Muraya & 2 others v Muraya & another (Civil Appeal (Application) E080 of 2024) [2025] KECA 1222 (KLR) (11 July 2025) (Ruling)

Neutral citation: [2025] KECA 1222 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL (APPLICATION) E080 OF 2024

JM MATIVO, PM GACHOKA & GV ODUNGA, JJA

JULY 11, 2025

BETWEEN

JAMES MUGO MURAYA ..... 1ST APPLICANT

CHRISTINE WANJIRU MURAYA ..... 2ND APPLICANT

PAULINE WANGUI MUCHIRI ..... 3RD APPLICANT

AND

MARGARET WAIRIMU MURAYA ..... 1ST RESPONDENT

SIMON CHEGE MURAYA ..... 2ND RESPONDENT

(Appeal Arising from the Judgment of the High Court of Kenya at Nakuru (H. K. Chemitei, J.) dated 19th October, 2023 in Succession Cause No.57 of 2018)

RULING

1. A concise history of the litigation before the High Court which culminated in the application dated 24th February 2025, the subject of this ruling is necessary in order to put into a proper perspective to the diametrically opposed arguments. Luckily, this background is fairly straight forward, essentially common ground or uncontroverted. Briefly, Peter Muraya Chege (deceased) died intestate on 9th September 2017. John Muthee Ngunjiri, James Macharia Chege and James Mugo Muraya petitioned for grant of letters of administration intestate to his estate. The grant was issued to them on 11th February 2019. By an application dated 21st March 2019, the 1st respondent applied for the revocation of the said grant, and for an order that caveats be placed on all the estate properties and any other dealings on the estate properties, the administrators be ordered to render the estate accounts. Lastly, she be allowed to file her objection and cross-petition.

2. Vide a consent recorded before the trial court on 14th February 2023, the following were appointed as the administrators: (a) James Mugo Macharia, (b) Simon Chege Muraya, and, (c) Christine Wanjiru

Muraya, thus effectively discharging John Muthee Ngunjiri, James Macharia Chege and James Mugo Muraya as the administrators. The said consent effectively resolved the prayer for the revocation of the grant. Therefore, the only issue that remained to be determined by the Court was whether the first respondent was the deceased's wife and whether her children are beneficiaries of the deceased's estate under the provisions of section 3 (2) of the *Law of Succession Act*.

3. By a Judgment dated 19th October 2023, Chemitei, J. held that the 1st respondent was the deceased's wife and her children namely Samuel Githinji Muraya, Jane Nyambura (deceased), Susan Wanja Muraya, Hannah Nyokabi and Miriam Muthoni Muraya and Simon Chege Muraya were recognized to be the deceased's children, therefore they are beneficiaries to the estate.

4. Aggrieved by the above verdict, the applicants filed a notice of appeal dated 2nd November 2023 and lodged in this Court's registry on the said date signifying their intention to appeal against the said decision. By an application dated 7th November 2023 filed before the trial court the applicants successfully applied for leave to appeal against the said decision.

5. By an application dated 24th February 2025, the subject of this ruling brought under Section 3A and 3B of the *Appellate Jurisdiction Act* and *Rules* 1 (2) & 5 (2) (b) of the *Court of Appeal Rules*, 2022, the applicants pray for stay of further proceedings in Nakuru HCC *Succ. No 57 of 2018* pending the hearing and determination of this appeal. They also pray for the costs of this application to be provided for. The application is supported by the grounds on its body and the 2nd applicant's supporting affidavit sworn on 24th February 2025 together with the annexures thereto.

6. The germane ground in support of the application is that the learned Judge in the impugned judgment ruled that children born out of wedlock are the deceased's children and are therefore beneficiaries to his estate. Consequently, the main ground in the appeal is determination of the deceased's beneficiaries, therefore, their appeal is arguable.

7. Regarding whether the appeal would be rendered nugatory unless the stay of proceedings is granted, the applicants maintain that the respondents have since filed an application for confirmation of the grant which is scheduled for directions before the trial court.

8. The respondents opposed the application vide a replying affidavit sworn on 15th March 2024 by Margaret Wairimu Muraya (the 1st respondent) who deposed *inter alia* that stay of proceedings is a grave judicial action that seriously interferes with the right of a litigant to conduct his litigation hence that jurisdiction ought to be exercised judiciously. Further, the application was filed after an inordinate delay of 3 months following the delivery of the judgment, which has not been explained nor have the applicants demonstrated that they will be prejudiced if the proceedings in the trial court proceed, therefore the application does not meet the threshold for grant of stay of proceedings.

