



**Njoroge v Ngugi & 3 others (Civil Application 196 of 2017)
[2024] KECA 221 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KECA 221 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 196 OF 2017
HA OMONDI, JM MATIVO & GWN MACHARIA, JJA
FEBRUARY 22, 2024**

BETWEEN

MARGARET MWIHAKI NJOROGE APPLICANT

AND

JAMES KARIUKI NGUGI 1ST RESPONDENT

NICHOLAS KIBIKU MBUGUA 2ND RESPONDENT

EDWARD NJUGUNA NGUGI 3RD RESPONDENT

**GRACE NJOKI MBUGUA, RACHEL WAITHIRA MBUGUA AND MOSES
MUTURI MBUGUA (SUING AS THE LEGAL REPRESENTATIVES OF THE
ESTATE OF JAMES MBUGUA KAMOTHO – DECEASED) 4TH RESPONDENT**

(Being an application for injunction and/or stay of execution of the judgement and orders of the High Court, Nairobi (Musyoka, J.) dated 26th October, 2016 in Succ. Cause No. 249 of 2012)

RULING

1. A briefly summary of the history of this prolonged dispute is necessary in order to place the parties' arguments into a proper perspective. Fortunately, for us, the genesis of the dispute (which is largely uncontroverted) and the arguments presented by the parties before the trial court is detailed in the judgment rendered by Musyoka, J. on 26th October, 2026, in High Court Succession Cause Number 249 of 2012. For the sake of brevity and completeness, we here below reproduce verbatim the respective parties' case as highlighted in the said judgment.

- “ 1. The deceased herein died on 9th August, 1996.
2. Representation was sought in respect of her estate by Margaret Mwihaki Njoroge. She was expressed to have been survived by a daughter called Wambui



Ngugi, and died possessed of a property known as Kabete/Kibichiku/205. The petitioner was claiming to be beneficially interested in the estate as her deceased husband, Njoroge Muthiora, was said to be entitled to Kabete/Kibichiku/205, which was initially registered in the name of Kimotho Wangige, which he held in trust for her husband but upon the death of Kimotho Wangige, the property was registered in the name of his widow, the deceased herein, Wairimu Kimotho, who also died before the issue could be resolved. A grant was accordingly made to her on 1st August, 2012, which was confirmed on 15th August, 2012 devolving Kabete/Kibichiku/205 to her absolutely.

3. On 7th January, 2012, a summons for revocation of the grant was lodged at the registry by James Kariuki Ngugi, Nicholas Kibiku Mbugua and Moses Muturi Mbugua. Their case was that the administrator had failed to disclose to the court that the deceased had surviving grandchildren. It was also alleged that the administrator had not obtained the consents of the applicants to support her petition for representation. It was averred that she had misrepresented to the court that she was the sole survivor of the deceased, yet she was not an immediate member of his family.
4. In the affidavit in support, sworn by the first applicant, James Kariuki Ngugi. It is explained that the deceased herein was his grandmother, by virtue of being the mother of Wambui Ngugi. Upon her demise in 1996, the deceased was survived by his mother. The deceased's husband had predeceased her in 1964, and was survived by Ngugi Francis Kimotho, Simon Peter Kariuki Kimotho and John Mbugua Kimotho, who are all deceased. Ngugi Francis Kimotho had nine (9) children, while Simon Peter Kariuki Kimotho had four (4) children, and John Mbugua Kimotho had seven (7) children. He complained that the administrator had disinherited the grandchildren of the deceased. She caused the property to be sub-divided and portions of it sold to third parties. The applicants have named the administrator and the buyers of some of the subplots as respondents to the application for revocation of grant.
5. There is a reply to the application by the fifth respondent, Geoffrey Mbugua Kariuki. He states that the applicants were strangers to him. He had acquired Kabete/Kibichiku/2967, a portion of Kabete/Kibichiku/205, as an innocent purchaser for value and he had subsequently developed the same. There is another affidavit by the 3rd respondent, Pauline Wanjeri Kariuki, in similar vein. Fraciah Wanjiru George, the 10th respondent also swore an affidavit in similar terms. There is also a similar affidavit by Edward Karanja Kamanu.
6. On her part, the administrator states that she issued citations for service upon the daughter of the deceased, who was served, but chose to ignore the citation. She asserts her right to the property. She concedes that there were tribunal proceedings over the property, which terminated in her favour, but the award of the tribunal was subsequently set aside by the High Court on a technicality. She concedes that the applicants occupy a portion of what was Kabete/Kibichiku/205.
7. There is a supplementary affidavit sworn by Gabriel Murira Muthiora. He states that the administrator is his sister in law, being the widow of his late brother, Stanley Njoroge Muthiora. He asserts that the land in question had



