

**IN THE COURT OF
APPEAL AT
KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. E244 OF 2024

BETWEEN

JOAB MANG'ULA SILAS.....APPLICANT

AND

JACKSON LUBANGA MALOBA.....1ST RESPONDENT

**ZABLON MUSSA MALOBA.....2ND
RESPONDENT**

**CHRISTINE ATEMBA LUBANGA3RD
RESPONDENT**

*(Being an Application for injunctive orders from the Ruling and
order of the High Court of Kenya at Kakamega, (Otieno, J), dated
5th July 2024*

in

HC Succession Cause No. 1237 of 2012)

****** RULING OF THE**

COURT

[1] Before us is a Notice of Motion dated 28th May,2025, said to be brought under **Sections 3A (1)** and **3B** of the Appellate Jurisdiction Act and **Rules 1(2), 5(2)(b), 31** and **47** of the Court of Appeal Rules. The application seeks injunctive reliefs pending the hearing

and determination of the **Kisumu Civil Appeal No. E244 of 2024**, that he has filed against the ruling and order of P J. Otieno, J. delivered on 5th

July 2024 in Kakamega High Court Succession Cause No. 1237 of 2012.

[2] The genesis of the application is that the 1st and 2nd respondents instituted succession proceedings in respect of the estate of **James Maloba Ibanga**, deceased, who was their father. Eventually, they were issued with a Certificate of Confirmation of Grant. The certificate listed three beneficiaries to wit: **Jackson Lubanga Maloba, Zablou Mussa Maloba**, the 1st and 2nd respondents respectively, and the applicant, **Joab Mang'ula Silas**. The applicant was allocated two acres out of land parcel **MARAMA/SHIKUNGA/965 “the suit property”** as his share of the estate of the deceased. Subsequently, **Christine Atemba Lubanga**, the 3rd respondent filed Summons for the Revocation and/or Annulment of Grant, claiming that she had been excluded from the list of beneficiaries, yet she was a daughter of the deceased.

[3] The applicant opposed the summons, relying on evidence from the Area Chief indicating that the 3rd respondent was not in fact a daughter of the deceased but of the 1st respondent and therefore a granddaughter of the deceased. Consequently, she was not a direct beneficiary of the estate of the deceased. That she could only benefit from the estate through her father, the 1st respondent. While the application was being processed for hearing, the 1st and 2nd

respondents informed the trial court that a compromise had been struck between the respondents by which, two acres out of the suit property will be devolved to the 3rd

respondent. The applicant was however not involved in this compromise. Pursuant to the compromise, the Certificate of Confirmation of Grant was rectified by removing the applicant's name and substituting it with that of the 3rd respondent.

[4]The applicant then filed an application seeking further rectification, which was dismissed by the trial court which held that the application was misconceived as the claim fell outside the mandate of the probate court. Aggrieved by the ruling and order, the applicant lodged the present appeal pursuant to which he filed the instant application. The applicant contends that the respondents have since subdivided the suit property into **MARAMA/SHIKUNGA/1908, 1909, and 1910**, and **registered parcel 1910**, which is in his occupation in favour of the 3rd respondent. He asserts that the respondents have threatened to evict him and dispose of the parcel.

[5]He further avers that the appeal raises arguable grounds, including the legality of the compromise, the relationship between the 1st and 3rd respondents, and the trial court's endorsement of what is alleged to be an illegality. He seeks preservation of the property to prevent the appeal from being rendered nugatory, citing risk of eviction, destruction of crops, and transfer of the suit

property to third parties that may put it
beyond his reach in the event his appeal succeeds.

[6] There were no responses by the 1st and 2nd respondents to the application. However, the application was opposed by the 3rd respondent who swore a replying affidavit. She deposed that she was the daughter of the deceased, and therefore a rightful beneficiary of the estate. She deposed that the applicant had entered into a land sale agreement for two acres out of the suit property with the 1st and 2nd respondents respectively, for a consideration of Kshs.300,000/-, which was never paid in full. She contended that the applicant was irregularly apportioned the two acres out of the estate, thereby excluding her.

[7] It was then that, she filed Summons for Revocation of Grant which was compromised by the 1st and 2nd respondents, resulting in her being allocated the two acres aforesaid. She asserted that the estate had since been duly transmitted in accordance with the rectified grant, and each respondent is now in occupation of their respective portions. She maintained that the applicant is not a beneficiary of the estate, having had no dealings with the deceased. She denied that the appellant ever occupied the suit property, stating that it is currently occupied by the respondents. In the ultimate she described the application as frivolous, incompetent, and brought in bad faith, urging the Court to dismiss it with costs.

[8]The application was heard by way of written submissions only. When called out, **Mr. Ogongo**, learned counsel appeared for the applicant, whereas there was no representation by the respondents and or their counsel though served with the day's hearing notice by the court.

