

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CIVIL APPEAL NO. E099 OF 2023**

**IN THE MATTER OF THE ESTATE OF MARY MUTHONI KIBUNJA**

**(DECEASED)**

**HANNAH WANJUGU MUGO.....1<sup>ST</sup>**

**APPELLANT**

**HANNAH WANJIKU KIBUNJA..... 2<sup>ND</sup>**

**APPELLANT**

**VERSUS**

**MARY NJERI NJARAMBA .....**

**.....RESPONDENT**

**AND**

**SAMUEL KIRUTHU WANJIKU..... INTERESTED**

**PARTY**

**(Being an appeal from the ruling delivered on 28<sup>th</sup> November  
2023 in Loitokitok PM's Succession Cause No. 10 of 2020)**

**RULING**

1. The brief undisputed background to the motion dated 9.01.2024, as gleaned from the material on record, is as follows. **Mary Muthoni Kibunja** the deceased herein died intestate sometimes in 2019 while possessed of a parcel of land described as **Loitokitok/Emperon/ 1445 measuring 0.101 Ha** (hereafter the subject property). The deceased never married and had no children of her own, but was survived by her siblings **Hannah Wanjugu Mugo, Hannah Wanjiku Kibunja** (hereafter the 1<sup>st</sup> and 2<sup>nd</sup> Applicants/the Applicants) and **Mary Wambui Kabangi**.
2. It appears that soon after, **Samuel Kiruthu Wanjiku** a nephew to the deceased and son to the 2<sup>nd</sup> Applicant, (hereafter the Interested Party) initiated succession proceedings, namely, **Loitokitok PM's Succession Cause No. 10 of 2020** (hereafter the lower court suit) pursuant to which he obtained a grant that was subsequently confirmed with him as the sole beneficiary of the subject property. In 2022, he obtained registration of the property in his name before filing a suit, namely, **Loitokitok PM's Court MCL & E**

**No. E 009 of 2022** seeking eviction orders against the Respondent.

3. Perhaps prompted by the suit, **Mary Njeri Njaramba** (hereafter the Respondent), alongside **Mary Wambui Kabangi** moved the court, seeking to revoke the grant issued in favor of the Interested Party. By its ruling delivered on 30.05.2023, the lower court revoked the grant. The Applicants who had until now had not been parties to the succession cause were subsequently to emerge and file a summons general dated 14<sup>th</sup> September 2023 by which they sought inter alia, that a fresh grant be issued and confirmed in their names and the subject property distributed as proposed in their application.
4. By the ruling delivered on 28<sup>th</sup> November 2023, the lower court having made a finding that it was functus officio by virtue of its earlier ruling in the matter, dismissed the application dated 14<sup>th</sup> September 2023. This outcome provoked the present appeal and the motion dated 9<sup>th</sup>

January 2024 by the Appellant/ Applicants, the latter which is the subject of this ruling.

5. The motion, which invokes Sections 45 and 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules, contains two key prayers :-

**1. THAT pending the hearing and determination of this appeal, this Honourable Court be pleased to issue preservatory orders restraining the Respondent either by herself, her servants or any other person acting from her authorization or control from intermeddling with the estate of the deceased by demolishing the buildings, constructing permanent structures, selling the property, developing the said property, leasing out the said property to third parties or undertaking or continuing to carry out any further development in all the properties of the deceased, pending the hearing and determination of this application and/or appeal.**

**2. THAT preservatory orders do issue restraining and/or stopping the Respondent either by herself, servants or any other person acting from her authorization or control from intermeddling with the estate or utilizing the estate to the disadvantage of other lawful beneficiaries of the estate.**

6. The application is supported by the grounds on its face and the affidavit sworn by the 2<sup>nd</sup> Applicant. Describing her relationship and family of the deceased and circumstances of her death, the deponent asserted that by virtue of Section 39(1) (c) of the Law of succession Act, the net intestate estate devolves upon the kindred of the intestate where the deceased left no surviving spouse or children. She contended that since 2019 however, the Respondent had without lawful justification taken occupation of the subject property, which comprised the estate of the deceased. And proceeded to intermeddle with the deceased's estate by constructing permanent structures, tilling the land and developing the subject property. Thereby denying the rightful beneficiaries' interest in the property. Hence the need to have the

Respondent restrained from infringing upon the rights of the beneficiaries.

