



**Thuo & 2 others (Acting through their Mother & Guardian - SWT) v Ngeta & another
(Civil Application E110 of 2024) [2025] KECA 1291 (KLR) (16 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1291 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E110 OF 2024
MA WARSAME, JM MATIVO & GV ODUNGA, JJA
JULY 16, 2025**

BETWEEN

**SUSAN WANJIRU THUO 1ST APPLICANT
NIXON KARIUKI THUO 2ND APPLICANT
MJMT 3RD APPLICANT
ACTING THROUGH THEIR MOTHER & GUARDIAN - SWT**

AND

**WAIHARO HARRISON NGETA 1ST RESPONDENT
NAHASHON MAHUGU KABIRI 2ND RESPONDENT**

(Being an application for stay of proceedings pending appeal from the ruling of Nakuru High Court (H.M Nyaga J.) dated 11th April, 2024 in Succession Cause No. E76 of 2022)

RULING

1. Following an application for grant of probate made by the respondents herein in Nakuru High Court Succession Cause No. E76 of 2022, as executors of the will of the late Joseck Thuo Ngeta, the applicants, who are the 2nd wife and children of the deceased, objected to the grant of probate and filed a summons dated 16th February, 2024 objecting to the validity of the will of the deceased and sought orders inter alia: “
 - a. That this Honourable court be pleased to order that the purported will of the late Joseck Thuo Ngeta stands inadmissible pending the hearing and determination of this Application.
 - b. That the entire collection of the 3 counterparts and alleged original will submitted by Adv. J.G. Kagucia of the late Joseck Thuo Ngeta be subjected to forensic document examination



to investigate the signatures, handwriting and prints and preferably the same be done by the Director of Criminal Investigations.

- c. That upon examination of the signatures, handwriting and prints of the copies of the will, the investigative agency be allowed to file a report in this Honourable Court on its findings.”
2. The applicants alleged that the signature of the deceased was suspicious, that the will purported to devolve property that did not belong to the deceased while leaving out some of his properties and that they had subjected a copy of the will to forensic examination, resulting in a report which confirmed that the will had been manipulated.
3. The respondents, who are the executors of the will, objected to the application, denied all allegations of discrepancies pertaining to the signature of the deceased and accused the applicants of inviting the court to go on a fishing expedition, ostensibly as a delay tactic to frustrate the distribution and determination of the estate.
4. In a ruling delivered on 11th April, 2024, the learned trial Judge dismissed the applicants’ application on the grounds that: the forensic document examination report was based only on a photocopy of the will and it was not clear if that copy was the same one filed in court; the report failed to state whether it actually compared the signatures in the will with the signature which was witnessed by the two witnesses who testified that the deceased signed the will in their presence; that the original counterpart of the will was produced by Mr. Kagucia Advocate, who confirmed that the will that he produced was as he drew and it had been in his custody throughout. Consequently, the learned judge held thus:

“Considering the circumstances of this case, it is my view that the aforesaid expert report tendered to support the Applicants’ case does not really raise any valid point to warrant any further investigations. All the 3 counterparts of the will, in their original form, including the one kept and availed by the applicants, are in the custody of the court and can be compared page by page, paragraph by paragraph, word for word and character by character if need be. The examination of the contents thereof, if they raise any conflicting provisions, may render the same to be probed. (sic) In my opinion the application does not disclose any reasonable suspicion that the will in issue might be a forgery.”

5. Dissatisfied with this decision, the appellant has lodged an appeal (being Civil Appeal E118 of 2024) and has filed the application before us dated 29th November, 2024 seeking to stay further proceedings in Nakuru H.C Succession Cause No. E076 of 2022, In the matter of the Estate of the late Joseck Thuo Ngeta, specifically that the matter should not be fixed for judgment, pending determination of the appeal.
6. The application is supported by the supporting affidavit of Susan Wanjiru Thuo and Nixon Thuo dated 29th November 2024. The applicants are apprehensive that their right to appeal as guaranteed by law will be tampered with, if the proceedings in the high court are not stayed given that the matter is scheduled for judgment and the court will rely on a contested will. If that were to happen, the appeal would be rendered nugatory.
7. It was the applicants’ case that the orders sought would not only preserve the substratum of the appeal in Nakuru Civil Appeal No. E 118 of 2024, but also save judicial time since neither the High Court nor the Court of Appeal would be engaged in a futile exercise, since the issue of whether a forensic examination shall be undertaken will be heard and determined with finality in the appeal. The applicants contended that the intended appeal raises arguable issues, is meritorious and has high



chances of success as demonstrated in their memorandum of appeal dated 8th August, 2024 and that they will suffer irreparably, if the orders sought are not granted.