been registered in the name of Kimotho Wangigi in trust for him and his late brother. He avers that he and his brother were sons of Muthiora wa Njoroge, who was a son of Njoroge Huria, a brother of Wangigi. Upon his demise, Njoroge Huria left his wife and children under the care of Wangigi. Both Wangigi and Njoroge were entitled to the land. Upon Njoroge's demise, his share was to be given to his son, Muthiora. Before Wangige died he had instructed his son Kimotho Wangige to ensure that Muthiora got his share of the land being Kabete/Kibichiku/205. When Kimotho died, the land was then registered in the names of his widows, Wambui and Wairimu. When Wambui Kimotho passed on, the land was registered in the name of her so James Mbugua Kimotho, and a grandson, Edward Njuguna Ngugi, together with Wairimu Kimotho."

2. In the said judgment, Musyoka, J. decreed as follows:
 - a. That the grant made herein on 1st August, 2012 to Margaret Mwhaki Njoroge is hereby revoked;
 - b. That the orders made on 15th August, 2012 confirming the said grant are hereby set aside, and the certificate of confirmation of grant dated 15th August 2012 is hereby cancelled;
 - c. That any orders made thereafter to rectify the certificate of 15th August, 2012 are hereby vacated;
 - d. That any transactions made on the strength of the said certificate of confirmation of grant, whether or not rectified, are hereby nullified;
 - e. That all the subdivisions made out of Kabete/Kibichiku/205 are hereby cancelled, and the Registrar responsible for the Kiambu Land Registry is hereby directed to restore the register in respect of Kabete/Kibichiku/205 to what it was on 23rd October, 2006;
 - f. That for avoidance of doubt, the titles to be canceled and reverted to Kabete/Kibichiku/205 are Kabete/Kibichiku/2945, 2960, 2961, 2962, 2963, 2964, 2965, 2966, 2967, 2968, 2969, 2970, 2971, 2972, 2973, 2974, 2975, 2976, 2977, 2978, 2979, 2980, 2981, 2982 and 2983;
 - g. That persons interested in the estate of the deceased to agree on appointment of administrator, failing which there is liberty for them to move the court appropriately in a process that shall include the immediate survivors of the deceased, the co-owners of Kabete/Kibichiku/205, creditors (if any) and all other claimants who have been identified so far;
 - h. That the property in question is situate within Kikuyu Sub-County of Kiambu County, consequently, I do hereby direct that the matter be transferred to the High Court of Kenya at Kiambu for final disposal; and
 - i. That there shall be no order as to costs.
3. Aggrieved by the above verdict, Margaret Mwhaki Njoroge (the applicant herein), filed a notice of appeal dated 1st November, 2016, signifying her intention to appeal against the said judgment. She also applied for certified copies of the proceedings and the judgment *vide* a letter of even date. By an application dated 18th August, 2017, the subject of this ruling, the applicant moved this Court under sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#) and Rule 5 (2) (b) of the [Court of Appeal Rules](#) seeking stay of execution of the above judgment pending the hearing and determination of her intended appeal to this Court.