7. By her replying affidavit dated 8.04.2024, the Respondent opposed the motion. Accusing the Applicants and Interested Party of approaching the court with unclean hands, she recounted the history of the matter outlined earlier in this ruling. Staking her claim to the subject property she stated that she and her son had lived with and cared for the elderly deceased on the subject property since 2015 until her demise.

8. She further contended that in the material period, the deceased allowed her to till and develop the subject property, and granted her permission to fence off the land, connect electricity and water, and to erect a food kiosk and rental dwellings from which she generated income. Moreover, she added, the deceased had bequeathed the subject property to her as a gift by executing an affidavit to that effect before an advocate. She therefore denied intermeddling with the deceased's estate, stating that she would suffer prejudice

should the orders sought in respect of the suit property be granted.

9. Additionally, on 2.07.2024, the Respondent filed a preliminary objection (PO) based on grounds that the Interested Party was not a party to the subject matter of the present appeal, not having participated in the motion before the lower court, from which the appeal arose; that the Interested Party had not sought or obtained leave of court to participate in the instant appellate proceedings; and that the Appellant/ Applicants have failed and or neglected to include **Mary Wambui Kabangi** as a party to the appeal, whereas she participated in the application before the subordinate court which gave rise to the appeal.

### **Submissions**

10. The motion was canvassed by way of written submissions. Through submissions dated 17.07.2024, the Applicants' counsel reiterated the material in the supporting affidavit. He asserted that the Respondent had intermeddled with the estate of the deceased contrary to Section 45 of the Law of

Succession Act, citing the case of **Gitau and 2 Others v Wandai and 5 Others [1989] KLR 231** for the proposition that , any act by a person who is not an executor or administrator which purports to affect the estate of the deceased amounts to intermeddling.

11. Concerning the applicable principles, counsel stated that demonstration of an arguable case, risk of alienation of subject property (estate) to the applicant's detriment, and possibility of the suit being rendered nugatory were key considerations in an application of this nature. Citing here the decisions in **In re Estate of Jeremiah Ngiri Kibati (Deceased) [2019] eKLR** and **Re Estate of Elijah Ngari (Deceased) [2019] eKLR**, where the courts cited with approval the decision of this court in **Japhet Kaimenyi M'ndatho v M'ndatho M'mbwiria [2012] eKLR** . In addition, relying on the principles enunciated in the case of **Giella vs Cassman Brown (1973) E.A 358**.

12.Reiterating that the Respondent is a stranger to the estate of the deceased counsel stated that the estate of the deceased

is in a state of neglect and mismanagement due to the Respondent's intermeddling and unless restrained, the beneficiaries will suffer irreparable harm and prejudice. While such event would render the appeal nugatory. On this score citing the decision of the Court of Appeal in **Stanley Kangethe Kinyanjui V Tony Ketter & 5 others [2013] eKLR**, as to when an appeal is arguable and would be rendered nugatory.

13. The Respondents' submissions addressed the application and the Preliminary Objection under three heads, namely, whether the Applicants have the locus standi to seek interlocutory orders against the estate of the deceased before obtaining limited grant of letters of administration; whether the Respondent is an intermeddler and; whether the Interested Party is a stranger in the appeal proceedings.
14. On the first question, it was argued that in the absence of a limited grant in their favour, the Applicants lacked the necessary locus standi to bring the present appeal. And reiterating affidavit material by the Respondent regarding

her claim to the estate, counsel asserted that the evidence was uncontroverted, hence the Respondent is not an intermeddler. In that regard, the case of **Desderio Nkonge Kirigu V Republic [2013]eKLR** was called to aid .

15. Pressing only the two related grounds of the Preliminary Objection concerning the Interested Party, it was asserted that he was not a party to the lower court application giving rise to this appeal. Counsel for the Respondent relying on the Court of Appeal decision in **Joseph Kamau Musa & others v Eleri Company Limited & others [2017] eKLR**.
16. On his part, the Interested Party citing Section 45 of the Law of Succession Act asserted that the Respondent was culpable for intermeddling, as defined in **Benson Mutuma Muriungi v C.E.O. Kenya Police Sacco & another [2016] eKLR**. That is, any acts that dissipate, diminish, or put at risk the free property of the deceased, including taking possession, occupation, disposing of, or otherwise interfering with the property without legal authority.

