



**Muthomi v Muthomi (Civil Appeal (Application) E107 of 2023)
[2025] KECA 345 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KECA 345 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) E107 OF 2023
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
FEBRUARY 28, 2025**

BETWEEN

TSILLA NKIROTE MUTHOMO APPLICANT

AND

ZIPPORAH KAMBURA MUTHOMI RESPONDENT

(Application for stay of proceedings pending hearing & determination of the appeal arising from the ruling and order of High Court (Cherere, J.) delivered on 15th February 2024 in Succession Cause No. 160 of 1997.)

RULING

1. By an application dated 9th July 2024, Tsilla Nkirote Muthomi, the applicant/1st administratrix of the deceased estate, seeks to have a stay of proceedings and/or further proceedings in High Court Succession Cause No. 160 of 1997 pending hearing and determination of the appeal in Civil Appeal No. E107 of 2023. She also seeks stay of the order of the learned Judge in the same Succession Cause made on 27th April 2023, pending the hearing and determination of the appeal. The application is supported by the affidavit sworn by the applicant's advocate, Mr. Charles Oticno Obwanda.
2. In the Succession Cause in which the High Court ruled that the applicant was neither a widow nor a beneficiary of the deceased estate but that the children born out of that relationship were beneficiaries.
3. The applicant urged this Court to find the grounds advanced in the grounds of appeal in the intended appeal arguable. She placed reliance on the case of Kenya Commercial Bank Limited vs. Nicholas Ombija [2009] eKLR, which held that an arguable appeal is not one that must necessarily succeed but one deserving consideration and which should be argued fully before the appellate court.
4. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The power of this Court on applications under rule 5 (2)(b) of this Court's Rules is discretionary and unfettered. In the exercise of this discretion, the Court must be satisfied the twin



principles are established: which are whether the appeal is arguable and that if the application is not granted and the appeal succeeds, whether the appeal will have been rendered nugatory.

5. In the case of *Trust Bank Limited & Another vs. Investech Bank Limited & 3 Others* [2000] eKLR, this Court delineated the jurisdiction of this Court 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 of 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...”

6. On the first limb, we have to consider whether there is a single bona fide arguable ground the applicant has been raised by the applicant to warrant ventilation before this Court. In *Stanley Kang’ethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR, 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.”

7. The applicant’s case is that on the 15th February 2024 the High Court at Meru delivered its ruling on the applicant’s application dated 20th September, 2023 and granted a stay of its proceedings in Meru High Court Succession Cause No. 160 of 1997 (HCSC) pending the hearing and determination of this appeal in favour of the applicant herein. The High Court had ruled that the applicant was not a wife of the deceased but that the children born out of their relationship were beneficiaries. However, on the 23rd May 2024 the High Court reviewed its ruling and set aside the order of stay of proceedings of the HCSC No. 160 of 1997.
8. We note from the ruling of the court annexed to the applicant’s supporting affidavit that the same arose from an application for review sought by the respondent/ 3rd administratrix of the estate of the deceased who argued that the ruling of 27th April 2023 was a negative order incapable of being executed or stayed. The court agreed with the respondent and set aside its ruling, now sought to be stayed, and fixed the matter for hearing inter partes of the summons for confirmation of the grant and protests, for the 19th September 2024.
9. The applicant urges that the effect of the ruling was to lock her out of the proceedings in the High Court in totality contrary to the expectation that the court was to wait for the outcome of the appeal in Nyeri before proceeding.
10. The respondent has opposed the application. In the replying affidavit dated 25th October 2024 the respondent deposes that the High Court made an order on the 23rd May 2024 reviewing its orders of 15th February 2024. She deposes that the applicant has not preferred an appeal against that finding of the superior court, as no appeal or a notice of appeal is annexed to the supporting affidavits filed in support thereof. She deposes that the only notice of appeal on record is dated 5th May 2023, against the ruling of 27th April 2023, and that consequently the instant application is incompetent as the jurisdiction of this Court has not been invoked.
11. The applicant did not file a response to the respondent’s affidavit. That means that her deposition is uncontroverted.



12. This Court’s jurisdiction to stay a ruling or judgment is contingent on a notice of appeal having been filed against the Nguruman Ltd vs. Shompole Group said ruling or judgment within 14 days of the date of its delivery, pursuant to the then rule 77 of the Court of Appeal Rules. This requirement is prescribed by rule 5 (2)(b) and was confirmed by this Court in Halai & Another vs. Thornton & Turpin (1963) Ltd. [1990] KLR 365. The Applicant did not exhibit any such notice of appeal against the ruling delivered on 23rd May 2024, and therefore the instant application is incompetently filed, in so far as it seeks orders of stay of execution against a ruling not appealed against. Also see the decision by this Court in Ranch & Another [2014] eKLR in this respect.
13. For the reasons we have stated in this ruling, we find that this application is incompetent and is accordingly struck out.

conclusions

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF FEBRUARY, 2025

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