8. In response by way of a replying affidavit sworn on 5th March, 2025 the respondents averred that the application did not meet the threshold set in law to stay proceedings; that the application was an attempt to thwart the distribution of the estate, given that the applicants are in control of substantial portions of the deceased's estate and are denying the other beneficiaries from benefiting and obtaining sustenance from the estate and that the court's decision was interlocutory and the applicants will still have an opportunity to appeal the final judgment if the court does not find in their favour.
9. When the matter came up before us virtually on 9th July 2025, Mr. Karanja learned Counsel appeared for the applicants while Mr. Kisilah learned counsel appeared for the respondents. Counsel informed us that they had filed their submissions which they relied on with brief oral highlight of the same.
10. As a preliminary point, Mr. Karanja emphasized that the applicants were not privy to the original copies of the will which were in the court's custody and could therefore not subject the same to forensic audit. This necessitated the filing of the application seeking that the three counterparts be subjected to a forensic audit.
11. It was submitted that the intended appeal will be rendered nugatory if an order for stay of proceedings is not granted as the judgment will be delivered, thereby rendering the intended appeal an academic exercise and causing irreparable harm to the applicants, given that the ruling on grant of probate will have been founded on an invalid will. In his view, the appeal would be a total waste of judicial time if the appeal is successful.
12. In response, Mr. Kisilah submitted that the objection of the applicants was heard by the trial court, including the evidence of one Emmanuel Carrisa Kenga, a document examiner. Consequently, the entire evidence and the report encapsulating their objection evidence were on record for the learned judge to consider. He invited the court to view the application for what it really is- an attempt to derail the succession proceedings as rightly noted by the court. He reiterated that the appeal process should not automatically freeze all proceedings because this means that justice will never be served.
13. Citing multiple authorities including *Shell Ltd v Kibiru* and *George Kimotho Ilewe v Joseph Mathuku Ngewa* [2022] KEHC 2604 (KLR), the respondents argue that the applicants must not only demonstrate substantial loss if stay is not granted, they must provide empirical or documentary evidence of potential loss. Mere assertions of substantial loss are insufficient and the Court should not consider assertions "on face value" but require proper evidence.
14. We have considered the application, the affidavits, and the submissions. The application before us is brought under rule 5(2)
 - (b) of the Court of Appeal Rules, 2022. The principles for granting a stay of execution, injunction or stay of proceedings under rule 5(2) of this Court's Rules are well settled. This court in *Trust Bank Limited and another v Investech Bank Limited and 3 others* [2000] eKLR delineated the jurisdiction of this court in such an application 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...”



15. The applicants' intended appeal is an interlocutory appeal, from a ruling declining to stay the proceedings in Nakuru High Court Succession Cause No. 76 of 2022. It challenges the exercise of judicial discretion by the learned Judge not to subject the deceased's will and three counterparts thereof to forensic scrutiny and the decision not to declare the will invalid.
16. Based on the grounds set out in the memorandum of appeal dated 8th August, 2024 and bearing in mind that an arguable appeal is not one that will necessarily succeed, we are not prepared to say that it is frivolous.
17. Turning to the second prerequisite, which is the nugatory aspect; that is, whether the appeal, if successful, would be rendered nugatory in the event we decline to grant the orders sought and the intended appeal succeeds, we are guided by the sentiments of this court in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR this court stated that:
 - “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling
 - 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.”
18. Applying this test to the present case, we must examine whether the consequences of allowing the High Court proceedings to continue would be reversible if the intended appeal succeeds. The applicants contend that if probate is granted based on what they consider an invalid will, the resulting distribution of the estate would render their appeal nugatory. However, this argument fails to appreciate the nature of probate proceedings and the remedies available.
19. First, a grant of probate is not irreversible. Should the intended appeal succeed and the Court of Appeal find that the will should have been subjected to forensic examination, any probate granted can be revoked under section 76 of the Succession Act. The estate assets, if distributed, can be recovered through appropriate legal proceedings against the beneficiaries who received them.
20. Second, the applicants have not demonstrated that they would suffer irreparable harm that cannot be compensated by damages. Estate assets are typically identifiable and traceable. Should the will ultimately be declared invalid, the applicants would be entitled to their rightful share under the valid will or intestacy laws, with appropriate compensation for any interim losses.
21. Third, the High Court's ruling was interlocutory, declining to order forensic examination. Even if probate is granted, this does not preclude the applicants from challenging the validity of the will in subsequent proceedings if their appeal succeeds and forensic examination reveals forgery or manipulation. In contrast, granting the stay would cause demonstrable harm to the legitimate beneficiaries who would be denied access to the estate while the appeal process unfolds. The balance of convenience clearly favors allowing the succession proceedings to continue, since the trial Judge will determine the dispute on the correct parameters of the law.
22. It is trite that a stay of proceedings is a drastic order to be deployed in extremely rare cases and where exceptional circumstances warrant such orders, as it may impede the right to access to justice. (See *Lucy Njoki Waithaka v Tribunal Appointed to Investigate the Conduct of the Honourable Lady Justice Lucy Njoki Waithaka & Judicial Service Commission; Kenya Magistrates & Judges Association (Interested Party)* [2020] eKLR)



- 23. Bearing the above in mind, we are not satisfied that the applicants have demonstrated that the appeal will be rendered nugatory. Moreover, it is premature for the applicants to assume that the substantive decision will be adverse to their interests. As admitted by both parties, the trial court had the opportunity to examine the document examiner's evidence and testimony from both parties. As we have stated, should the applicants be aggrieved by the final decision, they retain the right to challenge it on appeal. We think no prejudice will be suffered by the applicants, in the event the trial court makes a determination. They will have an opportunity to challenge the decision on appeal.
- 24. In the end, upon analyzing the reasons cited by the applicants in favour of the application, we are not persuaded that they have demonstrated any basis to merit the order of stay of further proceedings as prayed. A balance must be maintained between the right of a party to have the substantive suit heard timeously and the desire of his opponent to be given adequate time to prosecute his appeal. This court must ensure that justice is done to both parties and granting the stay sought will stand in the way of the determination, on merits, of the succession cause before the trial court.
- 25. As the law stands, applicants under rule 5 (2) (b) must as a necessity surmount both the arguability test and the nugatory test. Accordingly, having failed to satisfy the twin principles to qualify for an order of stay of the proceedings, the application dated 29th November, 2024 is dismissed with costs.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF JULY, 2025

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

G.V ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