17. Pointing out that the Respondent has not been appointed as an administrator of the deceased's estate, hence lacking legal authority to deal with the estate, counsel asserted that her illegal occupation of the subject property justifies the granting of preservatory orders to protect the estate.

18. Dismissing the Respondent's allegations that the suit property was a gift inter vivos donated to her by the deceased, the Interested Party argued that to be valid, such gift should meet specific legal requirements to be valid. Including the donor's capacity, competence and intention to make the gift, the delivery of the gift, and the donee's acceptance and perfection of the gift in the lifetime of the donor, all which he asserted have not been demonstrated in this case. Here relying on the decisions in **In re Estate of Etete Masakhalia (Deceased) [2021] eKLR**,; **Micheni Aphaxard Nyaga & 2 Others V Robert Njue & 2 Others [2021] (unreported) Civil Appeal No. 29 Of 2019** and **In re Estate of the Late Sosing'ot Arap Maina (Deceased) [2023] KEHC 1908 (KLR)**

19. With regard to the Preliminary Objection, it was asserted that under Order 1 Rule 10(2) of the Civil Procedure Rules, the court has the discretion to enjoin a party to proceedings if it is demonstrated that the presence of such a party is necessary to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. He defended his enjoinder in the current proceedings based on the fact that he was a party in the subordinate court proceedings in the lower court suit. Further asserting that his interests are directly affected by the outcome of the appeal, as he was a nephew to the deceased and a dependant under Section 29 of the Law of Succession Act.

20. Citing the definition of an interested party in the case of **Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2015] eKLR**, where the Court of Appeal held that an interested party is a person who has a stake in the proceedings, though they were not party to the cause *ab initio*, he argued that his presence is necessary in these proceedings so that all issues in dispute are fully

addressed. He called to aid the Supreme Court decision in **Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR**, for the proposition that a party should be enjoined if their presence is necessary to avoid multiplicity of suits and to achieve a just determination.

21. It was his position that the Respondent's Preliminary Objection as raised does not fall within the definition of a PO in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, to the effect that a preliminary objection raise a point of law and not require the ascertainment of facts. In his view, the question whether the Interested Party should have applied for leave requires a factual determination, and hence does not qualify as a pure point of law.

### **Analysis and Determination**

22. The court has considered the rival affidavit material and submissions in respect of the motion and the PO. The court

proposes to first deal with the PO. As defined in the case of **Mukisa Biscuit** (supra); -

**“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....**

**A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”**

23. **Ojwang J.** (as he then was) in the case of **Oraro v Mbaja [2005] KLR 141** in reiterating the foregoing stated that: -

**“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.**

**Where a Court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”**

**See also Kigwor Company Limited v Samedy Trading Company Limited [2021] eKLR and Mulemi v Angwenye & Another (Civil Appeal 170 of 2016) [2021] KECA 214**

24. As I understand the Respondent’s pleaded objection to participation by the Interested Party, it is that he is a

stranger to the appeal proceedings not having been a party to the application giving rise to the appeal. The pertinent facts on this limb are not in dispute. However, the objection was expanded during submissions to include the assertion that the Interested Party has not demonstrated any legal identifiable interest in the estate and how he will be affected by the appeal. These extended assertions constitute disputed factual matters and cannot be the basis of a PO, and to this extent the Interested Party's response that the PO raises issues of fact requiring ascertainment is accurate.

25. Regarding the pleaded objection, the court in the earlier part of this ruling outlined the undisputed factual background of this matter and the various roles played by the Interested Party in the lower court suit, having initiated the same as a petitioner. Equally, the Respondent's affidavit in opposition to the motion is replete with similar details. The Interested Party was a key party in the lower court suit and despite not having participated in the application which is the subject of this appeal, cannot be compared to a person who was not a party in the lower court proceedings at all.

Such a narrow application does not appear reasonable or tenable, in the circumstances of this case.

26. The Interested Party may not have participated in the lower court application giving rise to the appeal but having been enjoined in this appeal by the Applicants in that capacity, in the context of the admitted surrounding facts, cannot be termed a stranger. Besides, on the authority of the Court of Appeal decision in **Joseph Kamau Musa & others v Eleri Company Limited & others [2017]** cited by the Respondent, even a party who has not participated at all in proceedings in the court appealed from may be allowed to file or participate in an appeal.

