



**Muthui v Muthui & another (Civil Application 49 of 2022)
[2024] KECA 1017 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KECA 1017 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 49 OF 2022
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
FEBRUARY 2, 2024
IN THE MATTER OF THE ESTATE OF EUTYCHUS MUTHUI
(DECEASED)**

BETWEEN

JAMES KIMATHI MUTHUI APPELLANT

AND

MYRIAM MUTHUI KENDI 1ST RESPONDENT

CATHERINE KINYA MUTHUI 2ND RESPONDENT

(Being an application for an order of stay of execution pending the hearing and determination of the appeal from the ruling and decree of the High Court at Meru (A. A. Adwera. J.) dated 27th April 2020 in H.C. Succession Cause No. 398 of 2012)

RULING

1. The matter before the High Court in Meru, giving rise to this application, was in regard to the estate of Eutycus Muthui (deceased) who died intestate on 21st October, 2011, leaving behind a widow, 4 sons, and 2 daughters. His son James Kimathi Muthui petitioned the High Court for a grant of letters of administration which was issued on 3rd October, 2012. He applied for confirmation of the same *vide* summons dated 12th July, 2015. However, his brother Lincoln Muthui Muita filed an affidavit of protest concerning the proposed mode of distribution.
2. James Kimathi's assertion was that the said Lincoln Muthui had already benefited from the deceased's estate and, therefore, he was not entitled to benefit from the remainder of the estate. The protest was later withdrawn. However, the respondents herein moved the court again by way of an application dated 4th July, 2018 urging the court to annul and/or revoke the letters of administration to the estate of the deceased issued to James Kimathi on 22nd May, 2018. The court held that indeed the reasons given



- by the respondents were valid for the reason that the said James Kimathi did not disclose to the court that Lincoln Muthui and himself had already benefitted by being gifted inter vivos and therefore the distribution done on 22nd May, 2018 was inequitable and unfair. The said grant was revoked by a ruling dated 15th May, 2019 and they were ordered to file an equitable mode of distribution within 60 days.
3. The respondents and the applicant filed their proposed modes of distribution. The court in consideration of the proposed modes of distribution distributed the properties that comprised the estate of the deceased as follows:
 - a. L.R. No. Nyai/Kithoka/1488 to go to the 1st respondent James Kimathi;
 - b. L.R. No. Nyaki/Kithoka/1449 to go to Miriam Kendi Muthui;
 - c. L.R. No. Nyaki/Kithoka/1450 to go to Catherine Kinya;
 - d. L.R. No. Nyaki/Kithoka/1732 measuring 3.1. acres to go to:-
 - i. James Kimathi 1.10 acres,
 - ii. Miriam Kendi 1.0 acres, and
 - iii. Catherine Kinya 1.0 acres
 - e. L.R. No. Nyaki/Kithoka/1842 to go to Joel Kithinji in whole; and
 - f. L.R. No. Nyaki/Kithoka/2279 to Catherine Kinya Muthui.
 4. James Kimathi Muthui, the applicant, was dissatisfied with the decision and preferred an appeal to this Court. He also filed a notice of motion dated 4th July, 2022 under rule 5(2)(b) and 43 of the [Court of Appeal rules](#) 2010. He sought orders that there be a stay of proceedings in the Meru High Court Succession Cause No. 398 of 2012 pending hearing and determination of the application and appeal and thereafter stay of execution of the orders of the High Court pending the hearing and determination of this application and the appeal.
 5. The grounds in support of the motion and supporting affidavit of James Kimathi Muthui are, *inter alia*, that; the ruling comprised the distribution of the estate and certificate of confirmation of a grant was unfair in that it deprived the applicant his right to inheritance; the ruling distributed properties that did not form part of the estate hence it was unlawful; the trial court denied him a temporary stay of execution of the ruling; the applicant has been denied costs for managing, preserving, collecting the estate amounting to Ksh.2,000,000/=; the applicant has a *prima facie* case with high probability of success as demonstrated in the memorandum of appeal and that the intended appeal is arguable.
 6. Further grounds in the supporting affidavit of James Kimathi Muthui are that: *vide* a decree in Meru ELC Case No. 131 of 2011, land parcels number Nyaki/Kithoka/1726, Nyaki/Kithoka/1823 and Nyaki/Kithoka/1495 were decreed to be his and the decision has never been appealed against and that the court assumed jurisdiction upon itself and rendered his properties as part of the estate of the deceased and that he stands to lose his properties, and the loss of the colossal costs incurred in managing the estate. He urges that it is in the interest of justice that this application is allowed.
 7. In response to the application, Miriam Kendi Muthui and Catherine Kinya Muthui filed a joint replying affidavit. They state that the prayers being sought have been overtaken by events since the amended certificate of confirmation of grant dated 27th April, 2020 has already been implemented; new titles had already been issued as per the amended certificate of confirmation; that the applicant and their other brother Lincoln colluded to transfer the properties secretly and in the event the application is allowed the applicant should deposit a sum of Ksh.4,000,000/= as security.



