Ecobank Kenya Limited v Mbiyu (Civil Application E409 of 2025) [2025] KECA 1717 (KLR) (24 October 2025) (Ruling)

Neutral citation: [2025] KECA 1717 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E409 OF 2025

DK MUSINGA, M NGUGI & GV ODUNGA, JJA

OCTOBER 24, 2025

BETWEEN

ECOBANK KENYA LIMITED .... APPLICANT

AND

EDDAH WANJIRU MBIYU .... RESPONDENT

(Being an application for stay of execution pending the lodging, hearing, and determination of the intended appeal against the ruling and order of the High Court of Kenya at Nairobi (E.K. Ogola, J.) delivered on 26{{^th}} June 2025 in Succession Cause No. 527 of 1981)

RULING

1. The application before us is brought by way of Notice of Motion dated 10th July 2025. In the Motion, the applicant (the Bank) seeks an order of stay of execution of the ruling and the resultant order of the learned Judge (Ogola, J.) made on 26th June 2025 in Nairobi High Court Succession Cause No. 527 of 1981; In the Matter of the Estate of Late Mbiyu Koinange, pending the hearing and determination of the applicant's intended appeal to this Court.

2. By way of background, the proceedings in the High Court that gave rise to the impugned decision were originated by way of an application by the respondent dated 8th March 2024 in which the following orders were sought:

    1. That Eco Bank Kenya Limited be compelled to pay the Estate of the Late Mbiyu Koinange the sum of Kshs. 284,000,000.00 plus interest, which was illegally, irregularly, and in violation of the orders of the Court, withdrawn from Bank account No. 001005011762001, domiciled at Eco Bank Kenya Limited, Eco Bank Towers in the name of the Estate of Mbiyu Koinange.

2. That pending the hearing and determination of the Summons, the court be pleased to order Eco Bank Kenya Limited to disclose and give particulars of amounts and all beneficiaries of any amount of money withdrawn from the said account.

3. That the costs of the application be in the cause.

3. It was contended, in that application, that the Bank caused the withdrawal of the entire sum, deposited in the aforesaid account, without a court order, yet the account, which was opened at the Bank on 29th October 2010, could only be operated pursuant to a court order as directed by the order dated 26th July 2011 issued by Maraga, J. (as he then was). Notwithstanding the foregoing, it was contended, the Bank did not demand to see the court order while processing the said withdrawal. According to the respondent, the Bank's argument that the payments were made to lawyers was a nullity since the bank had no authority to release the monies except by an order of court.

4. In opposition, it was contended that the subject account was opened by the advocates of the administrators of the deceased's estate before the court issued the said order, and that the signatories to the account were the advocates. It was further averred that the Bank was not aware of the court order dated 26th July 2011 to halt and restrict any dealings with the account, and that the Bank was only aware of the order dated 4th September 2014, which they had complied with. Accordingly, the Bank maintained that the disbursement was done in accordance with the mandate of the account holders. It was however explained that the balance due to the beneficiaries was Kshs. 166,264,009.00 and not Kshs. 284,000,000.00 as contended by the respondent.

5. In his ruling, on 26th June 2025, the learned Judge found that the Bank must have been aware of the said order and that it was obligated to make inquiries before making out any payments as it had a duty of care to the Estate as it stood in a fiduciary relationship to the Estate. The Learned Judge ordered the Bank to pay the Estate the sum of Kshs. 284,000,000.00, being the amount, which was withdrawn from the said Bank Account, with interest accruing therefrom, from the date of deposit.

6. The application is based on the grounds: that whereas the refund ordered by the court was lawfully withdrawn by advocates on record for respective beneficiaries to the Estate, M/s Daly & Figgs Advocates, Beatrice Kariuki & Associates Advocates, A.M Wahome & Co. Advocates, Nyaberi & Co. Advocates, these advocates were not made parties to the respondent's application seeking refund of the monies; that the learned Judge ignored an earlier finding by Muchelule, J. (as he then was) that the advocates, according to their affidavits, withdrew the money, shared some of it to some of the beneficiaries and applied the balance to cover their fees and fees of other advocates, and other creditors; that despite there being no trial and/or oral evidence, the learned Judge found the Bank liable for negligence and wilful fraud, a finding that was not only unprocedural but also unlawful and inimical to the existence of a fair trial ; that the Bank was not a party to the proceedings, hence any proceedings against it ought to have been by way of a separate suit; that despite there being findings and proceedings previously before Musyoka, J. and Muchelule, J. dealing with the issues, the learned Judge declined the Bank's plea that the issue was res judicata and proceeded to enter judgment in a concluded matter; that the refund sum is colossal, which would constitute a serious dent in the depositors' funds held by the Bank; and that the orders issued by the learned Judge did not emanate from the prayers sought by the respondent in the application dated 8th March 2024.