9. The 1st respondent also deposed that the appeal cannot be rendered nugatory because the High Court is yet to make final orders in the matter because the grant is yet to be confirmed and the applicants will be afforded an opportunity to be heard as directed by the trial court on 28th February 2025. Therefore, staying the proceedings would only serve as an avenue for abuse of the court process and grossly disadvantage the 1st respondent and her children.

10. When the application came up for hearing before us on 9th April 2025, learned counsel Ms. Wangari appeared for the applicants while Ms. Mukira learned counsel appeared for the respondents. Both parties relied on their respective written submissions which they briefly highlighted. The applicants' submissions are dated 26th March, 2025 while the respondents' submissions are dated 7th April 2025.

11. In support of the application, the applicant's counsel Ms. Wangari referred to the memorandum of appeal dated 20th May 2024 raising 7 grounds of appeal and reiterated that the applicants' grievance is the finding that the 1st respondent's children born out of wedlock were the children of the deceased, therefore, they are beneficiaries of the estate.

12. On whether the appeal would be rendered nugatory if the stay of proceedings is not granted, the applicants maintained that there is already an application for confirmation for grant dated 18th October 2024 pending before the trial court and the disputed beneficiaries are listed in the said application. Therefore, if the proceedings are not stayed, the issue of beneficiaries will be overtaken by events and it will be difficult to reclaim the properties distributed.

13. In opposing the application, the respondent's counsel Ms. Mukira submitted that the memorandum of appeal raises frivolous grounds which raise no triable issues. She submitted that grounds 1-4 of the memorandum of appeal are ambiguous and do not flow from the trial since it was not disputed that the disputed beneficiaries were born out of wedlock. What is in dispute is whether upon marriage of their mother, they were adopted by the deceased as his children. Further, regarding grounds 5-7 of the memorandum of appeal, essentially dealing with the rendering of accounts by the previous administrators, counsel contended that the said grounds can be adequately handled by the trial court.

14. On whether the appeal would be rendered nugatory, Ms.Mukira submitted that the applicants only alluded to the pendency of the respondents' summons for confirmation of grant which they admitted was at its nascent stage and as such had not been set down for hearing. Ms. Mukira contended that confirmation of grant was one thing while distribution/enforcement was another thing both of which are potentially long, winding processes. Therefore, the applicants failed to discharge the burden placed upon them in order to be granted stay of proceedings bearing in mind that they needed to demonstrate exceptional circumstances for them to be granted such orders.

15. We have carefully considered the application and the grounds urged by both parties in support of their respective positions. The application before us is brought under Rule 5 (2) (b) of the *Court of Appeal Rules*, 2022. This Court in *Trust Bank Limited & Ano. v Investech Bank Limited & 3 Others* [2000] eKLR described the jurisdiction of this Court under Rule 5 (2) (b) as original and discretionary. This discretion is wide and unfettered. In *Kenya National Union of Teachers and 3 Others*, Civil Application No. 16 of 2015, the Supreme Court considering the nature and scope of this Court's jurisdiction under Rule 5 (2) (b) of the *Court of Appeal Rules* stated:

> "(23) It is clear to us that Rule 5 (2) (b) is essentially a tool of preservation. It safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that Court over the years....
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> (27) Rule 5 (2) (b) of the C*ourt of Appeal Rules* of 2010 is derived from Article 164 (3) of the *Constitution*. It illuminates the Court of Appeal's inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal. Although we would not go as far as describing such discretionary jurisdiction as 'original' (the term 'inherent' more accurately in our view captures the nature of that jurisdiction), the Court of Appeal has nonetheless defined the contours of this discretion succinctly and consistently and has employed it effectively to aid the conduct of its appellate jurisdiction."

16. In order to succeed in an application under rule 5 (2) (b), an applicant must first demonstrate that the intended appeal is arguable and not frivolous, and that the intended appeal, if it eventually succeeds,

will be rendered nugatory if the stay orders are not granted. In *Chris Munga N. Bichage v Richard Nyagaka Tongi, Independent Electoral & Boundaries Commission & Robert K. Ngeny* [2013] KECA 141 (KLR) it was held that:

> " The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated."

