



**Kaguara & another v Uiru & 5 others (Civil Application
E362 of 2024) [2025] KECA 69 (KLR) (24 January 2025) (Ruling)**

Neutral citation: [2025] KECA 69 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E362 OF 2024
P NYAMWEYA, WK KORIR & GV ODUNGA, JJA
JANUARY 24, 2025**

BETWEEN

NANCY WAIHERA KAGUARA 1ST APPLICANT

SIMON MUNGAI UIRU 2ND APPLICANT

AND

ALICE NYAKIO UIRU 1ST RESPONDENT

WINNIE WAIRIMU UIRU 2ND RESPONDENT

LUCY WANJIKKY UIRU 3RD RESPONDENT

RACHAEL MOI URIU 4TH RESPONDENT

**ESTATE OF JANET WANJIRU URIU ALIAS JANET WNJIRU
KANGONYA 5TH RESPONDENT**

ESTATE OF GRACE WANJUHI MBUGUA 6TH RESPONDENT

*(An application for stay of execution pending the hearing of an appeal
from the ruling of the High Court of Kenya at Kiambu (A. Mshila,
J.) delivered on 24th May 2024 in Succession Cause No. 7 of 2018)*

RULING

1. The applicants have filed a notice of motion under rule 5 (2) (b) of this [Court's Rules](#) in which their main prayer is for an order of stay of execution of the ruling delivered by Mshila, J. on 24th May 2024 in Kiambu Succession Cause No. 7 of 2018.
2. A brief background is necessary for the purposes of appreciating the instant application. This application arises from succession proceedings in respect to the estate of Naftary Uiru Kaguara alias



Naftary Uiru Kagaura “1” which were instituted at the High Court at Kiambu in Succession Cause No. 7 of 2018. In a ruling delivered on 30th April 2019, Meoli, J. ordered the Kiambu District Surveyor to visit the estate property (Kiambaa/Ruaka/113) in the presence of all beneficiaries and their advocates and prepare at least three proposals as to how the property could be sub-divided in a manner that was economically and equitably viable, taking into consideration the developments thereon. Two surveyors visited the property on different dates. One of the surveyors came up with one proposal and the other one prepared two proposals that were filed in court. The parties later submitted on the proposals and after considering them, Mshila, J. in a ruling delivered on 24th May 2024 adopted the proposal identified as “Plan B” and ordered that the confirmation of the grant be in accordance with that proposal. The applicants were dissatisfied with the decision and intend to appeal against it. In the interim, they have filed the instant application.

3. From the grounds on the face of the application and the averments in the supporting affidavit of the 1st applicant, Nancy Waithera Kaguara, it is the applicants’ case that they have an arguable appeal on the ground that the impugned ruling did not consider the fact that they had occupied and developed plots 1, 2, 3, 4, and 5 over the years. It is the applicants’ case that if the orders of stay are not granted, they will lose plot number 2 leading to the demolition of the structures they have erected thereon thus rendering the appeal nugatory.
4. The estate of the 1st respondent opposed the application through an affidavit sworn by the administrators, Naftary Uiru Nyakio and Peter Kaguara Nyakio, on 9th August 2024. They contend that the intended appeal is not arguable and that the motion is founded on untruths. They aver that the applicants fully participated in the process that led to the adoption of the settlement plan and that they should not now run away from that process. It is deposed that the intended appeal will not be rendered nugatory because the settlement plan did not interfere with the already established homes of the beneficiaries and that the only interference, if any, would be suffered by third parties who acquired part of the suit property against explicit court orders barring interference with it.
5. The 2nd, 3rd, 4th, 5th and 6th respondents, likewise, opposed the application through the affidavit of the 2nd respondent, Rachel Moi Uiru. To them, the intended appeal is not arguable but is a continuation of the applicants’ litigious history. They aver that the structures on the suit property were constructed by third parties who were not beneficiaries of the estate of the deceased, and against court orders barring further dealings with the suit property pending the judgment of the High Court. It is, therefore, their case that the application should not be allowed because it is only meant to deny them the fruits of the judgment.
6. All parties filed written submissions in time for the hearing of this matter. The firm of J. W. Wanjohi & Co. Advocates filed submissions dated 9th September 2024 in support of the application. In those submissions, counsel submitted on a myriad of issues but we will limit ourselves to what is relevant to this application. Counsel urged that the issues raised in the draft memorandum of appeal established an arguable appeal. He argues that should stay orders not be granted and the appeal succeeds, it will be rendered nugatory because the respondents have not established their ability to compensate them. Counsel relied on the case of *Stanley Kangethe Kinyanjui vs. Tony Keter & 5 Others* [2013] eKLR to identify the twin conditions that must be proved to warrant the grant of stay orders. He also referred to *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another* [2006] eKLR in support of the proposition that an applicant is not required to argue the grounds of appeal but only point out their arguability.
7. Musungu Pekke & Co. Advocates filed submissions dated 10th September 2024 to urge the case for the 1st respondent. Counsel submitted that there were no adverse orders upon which the applicants’