27. In that case, the Court stated that:

**“And in the case of Ahn -v- Openda [1982] KLR 87, it was held that a party who has taken no part in the lower court's proceedings may nevertheless, be a person directly affected by the appeal. That was reiterated in the case of Onjula Enterprises Ltd., -v- Sumaria [1986] KLR 651**

**where this Court held that persons directly affected by an appeal need not be those who were parties to the proceedings. It would appear that such a party would have to demonstrate that he has been aggrieved unless ....”**

28. I think I have said enough to demonstrate that the PO is without merit and must fail.

29. Equally, the assertion by the Respondent that that the Applicants lack locus standi because they do not hold a limited grant, appears to overlook the undisputed fact that the Applicants are siblings of the deceased who died intestate leaving no children or spouse. **Black’s Law Dictionary, Tenth Edition** defines *locus standi* as“... *the right to bring an action or to be heard in a given forum.*”

30. The Court of Appeal in **James Teko Lopoyetum v Rose Kasuku Watia & 4 others [2021] eKLR** reiterated its decision in **Alfred Njau & 5 Others vs. City Council of Nairobi [1983] eKLR** where it held that:

**“The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt’s Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”**

31. In **Sheila Nkatha Muthee v Alphonse Mwangemi Munga & Another [2016] eKLR** it was held that:

**“Locus standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue renders the suit incompetent.”**

32. Evidently, the Applicants had by their dismissed summons approached the lower court seeking that a grant be made to them pursuant to the provisions of section 39(1) (c) of the Law of Succession Act. On the face of it, the Applicants are clothed by the Law of Succession Act with the right to bring this action and to be heard on appeal. The Respondent’s submission appears to conflate two separate situations; a distinction must be made between an action

filed *on behalf* of an estate of a deceased person and a proceeding brought under the Law of Succession Act by an asserted beneficiary seeking a grant or other order in respect of an estate.

33. It would be superfluous in the latter case to require such beneficiary to first obtain a limited grant. The provisions of the Law of Succession Act do not envisage such a situation. The objection to the Applicants' right to bring the instant application and appeal concerning the decision of the lower court lacks a legal basis. The Applicants have the necessary locus standi and are properly before this court

34. Turning now to the merits of the motion, the Applicants invoke inter alia Section 45 and 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. This Court also has wide discretion under Section 47 of the Law of Succession Act to "*entertain any application and determine any dispute under this Act.*". Rule 73 of the Probate and Administration Rules saves the inherent power of the court "***to make such orders as may be necessary***

***for the ends of justice or to prevent abuse of the process of the court”.***

35. The Court of Appeal in **Floris Piezzo & Another vs Giancarlo [2014] eKLR** observed concerning the provisions of section 47 and Rule 73 above that:-

**“ In other words, we are of the firm view that Section 47 of the Act gives the court all-embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased’s estate. This Section must be read together with Rule 73 of the Probate & Administration Rules which further emboldens court’s jurisdiction to make such orders as may be necessary for the ends of justice to prevent abuse of the process of court. We would imagine such orders would also include injunctive orders.”**

36. Rule 63 of the Probate and Administration Rules applies the provisions of Order 40 of the Civil Procedure Rules to

probate causes. So far appeals are concerned, Order 42 Rule 6(6) of the Civil Procedure Rules provides that:

**“Notwithstanding anything contained in sub rule 1 of this rule (providing for stay pending appeal) the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from the Subordinate Court or tribunal has been complied with.”**

37. Interlocutory injunctions are governed by the provisions of Order 40 Rule 1 of the Civil Procedure Rules which provides in part that:

**“Where in any suit it is proved by affidavit or otherwise -**

**a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**

**b) .....**

**the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and**

**preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”**

38. The principles governing the grant of an interlocutory injunction are settled. For the purposes of the instant motion, the court must determine whether the Appellants have brought their applications within the required threshold for the granting of an interlocutory injunction. What are the applicable principles? The decision of the Court of Appeal in **Nguruman Limited vs Jan Bonde Nielsen & 2 Others (2014) eKLR** is particularly illuminating as to the principles applicable to applications for interlocutory injunctions. The Court described the role of the judge in such application to be merely to consider whether the principles for the grant of the interlocutory injunction were met.

