



**Waweru & 2 others v Waruingi & 2 others; Nicmac Crest Limited & 2 others (Interested Parties)
(Civil Appeal (Application) E162 of 2024) [2025] KECA 269 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KECA 269 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E162 OF 2024
A ALI-ARONI, AO MUCHELULE & GV ODUNGA, JJA
FEBRUARY 21, 2025**

BETWEEN

**NJUGUNA WAWERU 1ST APPELLANT
JANE WANJIRU NJERI 2ND APPELLANT
JOHN WARUINGI KAGAI 3RD APPELLANT**

AND

**JOHN WAWERU WARUINGI 1ST RESPONDENT
KAGAI WARUINGI 2ND RESPONDENT
LIVINGSTONE GICHERU WARUINGI 3RD RESPONDENT**

AND

**NICMAC CREST LIMITED INTERESTED PARTY
FORT LIMITED INTERESTED PARTY
CREST LIMITED INTERESTED PARTY**

(Being an application for a stay of execution of the Ruling and Order of the High Court at Nairobi (E.Ogola, J) delivered on 16th October, 2023 in Succession Cause No. 1671 of 1993)

RULING

1. By a Notice of Motion application dated 27th May 2024, the applicants seek an order that the ruling and order of the High Court delivered on 16th October 2023 in Succession Cause No. 1671 of 1993 be stayed pending the hearing and determination of this appeal. In the alternative, it is sought that pending the hearing and determination of the appeal, there be an order maintaining status quo in respect of land parcel No. Kiambaa/Thimbigua/1750 (subdivided into land parcel Nos. Kiambaa/



Thimbigua/7880-7890) and land parcel No. Kiambaa/Thimbigua/1777 (subdivided into land parcel Nos. Kiambaa/Thimbigua/7891-7902) (the suit properties).

2. The Motion was supported by the joint affidavit sworn by Jane Wanjiru Njeri and John Waruingi Kagai, the 2nd and 3rd applicants, on 27th May 2024. In the said affidavit, it was deposed: that the deponents are the beneficial owners of the suit properties being the children of Kagai who was the only child of the deceased, whose properties are the subject of the appeal; that they were issued with Letters of Administration dated 1st October 2029 and which were confirmed on 25th February, 2020; that they have assumed their respective portions pursuant to the Certificate of Confirmation and have in accordance with the Grant transferred of some of the portions therefrom to interested parties such including the 1st to the 3rd interested parties; that in its ruling delivered on 16th October 2023, the High Court revoked the said Grant at the behest of the respondents who are not beneficiaries of the estate of the deceased and are not entitled to a share from the estate; that the High Court also ordered for the cancellation of the titles and directed that the titles revert to the deceased's name; that the appeal will be rendered nugatory if the said cancellation of the titles are effected by the respondents before the appeal is heard and determined; that the respondents have since 16th October 2023 descended on their family land and demolished the perimeter fence and gates on the said land; that the respondents have, without any court order to that effect, denied them the possession and use of their family land hence deprived them from their right to cultivate the said land and earn a living for their families; that the respondents acts of dispossessing them of their land has persisted even after the appeal was filed.
3. The application was opposed by an affidavit sworn by Livingstone Gicheru Waruingi, the 3rd respondent, dated 19th August 2024, in which it was deposed: that the order sought to be stayed has already been complied with by the registration of the same with the Kiambu Lands Office on 16th April 2024; that the import of the said order was to cancel the registration of Kiambaa/Thimbigua/1750 and Kiambaa/Thimbigua/1777 into the names of Njuguna Waweru and the subdivision and subsequent transfer and registration of Kiambaa/Thimbigua/1750 (as subdivided into Kiambaa/Thimbigua/7880 to 7890) and Kiambaa/Thimbigua/1777 (as subdivided into Kiambaa/Thimbigua/7891 to 7902) by the 1st applicant, Njuguna Waweru, to the interested parties; that the Grant of Letters of Administration issued to the applicants on 1st October 2019 and confirmed on 25th February 2020 were revoked; that the registration of and compliance with the orders of 16th October 2023 can only be reversed by this Court upon hearing and determining the appeal and not by the instant application; and that whereas the grounds in the appeal may be arguable, the appeal may not be rendered nugatory by the failure to stay the orders of the 16th October 2023 since, in addition to the same having been fully complied with, the estate is not at risk of being distributed as the rightful beneficiaries thereof are yet to be determined.
4. The deponents explained that the deceased was the respondents' step-mother who passed away on 29th June 2023 leaving one son, Peter Kagai Waruinge; that on 10th March 1994, the High Court issued letters of administration to Francis Muigai Waruingi, the deponent's brother but the same were revoked on 28th November 1997; that Peter Kagai Waruingi, the deceased's only child, who was unmarried and had no issues, was appointed as the administrator of the estate of the deceased on 28th November 1997 in Francis Muigai Waruingi's stead; that Peter Kagai Waruingi passed away on 6th November 1998 before administering the estate; that following his demise the respondents filed summons dated 28th December 2006 seeking the revocation and/or annulment of the Grant of Letters issued to Peter Kagai Waruingi and seeking that they be granted the same; that during the pendency of the said proceedings, the applicants fraudulently and secretly filed Succession Cause No. 47 of 2012 before the Magistrate's Court at Kiambu over the same estate and obtained Letters of Administration Intestate and had the same confirmed without disclosing material facts; that the respondent, upon