7. In disputing the contention by the respondent that the Estate has assets which can be liquidated to refund the sum in question should the appeal succeed, the applicant averred that should the sum of Kshs. 840,000,000.00 be released, it will inevitably be dissipated across competing interests/ beneficiaries of the Estate, making the recovery impossible in the event that the intended appeal

succeeds. According to the Bank, the immovable assets which are tied up in succession disputes are not liquid and cannot guarantee restitution. Therefore, the suggestion that titles may be deposited in court does not equate to actual capacity to refund, thus the appeal will be rendered nugatory unless the orders sought are granted.

8. It was therefore contended that the intended appeal is arguable and has high probability of success and unless stay is granted, its success would be rendered nugatory and an academic exercise; that the application has been made without unreasonable delay; and that the Bank is ready and willing to abide by any such terms as the Court will make for the just and expeditious hearing of the intended appeal.

9. The applicant urged this Court to grant orders sought herein.

10. In opposition to the application, the respondent averred: that the learned Judge properly directed himself on all issues on record; that any money deposited with the Bank was trust money belonging to the Estate, as appears in the Account Opening Forms; that the Bank was aware that the money deposited was pursuant to a court order, and no withdrawals could be done without court sanction irrespective of the signatories of the account and no part of the Estate could be distributed without a court order; that since the order before the court is a money decree, should the stay be granted, the money should be deposited in a joint account opened by the advocates for the Estate; that the Estate has vast assets whose value is adequate to refund any money paid by the Bank to the Estate should the intended appeal succeed; that the Estate is ready to deposit the title deeds of the Estate assets in court pending the hearing of the intended appeal in the event the application is allowed; and that the appeal can be heard on priority basis and no further delay will be occasioned to the heirs of the Estate.

11. According to the respondent, the fact that the Bank made payments to the beneficiaries exactly as laid out in the order they purported not to have seen, is a clear indication that they were aware of the terms of the order. In the respondent's view, the dispute being a succession matter, res judicata is inapplicable and in any case, no ruling on the matter of refund of the money by the applicant had been made before the ruling complained of. It was reiterated that the Estate has sufficient assets capable of covering the sums of Kshs. 840,640,000.00 as there are no disputes regarding the distribution of the Estate, the Grant having been confirmed on 7th May 2020. According to the respondent, the Estate continues to suffer due to the loss of the sum of Kshs. 284,000,000 withdrawn illegally, hence the beneficiaries of the Estate would be greatly prejudiced if the order sought is granted. It was the respondent's view that the Bank had not demonstrated what loss or prejudice it stood to suffer should the court decline to grant the order sought. The respondent urged the Court to dismiss the application with costs.

12. Susan Kamau Kihara, a beneficiary of the Estate, averred in her replying affidavit, sworn on 26th September 2025: that the Bank was fully aware, since inception, that the account was in the name of the Estate; that the application is calculated to perpetuate the injustice, financial distress, and suffering of the beneficiaries; that the funds held as deposits by a Bank are, by law and practice, usually insured, thus the Bank does not stand to suffer any prejudice if the subject funds are paid as ordered by the High Court; and that the application should be dismissed, but if granted, then it be on condition that the applicant deposits the entire decretal sum into an interest earning bank account in the names of the Counsel on record so as not to continue the irreparable prejudice suffered by the beneficiaries to date. The deponent substantially adopted the submissions filed by the Respondent.

13. Joyce N. Njunu, a beneficiary of the Estate and the widow of the late Isaac Njunu Mbiyu (Deceased), son of the Late Mbiyu Koinange, filed a replying affidavit sworn on 28th July 2025 wherein she averred that the Bank participated in the Succession Cause proceedings through its counsel and it had at all material times been aware of the orders issued by the High Court and this Court in respect of the subject funds. The deponent contended: that the issue of res judicata did not apply since Musyoka,

J.'s ruling merely directed the Administrators' Advocates to render a true and proper account within thirty days, while Ogola, J., on 26th June, 2025, condemned the Bank to refund Kshs. 284,000,000/=, a matter not specifically adjudicated or determined against the Bank in the 2013 ruling; that the trial court properly identified the payee as "the Estate of Mbiyu Koinange", which was the entity holding the title to the funds, thus any subsequent distribution amongst beneficiaries or administrators was a matter for the Succession Court itself; that the finding that the Bank refunds the sum was made upon determination that the Bank was unlawfully culpable in the dissipation of the funds, an issue necessitating a fresh judicial finding and not merely an arbitrary reversal of a previous court's decision; that the learned Judge correctly held that the Bank was obligated to make inquiries before making out any payments; that the Bank participated in the proceedings in the Succession Cause through its duly appointed counsel; that since the order of the court was for the funds to be paid to the Estate of Mbiyu Koinange and not the beneficiaries of the Estate, the argument that the funds would be dissipated by the beneficiaries is speculative and baseless; that the Estate clearly has the financial ability to repay the decretal sum notwithstanding liquidity issues as alleged; that granting a stay would be highly prejudicial to the Estate and its beneficiaries; and that since it has been demonstrated that the intended appeal is neither arguable nor would it, if pursued, be rendered nugatory, the application should be dismissed with costs.

