



Githu & 5 others v Njoroge & another (Civil Application E363 of 2023) [2024] KECA 15 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KECA 15 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E363 OF 2023
S OLE KANTAI, M NGUGI & PM GACHOKA, JJA
JANUARY 25, 2024**

BETWEEN

**NYONYO GITHU 1ST APPLICANT
JANET WAMBUI GITHU 2ND APPLICANT
JOZELLE GATHONI COX 3RD APPLICANT
WAMBIRU GIOVANNI COX 4TH APPLICANT
KIMBERLY WAHU COX 5TH APPLICANT
ASHLI BIANCA COX 6TH APPLICANT**

AND

**STEPHEN RAGUI NJOROGE 1ST RESPONDENT
ROBERT ERIC WAMBIRU 2ND RESPONDENT**

(Being an application for stay of execution of the ruling of the High Court of Kenya at Nairobi (Riechi, J.) dated 28th July, 2023 in Succession Cause No. 1115 of 2020)

RULING

1. This application arises out of the ruling of Riechi J. dated July 28, 2023. The deceased, the mother of the 1st, 2nd and 3rd applicants, the 1st and 2nd respondents, and the grandmother of the 4th-7th applicants, died on January 28, 2019. The record indicates that she had several assets, but in contention in the present matter is a sum of money held in her account No. 0470xxxxx6300 at Equity Bank and account No. 6909xxxx35 NCBA Bank.



2. The court appointed, by consent, the 1st applicant and the respondents as the administrators of the estate. It noted that the estate of the deceased had, among other assets, the two bank accounts holding funds as follows:
 - a. Equity Bank Account No. 0470xxxxx6300- Kshs.195,534;
 - b. NNCBA Account No. 6909xxxx35- Kshs.4,933,698
3. The 1st applicant, Ms. Nyonyo Githu, proposed before the trial court that the amount in the bank accounts be used to 'pay school fees for the grand children whose parents had died, a position supported by the 2nd applicant, Janet Wambui. The respondents, Stephen Ragui Njoroge and Robert Eric Wambiru, denied that they had agreed that the funds be used to pay school fees for the grandchildren of the deceased. They proposed, instead, that the funds be divided equally among the five children of the deceased.
4. While noting that the beneficiaries of the estate were in agreement that they were all entitled to the funds in the bank accounts but were not in agreement on the mode of distribution of the funds pending the distribution of the rest of the estate, the court considered the provisions of the [Law of Succession Act](#) and noted that the children of the deceased take priority. It noted, further, that the grandchildren where, as in this case, their parents are deceased, are entitled to what is due to their parent's estate. In light of the beneficiaries' failure to agree on the distribution of the estate, the court issued a partial confirmation of the grant and distributed the funds in the two accounts equally among all the beneficiaries, with the grandchildren of the deceased taking the respective shares of their deceased parents.
5. The applicants were dissatisfied with the ruling and they filed the application dated July 31, 2023 seeking stay of execution of the ruling pending their intended appeal; an order allowing them access to NCBA bank account No. 6909xxxx14 to pay school fees for the grandchildren of the deceased in amounts set out in the application; and an order restraining the respondents from accessing the money in any of the deceased's bank accounts. They make various assertions in the application which are in the nature of submissions, which this Court is not concerned with at this stage.
6. The applicants make reference to Order 42 rule 6(2) of the [Civil Procedure Rules](#) which they seem to rely on. We note that the applicants were acting in person and may therefore not be aware that the [Civil Procedure Rules](#) have no application to proceedings before this Court, the applicable rules being the [Court of Appeal Rules 2022](#).
7. The application is supported by an affidavit sworn by Nyonyo Githu on July 31, 2023. Ms. Githu deposes that their appeal will be rendered nugatory if the Court does not grant a stay of execution; that they stand to suffer irreparable loss and prejudice; and that the appeal raises triable issues which have very high chances of success. The applicants cite in support the case of [Butt v Rent Restriction Tribunal](#) (1982) eKLR and aver that the respondents will not suffer any prejudice if the stay orders are granted as they continue to collect income of approximately Kshs. 1,500,000 per month from the deceased's trucking business and rental properties; that her fellow applicants, grandchildren of the deceased who are dependants of the deceased and who are in various educational institutions will suffer irreparable damage if the Court does not grant a stay of execution of the impugned orders.
8. The respondents oppose the application through a replying affidavit sworn by Robert Eric Wambiru, the 2nd respondent, on August 8, 2023. He avers that the appellants' appeal will not be rendered nugatory as the deceased's estate is estimated to be worth Kshs. 168,000,000 and there is no dispute as