- discovery of the proceedings by the applicants, successfully applied for the revocation of the said Grant; that the applicants used the said Grant to have Kiambaa/Thimbigua/1750 and 1777 registered in the names of Njuguna Waweru who subdivided the same into smaller portions and transferred them to 3rd parties some of them being the interested parties; that the respondents moved the court to have the transfers and resultant titles be cancelled and the court on 16th October 2023 ruled in favour of the respondents.
5. According to the deponents, the applicants have never been in possession, occupation and use of the suit properties.
 6. We heard the application on 8th October 2024 on the Court's virtual platform when learned counsel, Mr Omondi Ogwel, appeared for the applicants and the interested parties while learned counsel, Mr Mwathe, held brief for Mr Kibe Mungai for the respondents. Learned counsel entirely relied on their written submissions.
 7. On behalf of the applicants, reliance was placed on the cases of Dickson Sinkeet Mapi (Suing as the Personal Representative of Benjamin Mapi Ole Partimo-Deceased v Mutunkei Civil Appeal (Application) No. E 041 of 2020[2021] KECA 235 (KLR) and Trust Bank Limited and Another v Investec Bank Limited & 3 Others [2000] eKLR where this Court held that first, the applicant has to show that the 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. Further, the court held that these principles must be considered against the facts and circumstances of each case.
 8. The applicants' case, it is submitted, is: that the revocation was premised on the ground that the applicants had failed to involve the respondents, yet the respondents are not beneficiaries of the estate of the deceased; and that the trial court was devoid of jurisdiction to determine issues that had already been dealt with finality by the same court. Based on Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR, the applicants submitted that they have an arguable appeal.
 9. It was further submitted by the applicants that the basis of their eviction is the ruling and order yet, the order did not grant the respondents any legal or beneficial interests in the suit properties; that the respondents' occupation and use of the land is illegal and unlawful and has exposed the applicants to untold suffering as they do not have any other source of income; that they are facing imminent threat of being sued by third parties who are innocent purchasers who have also been evicted from their respective parcels; and that their appeal will be rendered nugatory if stay of execution is not granted as there is imminent threat of cancellation of their titles and the impending threat of being sued by innocent purchasers.
 10. The respondents, on the other hand, relied on the case of RWW v EKW (2019) eKLR, where the Court held that the purpose of an application for a stay of execution pending an appeal is not only to preserve the subject matter in dispute but also weigh the rights of parties against the success of a litigant who should not be deprived of the fruits of his/her judgment. They cited the case of Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR, where this Court set out principles governing the exercise of its jurisdiction under rule 5(2)(b) of this Court's Rules and submitted that the applicants have not demonstrated that they have an arguable appeal. According to them, the grounds raised in the Memorandum of Appeal do not demonstrate how the court went against the weight of the evidence, how the decision was irrational or how the court determined the wrong issues and/or legal principles. In addition, it was submitted that the applicants failed to establish, with specificity, factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of their appeal, should they be the successful parties in the appeal, hence rendering the same



nugatory. While relying on *James Wangalwa & Another v Agnes Naliaka Cheseto Misc Application No. 42 of 2011*[2012] eKLR, as quoted with approval in *RWW v EKW* (supra), the respondents submitted that no particulars of loss or any additional potential loss have been pleaded or proved by the applicants to disentitle the respondents of their rights to enjoy the fruits of their ruling and order. On the authority of the case of *Republic vs Kenya Anti-Corruption Commission & 2 Others* [2009] KLR 31, the respondents submitted that both limbs must be demonstrated to exist before one can obtain relief under rule 5(2)(b) of the Rules which the applicants have failed to do and urged this Court to dismiss the application with costs.