4. The applicant also prayed for an order of an injunction restraining the respondent from dealing with the suit property in any manner that may result in the alteration of its ownership. She also prayed for such other orders as this Court may deem fit and for costs of the application to abide the outcome of the intended appeal.
5. The grounds in support of the application are that the applicant has an arguable appeal with a probability of success, and if stay is refused, the titles for the parcels of land risk cancellation, which will adversely affect third parties. Further, the intended appeal will be rendered nugatory, thus occasioning substantial loss to the applicant incapable of being compensated by way of damages. Lastly, it is in the interests of justice that the prevailing status quo remains pending the hearing and determination of the intended appeal.
6. In opposition to the application, the respondents filed the replying affidavit of Moses Muturi Mbugua dated 29th June, 2018, sworn on his own behalf and on behalf of the other respondents. The key highlights of the affidavit are that the applicant's claim to the said land was premised on a decision rendered by the Kikuyu Land Disputes Land Tribunal, which decision was quashed by the High Court in a judgment rendered in Nairobi JR No. 8 of 2008. Further, no appeal or review was ever preferred against the decision. In addition, the applicant filed ELC No. 567 of 2009, which was dismissed by Ougo, J. on 13th December, 2011. Again, no appeal was preferred against the said judgment. Further, the applicant has not shown how the intended appeal will be rendered nugatory. Lastly, the draft memorandum of appeal does not disclose arguable grounds nor has the applicant provided security.
7. In his submissions, the applicant's counsel, Mr. Mbabu cited *Joseph Gitabi Gachau & Another v Pioneer Holdings (A) Ltd & 2 Others*, Civil Application No.124 of 2008 and *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004 in support of the position that 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. Mr. Mbabu cited *Stanley Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR in support of the finding that in considering an application brought under rule 5 (2) (b), the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.
8. On the nugatory aspect, Mr. Mbabu submitted that each case must depend on its own facts and peculiar circumstances and relied on *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001 and *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227. Further, counsel relied on *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* (*supra*) in support of the holding that 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. Buttressed by the said decision, counsel submitted that the applicant is reasonably apprehensive that the suit property is likely to be distributed to other beneficiaries excluding the applicant or the property may be transferred to third parties or titles already issued to third parties may be cancelled thereby rendering the appeal nugatory. He argued that the applicant is apprehensive that should the property change hands, it will be out of reach of the applicant, as a result the applicant will suffer irreparable harm.
9. The 1st to 4th respondents also cited *Stanley Kangethe Kinyanjui v Tony Ketter & Others* (*supra*) and submitted that the applicant has failed to demonstrate that he has an arguable appeal. Counsel pointed that out the High Court in JR No. 8 of 2008 and HCCC No. 567 of 2009 dismissed the applicant's claim to land.
10. On the nugatory aspect, the respondent's counsel also cited *Stanley Kangethe Kinyanjui v Tony Ketter & Others* (*supra*) and submitted that the applicant has not demonstrated that the appeal will be



rendered nugatory. Counsel also relied on *Alfred Mincha Ndubai v Standard Limited* [2020] eKLR and *Ndiritu Muriithi v Independent Electoral and Boundaries Commission & 2 Others* [2018] eKLR and argued that the applicant has failed to satisfy both limbs.

11. Lastly, counsel argued that the stay sought has been overtaken by events because the court in Succession Cause Number 90B of 2016, Kiambu (Kasango, J.) confirmed the distribution on 16th December, 2021.

12. The applicable principles that guide the court in the discharge of its mandate under Rule 5 (2) (b) of the *Court of Appeal Rules*, 2022 which we fully adopt were aptly articulated by this Court in the decisions cited by both parties. I will add no value for us to regurgitate the same decisions here. It will suffice to mention that an applicant must demonstrate that the appeal or the intended appeal is arguable and that the appeal will be rendered nugatory should it ultimately succeed after the substratum of the appeal is no more or out of reach of the successful appellant. We are also guided by this Court’s decision in *Eric Makokha & 4 Others v Lawrence Sagini & 2 Others* [1994] eKLR CA that:

“An application for injunction under Rule 5 (2) (b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity...”

13. 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 applicant in order to warrant ventilation before this Court. This Court in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* (*supra*) 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.

viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

14. Regarding the first prerequisite, namely, whether the intended appeal is arguable, we have considered the grounds of appeal. It will add no value for us to replicate the grounds here. We are conscious that in the application before us we are not required to make definitive findings on the proposed grounds of appeal. That is the function of the court, which will hear the appeal. An arguable ground is not necessarily one, which must necessarily succeed, but one, which is not frivolous but raises a bona fide issue that, can be argued fully before the court. Without saying more, the High Court in JR. No. 8 of 2008 and ELC No.567 of 2009 dismissed the applicant’s claim to the same land. There is nothing before us to suggest that the said judgments have been overturned either by way of appeal or review. We are satisfied that the applicant has not satisfied the first test.

15. Having found that the applicant has not satisfied the first test, we find no reason to address the second test. The upshot is that, we hereby dismiss the applicant’s application dated 18th August, 2017, with costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

J. MATIVO



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JUDGE OF APPEAL

G. W. NGENYE - MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