8. At the plenary hearing of the motion on 28th November, 2022, learned counsel Mr. Thangicia and Mr. Nyenyire appeared for the applicant and the respondents, respectively. Both counsel made brief oral highlights of their written submissions filed in Court earlier. Mr. Thangicia informed the Court that pending this application, the respondents had managed to transfer some four properties and further that if execution of the decree continued then the applicant would suffer loss of the land he occupies.
9. We have considered the notice of motion, the rival affidavits, and both oral and written submissions. The issue that arises is whether the applicant deserves us to exercise our discretion in his favour. The jurisdiction under rule 5(2)(b) of this *Court's rules* is discretionary and guided by the interests of justice. This court in *Trust Bank Limited & Another -vs- Investech Bank Limited & 3 others* [200]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.”
10. In the exercise of this discretion, the Court must be satisfied that the applicant has demonstrated the twin principles which are the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, then the appeal or the intended appeal shall be rendered nugatory.
11. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicant in order to warrant the order being sought. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2013]eKLR. This Court described an arguable appeal as follows:

vii) an arguable appeal must not necessarily succeed, but one which ought to be argued fully before the court, one which is not frivolous...”
12. We have referred to the motion itself, in which the applicant has annexed a copy of the draft memorandum of appeal which raises seven (7) issues for determination by this Court. He faults the High Court for vesting itself with the jurisdiction of the Environment and Land Court hence arriving at the decision; he faults the decision that the parcels owned by Muthui Coffee Trade & Development Company Limited were part of the estate whereas the Company was in existence, he faults the decision whereby properties in his name were declared part of the estate of the deceased. We are persuaded that these issues are not idle or frivolous and are deserving of this Court's consideration on appeal.
13. On the nugatory aspect, which is whether the appeal should it succeed would be rendered nugatory if we decline to grant the orders sought, we find that the applicant has to demonstrate that if what is being sought to be stayed is allowed to happen, the same will be reversible and whether the applicant can be compensated by way of damages.
14. The applicant contended that the properties that are the subject of the intended appeal and are on the verge of being transferred have been developed and that he lives thereon, and in the absence of a stay he shall suffer substantial loss. On the other hand, the respondents aver that the order granted by the High Court has been implemented by transferring some of the properties to the named beneficiaries to the estate of the deceased. The respondents have even annexed some of the title deeds in support of the claim, for example, parcel numbers Nyaki/Kithoka/1495 and 1842 have been registered to Joel Kithinji Muthui's name, and parcel No. Nyaki/Kithoka/2279 which has been registered in Catherine Kinya Muthui's name. These are the parcels the applicant seeks to have preserved by this Court.



15. The purpose of a stay of execution is to protect the substratum of the intended appeal. In this case, as shown above, execution has already taken place and therefore there is nothing to be preserved. Though the applicant's counsel argued that the properties already transferred were only part of the properties that comprised the estate of the deceased, he failed to prove that there were others which were in the process of being transferred, which the applicant herein sought to preserve. In the absence of proof, we find that the application herein has been overtaken by events. The applicant has not established the second principle ie that his intended appeal would be rendered nugatory if stay is not granted. In any event, if the intended appeal succeeds, the properties can be restored to the applicant or he can be compensated by way of damages by the respondents.
16. Accordingly, we find that the application dated 4th July, 2022 is without merit and is dismissed with no order as to costs.

DATED AND DELIVERED AT NYERI THIS 2ND DAY OF FEBRUARY 2024.

W. KARANJA

JUDGE OF APPEAL

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L. KIMARU

JUDGE OF APPEAL

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A.O. MUCHELULE

JUDGE OF APPEAL