[9] Counsel for the applicant submitted that the appeal raises substantial and arguable grounds, warranting the exercise of this Court's discretion under Rule 5(2)(b) of the Court of Appeal Rules in his favour. He relied on the principles articulated in the case of *Ishmael Kagunyi Thande v Housing Finance Kenya Ltd*, Civil Appl. No. NAI 157 of 2006 (unreported), which require an applicant to demonstrate both the arguability of the appeal and the risk of it being rendered nugatory if the discretionary interim relief sought under the rule was to be denied. That the applicant had annexed a draft Memorandum of Appeal with fifteen grounds some of which we have set out elsewhere in this ruling.

[10] On the nugatory limb, the applicant avers that he has been in exclusive possession of the suit property since 2012, cultivating crops and planting trees, and that the respondents have procured a title deed in favour of the 3rd respondent with the intent to evict him and dispose it off. He fears that such actions would defeat the

substratum of the intended appeal and render it a mere academic exercise. In support

thereof, counsel cited **Butt v Rent Restriction Tribunal [1979]**
KECA

22 (KLR), where the Court emphasized that a stay of execution of a decree or order should be granted to prevent an appeal from being rendered nugatory, and **Kimutai Lelei v Hosea Bittok [2020] KECA 126 (KLR)**, where interim relief was granted to forestall eviction of the applicant pending appeal. The applicant therefore urges the Court to preserve the stratum of the appeal by granting the orders sought.

[11] The principles for granting stay of execution, injunction and stay of proceedings under Rule 5(2) (b) of this Court's Rules are the same and are well settled. This Court in the case of **Trust Bank Limited and Another v. Investech Bank Limited and 3 others [2000] eKLR**, delineated such jurisdiction as follows:

"The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case..."

[12] In considering the twin principles set out above, we are cognizant

that both limbs must be demonstrated to the Court's satisfaction.

[13] On the first limb, we have to consider whether there is at least a single *bona fide* arguable ground that has been raised by the

applicant that warrants ventilation before this Court. See **Stanley Kang'ethe**

Kinyanjui v Tony Ketter & 5 Others [2013] eKLR, where this

Court described an arguable appeal in the following terms:

“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.”

[14] We have carefully considered the grounds set out in the draft Memorandum of Appeal. In our view, they are arguable. Certainly, the propriety of the trial court’s endorsement of a compromise that excluded the applicant from the list of beneficiaries, the disputed familial relationship between the 3rd respondent and the deceased, and the procedural fairness of the rectification process that led to the applicant’s exclusion from the estate are not frivolous grounds. We are of course aware that an arguable ground need not ultimately succeed; it is sufficient that it raises an issue deserving full judicial consideration. (See *Kenya Railways Corporation v. Edermann Properties Ltd, Civil Appeal No. Nai. 176 of 2012*).

[15] Turning to the second limb, we must determine whether the intended appeal would be rendered nugatory if the injunction is not granted. This inquiry is fact-specific and guided by the overriding objective of ensuring that a successful appeal does not amount to a hollow or pyrrhic victory. As stated in **Stanley Kang’ethe Kinyanjui v.**

Tony Ketter & 5 Others (supra), the Court must assess whether the

acts sought to be stayed or injuncted are reversible, or if not, whether damages would reasonably compensate the aggrieved party.

[16] In the present case, the applicant has demonstrated that he has been in actual and exclusive possession of the suit property which has now been re-designated as **MARAMA/SHIKUNGA/1910**. He has cultivated the land, planted trees nearing maturity, and made substantial investments in its development. The respondents have procured a title deed in favour of the 3rd respondent and have issued threats of imminent eviction, with indications of intent to dispose of the suit property to third parties. The applicant fears that such actions would permanently dispossess him and defeat the substratum of the appeal are therefore not hyperbole.

[17] Unlike a money decree, the subject matter here involves land rights and physical possession, which, if disrupted, cannot be adequately remedied by an award of damages. The risk of irreversible loss and third-party transfer renders the appeal vulnerable to being rendered nugatory. We are persuaded that the applicant has satisfied the second limb of the test as well, and that the circumstances warrant preservation of the status quo as it currently obtains with regard to the parcel of the land.

[18]Accordingly, we find merit in the application which we hereby allow.

The injunctive reliefs sought are hereby granted, pending the hearing and determination of **Kisumu Civil Appeal No. E244 of 2024**. Costs of the application shall abide the outcome of the appeal.

Dated and delivered at Kisumu this 7th day of November, 2025.

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

H.A. OMONDI

.....
JUDGE OF APPEAL

L. KIMARU

.....
JUDGE OF APPEAL

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

Signed
DEPUTY
REGISTRAR