest of justice to issue an order staying further execution of the High Court's ruling dated 3rd August, 2023 with respect to monies being drawn out of the deceased's estate pending the hearing and determination of the appeal or further orders of this Court, as the case may be.
- vii. Taking into account the nature of this matter and this Court's decision in ***Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others***, SC Petition No. 4 of 2012; [2014] eKLR, we deem it just to order that each party bears their own costs.

[14] CONSEQUENTLY and for the reasons afore-stated, we make the following Orders:

i. The Notice of Motion dated 14th December, 2023 and filed on 18th December, 2023 is hereby allowed in the following terms:

a) An order of stay of execution of the judgment of the Court of Appeal in Mombasa Civil Appeal No. E043 of 2023 dated 10th November, 2023 is hereby issued pending the hearing and determination of SC Petition No. E035 of 2023.

b) An order of stay of the proceedings in High Court Mombasa Succession Cause No. 200 of 2015 is hereby issued pending the hearing and determination of SC Petition No. E035 of 2023.

c) An order of stay of further execution of the High Court ruling dated 3rd August, 2023 in High Court Mombasa Succession Cause No. 200 of 2015 is hereby issued pending the hearing and determination of SC Petition No. E035 of 2023 or further orders of this Court, as the case may be.

ii. Each party shall bear their costs of the Motion.

It is so ordered.

DATED and DELIVERED at NAIROBI this 18th day of October, 2024.

.....
M. K. KOOME

**CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT**

.....
P.M. MWILU

**DEPUTY CHIEF JUSTICE &
VICE PRESIDENT OF THE
SUPREME COURT**

.....
M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

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

REGISTRAR
SUPREME COURT OF KENYA