- to the rightful beneficiaries. He contends that it is the 1st applicant who has made all the beneficiaries live in penury as she obstructs every attempt to divide the estate.
9. In their submissions dated August 8, 2023, the applicants reiterate the contentions in the application and affidavit in support. On their part, the respondents have filed submissions dated August 11, 2023, also reiterating their averments in the affidavit in opposition to the application.
 10. At the hearing of the application, Ms. Nyonyo Githu presented the applicants' case. She submitted that they were seeking a stay of execution as they do not want the money in the deceased's accounts distributed until the appeal is heard; that the partial distribution was not done correctly as there was no application for a partial distribution; that the distribution was prejudicing, in particular, the 6th applicant, Kimberly Cox; and they would like the money to remain in the account in order to continue to pay school fees and other expenses for the estate.
 11. For the respondents, learned counsel, Mr. Kagiri, submitted that the ruling by Riechi J. was made out of absolute equity; that Kimberly Cox has drawn from the deceased's account in respect of her fees on three occasions yet there are other beneficiaries of the estate; that the orders at issue distributed Kshs.5 million out of an estate worth Kshs.168 million; and none of the parties would suffer any prejudice from the distribution by the trial court. Mr. Kagiri submitted that the 1st applicant sought to disentitle all other beneficiaries to her own advantage and to Kimberly Cox's advantage. He asserted that other beneficiaries of the estate were going through similar challenges financially and were entitled to benefit from the account.
 12. To the question regarding the arguable appeal that the applicants would bring before the Court, Ms. Githu submitted that the arguable issue was that there would be no funds left as the (court) had done a partial distribution when there was no application before it for distribution. She submitted that the appeal would be rendered nugatory because the funds would have left the account. She maintained that the Court should make an order of status quo so that the money remains in the account as the parties argue their case on whether or not the funds should be distributed as directed in the ruling of Riechi J.
 13. We have considered the application, the affidavits in support and opposition thereto, and the submissions of the parties. The law with respect to grant of orders of stay of execution or injunction under rule 5(2)(b) of this *Court's Rules* is well settled. In its decision in *Stanley Kangethe Kinyanjui v Tony Keter & 5 others* [2013] eKLR this Court laid down the factors to be considered in determining whether to exercise the discretionary power under the said rule in favour of a party. These are, first, whether the intended appeal is arguable. Such an appeal is not one that must necessarily succeed, but it should be one which is not frivolous, and a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.
 14. Ms. Githu submitted that the arguable appeal that they intend to raise before this Court is that the trial court partially distributed the estate of the deceased while there was no application before it for such distribution. The applicants have not annexed a memorandum of appeal to their application, so it is not possible to tell whether there are grounds, other than what Ms. Githu mentioned, on the prompting of the Court, which would arise on appeal. Given the low threshold set in the jurisprudence on rule 5(2)(b), however, that the appeal need not be one that must necessarily succeed, we accept that the applicants may well have an arguable appeal.
 15. Would the appeal be rendered nugatory? The applicants made several, mutually exclusive, arguments: inter alia: that the trial court should not have made a partial distribution of the funds held in the bank accounts of the deceased; that the funds should be used to pay school fees for the grandchildren of the deceased; that the funds should be left in the accounts so that they can be used for subdivision,



mutation and valuation of the estate; that this Court should make an order for maintenance of the status quo, meaning, if we understand Ms. Githu correctly, that none of the beneficiaries of the estate should get their share of the funds that Riechi J. apportioned to them, with the necessary implication that the grandchildren would not get the school fees that the applicants averred they were fighting for.

16. As observed earlier, the arguable appeal, according to the applicants, is that the court should not have made a partial distribution of the estate as none of the parties had prayed for it. Whether or not the funds are distributed as directed by the trial court, this point can still be argued. As the parties concede, the estate of the deceased is a large estate, valued, according to the respondents, at Kshs. 168 million. There is no dispute that all the parties before us are all beneficiaries of the estate, entitled, as provided under section 38 of the *Law of Succession Act*, to a share of the deceased's estate, either as children of the deceased or, in the case of the grandchildren, to the share that their respective parents would have been entitled to. There is thus nothing before us that shows that the applicants' intended appeal would be rendered nugatory if the orders of stay that they seek are not granted.
17. As the applicants have not satisfied us on the second limb under rule 5(2)(b), we find their application to be without merit, and it is hereby dismissed. This being a family matter, there shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2024.

S. OLE KANTAI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