39. The Court further observed that:

**“...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella’s case, they could**

**neither be questioned nor be elaborated in detailed research. Since those principles are already ..... by authoritative pronouncements in the precedents, they may be conveniently noted in brief as follows:**

**In an interlocutory injunction application, the Appellants has to satisfy the triple requirements to:**

**a) establish his case only at a *prima facie* level**

**b) demonstrate irreparable injury if a temporary injunction is not granted.**

**c) allay any doubts as to (b) by showing that the balance of convenience is in his favor.”**

40. The Court further stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by an applicant. Such that, it is not enough that the Appellants establish a *prima facie* case, they must further successfully establish irreparable injury, that is, injury for which damages recoverable at law could not be an adequate remedy. And where there is doubt as to the

adequacy of damages, the court will consider the balance of convenience. Conversely, where no *prima facie* case is established, the court need not consider irreparable injury or balance of convenience. The Court of Appeal emphasized that the standard of proof is to *prima facie* standard.

41. Regarding the definition of a “*prima facie case*” the Court stated:

**“Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for “*prima facie case*” in civil cases in the following words:**

**“In civil cases, a *prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the appellant’s case upon trial. That is clearly a standard, which is higher than an arguable case.***

**We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The Appellants need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no**

more than that the Court takes the view that on the face of it the appellant's case is more likely than not to ultimately succeed."

42. In **Madhupaper International Limited v Kerr [1985] KLR 840** the Court of appeal stated that:

**"The Court of Appeal's jurisdiction to grant an injunction pending an appeal is discretionary and is to be exercised judicially and not arbitrarily. It would be wrong to grant the injunction where the appeal is frivolous or where to grant it would inflict greater hardship than it would avoid. In this case, to grant an injunction pending appeal would be wrong as it would probably inflict greater hardship than it would avoid."**

43. **Visram J** (as he then was), in my humble view further amplified the applicable principles in **Patricia Njeri & 3 Others -Vs- National Museums of Kenya [2004] eKLR**.

The learned Judge stated:

**"The appellant did, however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the court can, in a proper case grant an injunction pending**

**appeal. What are the principles that guide the court in dealing with such an application?**

**In the Venture Capital case (Venture Capital and Credit Ltd -Vs- Consolidated Bank of Kenya Ltd Civil Application No. Nairobi 349 of 2003 (UR)) the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in a whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:**

- a. The discretion will be exercised against an appellant whose appeal is frivolous (See Madhupaper International Limited - Vs- Kerr [1985] KLR 840 which cited Venture Capital). The Appellant must state that a reasonable argument can be put forward in support of his appeal (J. K. Industries -Vs-KCB 1982 - 88) KLR 1088 (also cited in Venture Capital.**
- b. The discretion should be refused where it would inflict greater hardship that it would avoid (See Madhupaper supra).**
- c. The appellant must show that to refuse the injunction would render his appeal nugatory (See Butt -Vs- Rent Restriction**

**Tribunal [1982] KLR 417 (cited also in Venture Capital).**

**d. The Court should also be guided by the principles in Giella -Vs- Cassman Brown & Company Ltd [1973] EA 358 as set out in the case of Shitukha Mwamodo & Others (1986) KLR 445 (also cited in Venture Capital).” See also Mukoma - Vs-Abuoga [1988] KLR 645.”**

44. Concerning the question of prima facie case which also ties in with the arguability of the appeal, it is not denied that the subject property of the application and appeal is an asset forming part of the estate of the deceased, to which both the Applicants, the Interested Party and Respondent, lay claim. The Applicants and Interested Party assert that they are siblings and nephew/dependant, respectively to the deceased therefore entitled to administer/ benefit from her estate while the Respondent is an intermeddler. On her part, the Respondent contends that the deceased gifted the asset to her during her lifetime.

45. In addition, looking at the grounds of appeal, without more, they raise clearly arguable points worthy of the court’s

consideration on appeal, not only concerning the above issues, but also, more significantly, whether indeed the lower court was justified in declaring itself functus officio and declining to issue a fresh grant to the Applicants as sought in their summons. These are weighty issues to be argued on appeal.