intended appeal can be anchored. According to counsel, the intended appeal is not arguable as the proposed survey plans 1 and 2, which the appeal is against, were not adopted by the trial court. Counsel also submitted that the applicants have not established what prejudice they would suffer should the orders sought be declined. Counsel consequently urged for the dismissal of the application with costs.

8. For the 2nd, 3rd, 4th, 5th and 6th respondents, learned counsel Ruth N. Kibebo through the submissions dated 25th September 2024 relied on the case of *Nairobi City Council vs. Tom Ojienda & Associates* [2022] KECA 1326 (KLR), to urge that an applicant seeking stay of execution must establish that the intended appeal is arguable and is likely to be rendered nugatory should the application for an order of stay be declined. According to counsel, the applicants have not demonstrated these principles and neither have they shown the prejudice they would suffer should the impugned ruling be executed. Additionally, counsel argued that the impugned ruling was yet to be extracted by the applicants and urged that the application be struck out. Counsel also submitted that since no memorandum of appeal has been filed and served, the intended appeal cannot be said to be arguable. Finally, counsel submitted that the application has been overtaken by events since the survey plans had been drawn and one of the resulting proposals adopted by the trial court. She consequently urged for the dismissal of the application with costs to the respondents.
9. The principles undergirding the determination of an application under rule 5 (2) (b) are well established by the Court's long chain of decisions. In order to succeed, an applicant must demonstrate the existence of an arguable appeal, which, in the absence of the stay orders, is likely to be rendered nugatory. For instance, in *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike; Lantech Ltd* [2006] KECA 333 (KLR), the Court observed as follows:

“What falls for consideration by the Court under Rule 5 (2) (b) is:-

 - a. whether the appeal or the intended appeal, as the case may be, is an arguable and not a frivolous one; and
 - b. whether if the stay or injunction sought is not granted and the appeal or the intended appeal were to eventually succeed, such success would have been rendered nugatory by the earlier refusal to grant the stay or the injunction.”
10. Is the intended appeal arguable? In answering this question, we bear in mind the holding in *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike; Lantech Ltd* (supra) that:

“It is to be remembered that in an application such as this the grounds are not to be argued; all an applicant is required to do is to point out to the Court the ground or grounds which he believes are arguable and leave it to the Court to decide on the issue of whether or not the matters raised are arguable.”
11. We are equally aware that a single arguable point, and not a multiplicity of issues, will suffice for the Court to conclude that an arguable appeal has been disclosed. We have perused the applicants' draft memorandum of appeal, where nine issues have been raised. We have also considered the same vis-à-vis the annexed impugned ruling. From the documentation placed before the Court, it is safe to conclude that the applicants' intended appeal is arguable. We need not say more lest we embarrass the bench that will eventually be tasked with hearing the intended appeal.
12. Will the intended appeal be rendered nugatory if the stay is not granted? The applicants' primary contention was that they had constructed and occupied plots number 1, 2, 3, 4, and 5 over the years and that if the impugned ruling is executed, they will lose the structures thereon. According to