14. The deponent submitted: that the intended appeal does not raise any bona fide issues for consideration, as there was no court order sanctioning the withdrawal; that the appeal will not be rendered nugatory as the Bank has acknowledged that the uncontested sum was deposited in the Estate account and could not produce any lawful order authorizing withdrawal of the said sum; that the deceased's estate has vast resources hence any loss suffered would be fully compensable by an award of damages, should the appeal succeed; that it is only fair and just for the Court to decline the stay of execution sought and allow the parties to proceed to the hearing of the appeal; and that the application should be dismissed with costs. In support of the submissions, reliance was placed on Civil Application No. E029 of 2020: Kenya Pipeline Company Limited v Zakhem International Construction Limited and Reliance Bank Ltd v Norlake Investments Ltd (2002) 1 EA 227.

15. During the plenary hearing of the application on 29th September 2025, learned counsel, Mr Elijah Mwangi, appeared with Mr D. Kimani, for the applicant; learned Senior Counsel, Mr Paul Muite, appeared with Mr Waitere, for the respondent; learned counsel, Mr Ashford Mugwuku, appeared for Susan Kamau Kihara; learned Senior Counsel, Mr Ahmednasir Abdulahi, appeared for Margaret Mbiyu, a co-administrator and a representative of the 3rd house; learned counsel, Mr Benson Owuor, held brief for Mr Kevin Ouma, for Lena Koinange, a co- administrator representing the 2nd house; learned counsel, Mr Solomon Opole, held brief for Mr Peter Munge, for Joyce Njunu, a beneficiary; and learned counsel, Mr Kimani Horeria, appeared for Nancy Wairimu, a beneficiary.

16. In highlighting the submissions that we have summarized above, Mr Mwangi contended that since it is on record that the money withdrawn was shared, amongst others, the beneficiaries of the Estate, payment of the amount as directed would amount to an unjust enrichment; that since the account was opened by the advocates without evidence of the existence of a court order, the advocates who were signatories to the account owed a duty to their clients, and if advocates exceeded their mandate, the respondent has no duty dragging the Bank into the dispute; that the learned Judge did not handle the matter procedurally since the issues of wilful fraud and negligence needed to be tried separately and not within the Succession Cause; that such dispute could not be as summary proceedings by way of affidavits; that the issue of liability for the withdrawal of the money had been determined by Musyoka, J. and Muchelule, J. (as he then was), who found that the advocates should account for the money; that the money having been paid out by the Bank, to order the Bank to pay the same amount will compel the Bank to resort to depositors' money which would disrupt the Bank's business with a likelihood

of a run on the Bank; that the recovery of the said sum from the Estate, in the event that the appeal succeeds will not be easy, considering that the Bank is not aware of where to find the beneficiaries; and that no prejudice will be occasioned to the respondent if the stay is granted.

17. Learned Senior Counsel, Mr Paul Muite, submitted: that the said Kshs 284,000,000 was the balance remaining after all the outgoings had been paid, hence there is no question of unjust enrichment; that intermeddling in the Estate of a deceased person amounts to a criminal offence; that since the payment was made out in the manner set out in the court order, the Bank must have been aware of the order; that it was clear from the account opening forms that the account was in respect of the Estate of the deceased, hence this was a trust account; that the issue of withdrawal of the money was not determined by Muchelule, J. (as he then was) but was left to be determined later; that since the Bank did not comply with the directions given in this application, it does not deserve favourable exercise of discretion; that there are titles worth billions of shillings which the administrators are prepared to deposit in court, hence no possibility of the appeal being rendered nugatory; that this being a money decree, it is inappropriate to grant stay of execution; and that in the event that this Court grants a stay it should do so on condition that the sum be deposited in a joint interest earning account in the name of the advocates for the parties.

18. On his part, learned Senior Counsel, Mr Ahmednasir, submitted: that the three points raised by the applicants are not bona fide but are frivolous; that from the tabulation set out in the affidavit in reply, there is no question of unjust enrichment; that it was clear that the account opening forms made reference to the High Court and the Estate of Mbiyu Koinange, hence there is no way the Bank can claim that the court order was not served; that the court already found that the said sum was withdrawn in violation of the court order, although it did not determine who was to blame; that the money in question is not depositors' money but money belonging to the Estate and that in any event, the Bank has remedy against the lawyers who withdrew the money; that if the Bank cannot pay the money, it is no defence to claim that there will be a run on the Bank.