11. We have considered the application and the submissions made before us. This Court, in its numerous decisions, has crystallised the basis for the exercise of this Court’s jurisdiction under rule 5(2)(b) aforesaid. The exercise of this jurisdiction is original, independent and discretionary (see *Githunguri v Jimba Credit Corporation Ltd No (2)* (1988) KLR 838). It is a procedural innovation designed to empower the Court to entertain interlocutory application for the preservation of the subject matter of the appeal where one has been filed or is intended (see *Equity Bank Ltd v West Link Mbo Limited* [2013] eKLR. It only arises where the applicant has lodged a notice of appeal or the appeal itself (see *Safaricom Ltd v Ocean View Beach Hotel & 2 Others Civil Application No. 327 of 2009 UR*).
12. The conditions to be met before a party can obtain relief under rule 5(2)(b), as enunciated in case law, are that the applicant has to demonstrate that the appeal is arguable on the one hand and, on the other hand, that if the stay sought is not granted, the appeal or the intended appeal, as the case may be, will be rendered nugatory (see *Githunguri v Jimba Credit Corporation Ltd No (2)* (supra). By the term “arguable”, it is not meant an appeal or an intended appeal that will succeed, but one which raises a bona fide issue worth of consideration by the Court (see *Kenya Tea Growers Association & Another v Kenya Planters Agricultural Workers Union, Civil Application No. Nai. 72 of 2011 UR*). An appeal need not raise a multiplicity or any number of such points, and a single arguable point is sufficient to earn an applicant such a relief, subject to the satisfaction of the second condition (see *Damji Praji Mandavia v Sara Lee Household Body care (K) Ltd Civil Application No. Nai 345 of 2005 (UR)*). It is therefore trite that demonstration of one arguable point will suffice (see *Kenya Railways Corporation v Ederman Properties Ltd Civil Appeal No. Nai. 176 of 2012*; and *Alimohamed Musa Ismael v Kimba Ole Ntamorua & 4 others Civil Appeal No. Nai. 256 of 2013*.)
13. As for the second requirement, an appeal or intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible or, if it is not reversible, whether damages will reasonably compensate the party aggrieved (see *Stanley Kangethe Kinyanjui v Tony Keter & 5 others Civil Appeal No. 31 of 2012*). Loss to the parties on both sides of the appeal plays a central role in the determination since the Court must strive to prevent by preserving the status quo (see *Total Kenya Limited versus Kenya Revenue Authority Civil Application No. 135 of 2012*).
14. Both limbs must be demonstrated before a party can obtain relief under rule 5(2) (b) (see *Republic v Kenya Anti- Corruption Commission & 2 others* (2009) KLR 31; *Reliance Bank Ltd v Norlake Investments Ltd* (2012) IEA 22); and *Githunguri v Jimba Credit Corporation* (supra).
15. In the appeal, the applicants intend to argue that the revocation was premised on the ground that the applicants had failed to involve the respondents in the succession proceedings yet the respondents are not beneficiaries of the estate of the deceased and that the trial court was devoid of jurisdiction to determine issues that had already been dealt with finality by the same court. While we cannot state with certainty that these grounds will succeed, they are certainly not frivolous. On that basis, the applicants have surmounted the first test for the grant of the stay orders sought.



16. As for the second condition, the learned Judge nullified, and or revoked the Grant of Letters of Administration that had been issued to the applicants. The effect of that decision was that the titles to the suit property reverted to the deceased's estate from whom all the parties claim interest in the suit properties. The decision did not bar the applicants from laying claim to the estate of the deceased in the renewed or subsequent succession proceedings. We have not been told that the order directed the applicants to vacate the suit property. If it was the applicant's view that the same was being misinterpreted, their recourse lay to the trial court and not in this Court. The respondents' position is that the applicants have never been in possession of the suit property and that the order has been effected. The fact that the applicants disposed of part of the estate to third parties may well lend credence to this allegation. The applicants have not even specified what portion of the suit property is occupied by them as opposed to that occupied by the third parties, if at all.
17. All in all, we are not satisfied that absent stay, the applicants' appeal will be rendered nugatory, should the appeal succeed. In the event that the appeal succeeds, it would have the effect of reversing the decision of the learned Judge with the effect that the status quo ante will be restored. Accordingly, we are not satisfied that the resulting effect of execution of the decision sought to be stayed is likely to be irreversible in the event that the appeal succeeds. If, as the applicants contend, they are sued by the third parties or interested parties, we are not satisfied that the loss they stand to suffer if such speculative suits were to be filed, cannot be compensated by award of damages should the appeal succeed.
18. Consequently, the application dated May 27, 2024 fails and is dismissed with costs.
19. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

ALI-ARONI

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