17. As to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicants in order to warrant ventilation before this Court. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR this Court described an arguable appeal as one which must not necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous, and this court must not make definitive or final findings of either fact or law at this stage because doing so may embarrass the ultimate hearing of the main appeal.

18. In satisfaction of the first prerequisite, the applicants have raised 7 grounds in their memorandum of appeal dated 20th May 2024. One of the grounds is that the learned Judge erred in law and in fact by allowing strangers to benefit from the estate. Without going into the merits of the intended appeal as this will be the preserve of another bench, we take the view that the question whether strangers were allowed to benefit from the deceased's estate is arguable, and it is certainly a matter for resolution by this Court on appeal.

19. The next question is whether the applicants have demonstrated that their pending appeal will be rendered nugatory should their application for stay further proceedings in Nakuru HCC *Succ. No. 57 of 2018* be declined. As was stated by this Court in *David Morton Silverstein v Atsango Chesoni* [2002] eKLR:

> " The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2)(b) of the Court's own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts..."

20. "Stay of proceedings" as the phrase suggests, is the stoppage of an entire case or a specific proceeding within a case. Such a disruption of judicial proceedings has been described in case law as a drastic order which is only to be deployed in extremely rare cases and with immense circumspection. The principles which should guide a court in exercising its discretion to grant or refuse an application for stay of proceedings were detailed by the Court of Appeal of Nigeria, Abuja Division in the case of *NNPC & Anor v Odidere Enterprises Nigeria Ltd* [2008] 8 NWLR (Pt. 1090) 583 at 616-618, per Aboki, JCA. as follows:

> " Stay of Proceedings is a serious, grave and fundamental interruption on the right of a party to conduct his litigation towards the trial on the basis of the substantive merit of his case, and therefore the general practice of the courts is that a stay of proceedings should not be granted, unless the proceedings beyond all reasonable doubt ought not to be allowed to continue."

21. In the *Halsbury's Laws of England*, 4th Edition. Vol. 37, at p.330 and p.332, it is stated:

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue...This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity.
>
> The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case".

22. Our understanding of the applicants' argument is that "if the strangers" who are included in the application for confirmation of grant are considered in the distribution of the estate, then the said children born out of wedlock may dispose of the properties allocated to them. In our view, this line of reasoning falls short of the required threshold for several reasons. First, an application for stay of proceedings, particularly one based solely on the applicants' apprehension or fear, is generally not considered sufficient grounds for granting a stay of proceedings. Courts require more concrete evidence of potential harm or prejudice that would arise if the proceedings were to continue. A party seeking a stay of proceedings must demonstrate more than just a subjective feeling of apprehension or fear about the potential outcome of the case. The applicant typically needs to show that proceeding with the case would cause them substantial loss or irreparable harm, which could render their appeal, if successful, nugatory. As was held by this Court in *Kenya Commercial Bank Ltd. v Benjoh Amalgamated Ltd*. Civil Application No. NAI. 50 of 2001 (unreported) and *David Morton Silverstein v Atsango Chesoni* [*supra*].

> " What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory."

23. Second, the threshold for obtaining a stay of proceedings is high because it can significantly impact on the progress and outcome of a case. Further, as authorities suggest, stay of proceedings is only granted in exceptional cases. (See *Meta Platforms, Inc & Ano. v Samasource Kenya EPZ Limited t/a Sama & Ano.; Kenya National Humans Rights Equality Commission & 9 Others (Interested Parties)* [2023] KECA 996 (KLR).

24. Third, the Court needs to balance the applicants' right to exercise their right of appeal and the potential for irreparable harm against the respondents' right to have their case heard, determined and potentially benefit from a favorable judgment. (See *Meta Platforms, Inc & Ano. v Samasource Kenya EPZ Limited* (*supra*).

25. Consequently, for the reasons stated above, we are not persuaded that the applicant has demonstrated that the appeal will be rendered nugatory. In view of the foregoing, we find that the applicants have failed to satisfy the twin principles for grant of the orders sought pursuant to rule 5 (2) (b) of the *Rules*

of this Court. Accordingly, the Notice of motion dated February 24, 2025 fails and is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAKURU THIS 11TH DAY OF JULY, 2025.

J. MATIVO

JUDGE OF APPEAL

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M. GACHOKA C. Arb, FCIArb.

JUDGE OF APPEAL

.....

G.V. ODUNGA

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.