them, an award of damages will not adequately compensate them for the loss. In opposing this plea, the respondents averred that the said structures were erected in disregard of court orders preserving the estate property. The respondents further averred that all pre-existing homes were considered and left un-interfered with in the adopted survey plan. It is therefore the respondents' position that the applicants will not suffer any prejudice should the proposal be implemented.

13. In *Stanley Kangethe Kinyanjui vs. Tony Keter & 5 Others* [2013] eKLR, the factors to be considered in determining whether an appeal would be rendered nugatory were outlined as follows:
 - ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd vs. 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.”
14. From the foregoing, it is apparent that an applicant desirous of convincing the Court that an appeal or intended appeal is likely to be rendered nugatory is required to demonstrate that if stay is not granted, the intended appeal, if successful, will serve no purpose as the act sought to be stayed will not be reversible and damages cannot adequately compensate the loss suffered. In this application, we note that there is a ruling delivered on 6th July 2022 by Kasango, J. in which she held that Peter Kaguara, the husband to the 1st applicant, had no interest in the immovable property of the deceased that he could transfer to one Patrick Kihui Kamau. In the decision, the learned Judge noted that there were orders dated 26th February 2019 barring Patrick Kihui Kamau from renting out certain residential premises erected on the suit property. It was further observed that the sale transaction had not been completed and that there were numerous applications in which the beneficiaries had alleged continuing construction by Patrick on the suit property.
15. The findings by the learned Judge above give credence to the averments by the 2nd, 3rd, 4th, 5th and 6th respondents that the constructions, if any, were made in disregard of existing court orders barring any developments on the estate property. In the circumstances, what the applicants perceive as having the possibility of rendering the appeal nugatory are outcomes of what may well be illegal activities bordering on intermeddling with the estate of the deceased. Those developments cannot be protected by stay orders and neither can it be said that the intended appeal will be rendered nugatory because activities carried out in clear contravention of court orders have not been protected. In the circumstances, the holding of the Court in *Wakiha Muchungu vs. Zacharia Muchungu Njoroge, Tabitha Wanja Njoroge - Personal Representatives of the Estate of Njoroge Muchungu (Deceased) & Attorney General* [2020] KECA 890 (KLR) (Civ) (7 February 2020) (Ruling) is apt. Therein it was stated that:

“We have considered the Motion and cannot see or discern any arguable point on appeal. The uncontroverted affidavit evidence before us shows that the applicant has violated court orders with abandon and is entitled to any protection of the court, equitable protection which rule 5 (2) (b) of the rules of this Court gives in deserving cases. The Motion has no merit and it is dismissed with costs to the 1st respondents.”
16. Furthermore, the key issue in the applicants' intended appeal is whether the distribution of the estate of the deceased by the High Court complied with the succession laws. Nowhere has it been averred by the applicants that the respondents intend to dispose the estate property. In the circumstances, we are not convinced that the appeal will be rendered nugatory.



17. The applicants in their submissions alluded to the respondents' inability to pay back the decretal sum. Since this was not raised in the pleadings, we do not find it proper to shift the onus to the respondents to dislodge the statement. In any event, there is no mention of any monetary award in the ruling the applicants intend to appeal against.
18. Considering the history of the dispute, and notwithstanding the fact that this is a family affair, we find no reason to depart from the rule that costs ordinarily follow the event. As such, we award the costs of the application to the respondents.
19. Consequently, the application dated 12th July 2024 is found to be without merit and is dismissed with costs to the respondents.

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

P. NYAMWEYA

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

W. KORIR

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

G. V. ODUNGA

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

I certify that this is a True copy of the original,

Signed Deputy Registrar.