46. In **Stanley Kang’ethe Kinyanjui V Tony Keter & 5 Others [2013] eKLR** the court of appeal stated:

**“The first issue for our consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable”.**

See also **Denis Mogambi Mong’are V. Attorney General & 3 Others Civil Appeal No. Nairobi 265 of 2011 (UR 175/2011)** where the Court of Appeal stated that:

**“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”**

47. The appeal herein cannot be said to be frivolous. It raises serious questions of law and arguments deserving the consideration of the court. Given the undisputed relationship between the Applicants and the deceased, barring the claims by the Respondent being upheld, they would have a rightful anticipation under section 39(1) ( c ) of the Law of Succession Act that the estate of the deceased would devolve to them as siblings .

48. Intermeddling in an estate amounts to a criminal offence. Section 45 of the Law of Succession Act, provides as follows

**“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession of or dispose of, or otherwise intermeddle with, any free property of a deceased.**

**(2)Any person who contravenes the provisions of this section shall-**

**a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and**

**b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."**

49. It is undisputed that the Respondent is not related to the deceased and has not obtained a grant in respect of the estate of the deceased but has been in continuous and exclusive possession of its sole asset, the subject property, since the deceased passed away. It is asserted by the Applicants that the Respondent has continued to use and develop the subject property for her own exclusive benefit, a matter confirmed in the Respondent's affidavit material. Therein, she confirms freely using the land for farming and erecting developments which she says are her source of

income. Her justification being that she is indeed the rightful owner of the asset which the deceased allegedly gifted her in her lifetime, through the affidavit annexed to her affidavit opposing the present application.

50. That said, the parties will have the opportunity to prove their respective claims at the appropriate time and forum. At this stage however, it appears to the court that the risk that the assets of the estate may be adversely dealt with or alienated by the Respondent who has hitherto enjoyed exclusive possession and control is real. In which event the Applicants would suffer irreparably as such assets would no longer be available for eventual distribution even if the appeal succeeded. In my view, there is a clear unmistakable right to be protected which is directly threatened by the acts sought to be restrained.

51. In **George Gathura Karanja v George Gathuru Thuo & 2 Others [2019] e KLR**, the Court of Appeal stated that:

**“[A]n appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible. See the case of Stanley Kangethe Kinyanjui versus Tony Ketter & 5 Others, Civil Appeal No. 31 of 2012 where this Court stated inter alia thus:**

**“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is irreversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party.”**

52. In this case, if the assets of the estate are dissipated the appeal herein will clearly be rendered nugatory. As earlier observed, the Respondent has since 2019 been in exclusive possession and enjoyment of the sole asset of the estate which she asserts to be her property gifted to her pursuant to an alleged affidavit by the deceased. The material on record suggests that the Applicants believe that the documents of title in respect of the subject property are in the custody of the Respondent.

53. The decision of the lower court may be affirmed or set aside, but in the meantime, it is the duty of the court to preserve the estate and to hold the ring even-handedly so as not to prejudice the rights of the parties pending the appeal. It appears to the court therefore that if the discretion is exercised in the Applicants' favour, it will prevent more hardship than it will inflict at this stage, as the Applicants will have the opportunity to argue their appeal with the subject property secured until the final determination of the appeal. This consideration far outweighs any inconvenience that the Respondent will suffer. Besides, a court of law is obligated to err on the side of caution where it appears that an offence of intermeddling is alleged against a party in undisputed possession of assets of an estate.

54. As drawn, the prayers in the motion appear duplex and the intent confusing. The court having considered all the relevant matters herein is persuaded to grant the following orders: -

**1. THAT pending the hearing and determination of this appeal , a temporary injunction is hereby issued to restrain the Respondent either by herself, her servants, agents or any other person acting on her behalf from occupying or tilling the land parcel described as Loitokitok/Emperon/ 1445 , developing or demolishing any structures thereon, alienating the said property by way of sale or lease to third parties, or in any other manner howsoever dealing with the said property or the estate of Mary Muthoni Kibunja , the deceased herein.**

**2. The costs of the motion and PO are awarded to the Applicants and Interested Party.**

55. In view of the above orders, it is imperative that this appeal be heard with dispatch, and the Court directs the Appellants to file the record of appeal within 60 days, and the Deputy Registrar of the Court to call for the original record.

**DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON  
THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2025.**



**C.MEOLI  
JUDGE**

**In the presence of:**

**For the Applicants: Mr. Okwiri**

**For the Respondent: N/A**

**For the Interested Party: in person**

**C/A: Lepatei**

ORIGINAL