

**IN THE COURT OF APPEAL  
AT NAKURU**

**(CORAM: MATIVO, GACHOKA & MURUNGI, JJ.A.)**

**CIVIL APPEAL (APPLICATION) NO. NAK E142 OF 2024**

**BETWEEN**

**MARIANA NJERI GATHENYA.....1<sup>ST</sup>  
APPLICANT  
JEREMIAH MUTHEE NDERITU.....2<sup>ND</sup> APPLICANT  
JOHN MWANGI NDERITU.....3<sup>RD</sup>  
APPLICANT  
JOYCE MUGURE THUITA.....4<sup>TH</sup>**

**APPLICANT AND**

**GEORGE NDUNGU KIMANI.....1<sup>ST</sup>  
RESPONDENT  
JANE WANGARI NDERITU.....2<sup>ND</sup>  
RESPONDENT  
GEORGE MUHUHU.....3<sup>RD</sup> RESPONDENT**

*(Being an application for stay of proceedings from the ruling of the High Court of Kenya at Naivasha (G. Nzioka, J.) dated 17<sup>th</sup> May 2024*

*in*

***Succession Cause No. 3 of 2017  
Consolidated with Succession Cause No. 4 of 2017).***

\*\*\*\*\*

**RULING OF THE COURT**

1. By an application dated 14<sup>th</sup> November 2025, brought under Rules 5 (2) (b), 43 and 44 of the Court of Appeal Rules, 2022, the applicants pray for an order of stay of further proceedings

in Naivasha High Court Succession Cause No. 3 of 2017  
consolidated with Naivasha High Court Succession Cause No.  
4

of 2017, in the matter of the Estate of Joseph Nderitu Kingori (deceased) pending hearing and determination of Nakuru COACA No. E142 of 2024 Mariana Njeri Gathenya and 3 Others vs. George Ndungu Kimani and 2 Others. The applicants also pray for the costs of the application to be provided for.

2. The application is premised on the grounds listed on its body and in the annexed supporting affidavit sworn John Mwangi Nderitu, the 3<sup>rd</sup> applicant dated 11<sup>th</sup> June 2025. The salient averments are: (a) by a ruling dated 17<sup>th</sup> May 2024, the trial court dismissed the applicants' application dated 11<sup>th</sup> June 2024 brought under section 26 of the Law of Succession Act in which they sought reasonable provision as deceased's dependants; (b) aggrieved by the said ruling, the applicants have already appealed to this Court; (c) the applicants have an arguable appeal as evidenced by the grounds set out in its memorandum of appeal; (d) by a ruling dated 4<sup>th</sup> November 2025, the trial court granted the executor of the deceased's Will 7 days to apply for confirmation of the grant, and; (d) should the grant be confirmed, there will be no estate left for

them to benefit, therefore, their appeal will be rendered nugatory.

3. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed separate identical replying affidavits both dated 11<sup>th</sup> December 2025 essentially urging that:

(a) the executor of the deceased's Will reneged from his mandate, by allowing the appellants to illegally benefit from LR No. 1144/684 and Naivasha Municipal Block/2, which are rent generating assets which were bequeathed to them by the deceased; (b) the appeal will not be rendered nugatory; and (c) the applicants are not deceased's dependants.

4. The 1<sup>st</sup> respondent did not file any response to the application nor did he attend the hearing.

5. In his submissions dated 20<sup>th</sup> December 2025, the applicants' counsel cited **Stanley Kang'ethe Kinyanjui vs. Tony Ketter &**

**5 Others [2013] eKLR** in support of his submission that the

application satisfied the two prerequisites set out in the said decision, that is, the appeal is arguable and absent of stay, the appeal if successful will be rendered nugatory. Counsel argued that whether or not the learned judge erred in

dismissing the applicant's application is an arguable ground.  
It was also submitted that the 1<sup>st</sup> applicant, who is a widow of  
the deceased

was not considered during the distribution of the estate. Lastly, the applicants' counsel submitted that if the stay sought is not granted, in the event the appeal succeeds, it will be rendered nugatory.