19. Mr Odiwuor, Mr Opole, Mr Horeria and Mr Mugwuku associated themselves with the submissions made by Mr Muite and Mr Ahmednasir.

20. We have considered the application as well as the submissions made. It was contended that the Bank did not comply with the procedural directions that were issued in respect of the filing of submissions. However, learned counsel did not state the prejudice, if any, that was occasioned by the said procedural lapse. It has been stated that rules of procedure cannot be allowed to become mistress of justice since they are handmaids of justice. Since they are not themselves an end but the means to achieve the ends of justice, they are tools targeted to achieve justice and are not hurdles to obstruct the pathway of justice. See Seaford Court Estates Ltd v Asher [1994] 2 All ER 155 at 164. Nothing therefore turns on the said objection.

21. This Court has, on numerous occasions restated the conditions for the grant of stay pending an appeal or an intended appeal which conditions were crystallised and summarized in Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR, as hereunder:

> "This Court, in accordance with precedent, has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal would be nugatory if these interim orders were denied. From the long line of decided cases (although none was cited by counsel, perhaps due to their notoriety) on Rule 5(2) (b) aforesaid, the common vein running through them and the jurisprudence underlying these decisions can today be summarized as follows:

i. in dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See Reuben & 9 Others v Nderitu & Another (1989) KLR 459;

ii. the discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so;

iii. the Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. See Halai & Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365;

iv. in considering whether an appeal will be rendered nugatory the Court must bear in mind that each case must depend on its facts and peculiar circumstances. See David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001;

v. an applicant must satisfy the Court on both of the twin principles;

vi. in whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. See Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004;

vii. an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. See Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008;

viii. in considering an application brought under Rule 5 (2) (b) the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. See Damji Pragji (supra);

ix. the term “nugatory” has to be given its full meaning. It does not only mean worthless, futile, or invalid. It also means trifling. See Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232;

x. 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 reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved;

xi. where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impunity, the onus shifts to the latter to rebut by evidence the claim. See International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.”

22. The applicant contends that the issues raised before the learned Judge such as wilful fraud and negligence could not properly be canvassed in a Succession Cause by way of summary proceedings as was done in the case before the learned Judge. It is also contended that the learned Judge gave orders which were not expressly sought before him. The applicant also argues that the learned judge dealt with issues that were res judicata. It is our view that these are not idle issues. To the contrary, these are issues that deserve interrogation by this Court at the hearing of the intended appeal. We find that the intended appeal is arguable.

23. On the nugatory aspect, it is clear that if the sum in question is paid out, the likelihood of being distributed to the beneficiaries of the Estate is very high. The applicant is apprehensive, and rightly so in our view, that if the appeal were to succeed, tracing the said sum amongst the beneficiaries would be a herculean task. Although the respondent contends that the administrators are ready to place, at the disposal of the Court titles to some assets, it was not lost to us that it was submitted that the distribution of the Estate is almost complete. If that is the position, then the disposal of the said assets, should the appeal succeed, may open doors to further litigation fronts. If that were to happen, the Bank would not be able to access the said funds immediately.

24. It is also not in doubt that banks do business with their depositors' funds. While we cannot, at this stage, state whether the Bank is liable to pay the said sum, we are enjoined to decide the matter taking into account the overriding objective in sections 3A and 3B of the *Appellate Jurisdiction Act*, which requires that, when exercising discretion, the principle of proportionality ought to be taken into account. This position was restated in the case of African Safari Club Limited v Safe Rentals Limited [2010] eKLR where this Court held that:

> " ...it is incumbent upon the Court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... We think that the balancing act is in keeping with one of the principle aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable."

25. Considering the interests of the parties in this application, we find that the balance tilts towards the grant of the stay, since no serious prejudice is likely to be occasioned to the respondent during the pendency of the intended appeal.

26. In the premises, we find merit in the application dated 10th July 2025. We grant an order of stay of execution of the ruling and the resultant order of E.K Ogola, J. made on 26th June 2025 in

Nairobi High Court Succession Cause No. 527 of 1981 - In the Matter of the Estate of Late Mbiyu Koinange - pending the hearing and determination of the applicant's intended appeal to this Court. The costs of this application will be in the intended appeal.

27. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER 2025.

D. K. MUSINGA, (President)

JUDGE OF APPEAL

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MUMBI NGUGI

JUDGE OF APPEAL

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G. V. ODUNGA

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.