6. In their written submissions dated 3<sup>rd</sup> March 2026, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents maintained that the applicants' application is aimed at delaying the case, that it is founded on concocted facts and that the grounds of appeal are not arguable, therefore, it does not satisfy the twin principles of arguability and the nugatory aspect.
7. The application before us is brought under Rule 5 (2) (b) of the Court of Appeal Rules, 2022. The applicants are seeking to stay further proceedings in Naivasha High Court Succession Cause No. 3 of 2017 (Consolidated with Naivasha High Court Succession Cause No. 4 of 2017) currently pending before the trial court. Under the said rule, this Court possesses original jurisdiction to grant a stay of execution or stay of proceedings pending before the trial court. This jurisdiction is a procedural safeguard designed to preserve the subject matter of an appeal

and prevent the judicial process from being rendered a "complete nullity" before the appeal is heard.

- 8.** Under Rule 5 (2) (b), this Court has wide and unfettered discretion to grant interim reliefs such as stay of execution, injunctions or stay of further proceedings. The only fetter is that the discretion must be exercised judicially and not capriciously. To ensure this discretion is exercised judicially and rationally rather than impulsively, the Court is guided by two well-settled principles. (See this Court's decision in **Anne Wanjiku Kibeh vs. Clement Kungu Waibara and IEBC [2020]** **eKLR**). To successfully invoke this jurisdiction, an applicant must satisfy the two mandatory conditions, often referred to as the twin principles, namely, that the appeal is arguable and absent of stay, the appeal will be rendered nugatory. (See this Court's decision in **Anne Wanjiku Kibeh vs. Clement Kungu Waibara and IEBC [2020]** **eKLR**). In addition, stay of proceedings is a rare remedy granted with circumspection and only in exceptional circumstances.

9. First, we will address our mind to the question whether the applicants have demonstrated that their appeal is arguable. An arguable appeal is one that raises at least one *bona fide* point that deserves full consideration by the Court, even if it is not guaranteed to succeed. (**Stanley Kangethe Kinyanjui vs. Tony Ketter and 5 Others [2013] eKLR**). The applicants are contesting the dismissal of their application for provision as dependants. They are also arguing that the 1<sup>st</sup> applicant, a widow of the deceased was not considered during the distribution. We are alive to the fact that in an application under Rule 5 (2) (b), we are strictly prohibited from making conclusive or definitive findings of fact or law. That is the function of the Court that will hear the appeal. (See **Teachers Service Commission Kenya National Examinations Council vs. Republic & 129 Others [2021] eKLR**).

10. However, it is important to mention that each case is to be determined taking into consideration its peculiar

circumstances. Here is a case where the validity of the deceased's Will was conclusively settled in a ruling rendered by *Mwongo, J.* on 17<sup>th</sup> November 2022. The said ruling has never been appealed

against or reviewed. It is basic law that a court decision that is not challenged through an appeal or review within the prescribed limitation period attains finality. This principle is grounded in the doctrine of finality and the rule of *Res Judicata*, which ensures that litigation eventually comes to an end to maintain social order and legal certainty.

11. As was observed by the learned judge in the impugned ruling at paragraph 40, the deceased clearly recognized the applicants as his children. The learned judge at paragraph 50 of the said ruling underscored that ascertaining the deceased's properties required *viva voce* evidence. The import of this is that the entire estate will be determined during the trial. The learned judge at paragraph 51 of the ruling stated that the executor of the will proceed to apply for confirmation of the grant and at that point, the applicants will have the liberty to file either a protest or file objection proceedings. The import of this is that, they have a chance to ventilate their grievances before the trial court. In other words, their grievances are live issues before the trial court. While appreciating that the threshold for arguability is very

low,

based on the peculiar facts of this case, the applicants have not

demonstrated that they have a *bona fide* arguable appeal. Because it is a requirement that an applicant must satisfy the two prerequisites, it will add no value for us to address the nugatory aspect or consider whether the threshold for stay of proceedings has been met.

12. The upshot of the foregoing is that the applicants' application dated 14<sup>th</sup> November 2025 is devoid of merit and the same is hereby dismissed with costs to the respondents.

**Dated and delivered at Nakuru this 17<sup>th</sup> day of April, 2026.**

**J. MATIVO**

.....  
**JUDGE OF APPEAL**

**M. GACHOKA C. Arb, FCI Arb**

.....  
**JUDGE OF APPEAL**

**MURUNGI B. KAIRARIA**

.....  
**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the*

*original.*

*Signed.*

**DEPUTY REGISTRAR.**