



Kuko & another v Ali & another; Robinson (Interested Party) (Civil Application E023 of 2023) [2024] KECA 305 (KLR) (22 March 2024) (Ruling)

Neutral citation: [2024] KECA 305 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E023 OF 2023
FA OCHIENG, PM GACHOKA & WK KORIR, JJA
MARCH 22, 2024**

BETWEEN

TRUPHENA TAPEN KUKO 1ST APPLICANT

LEILA MOHAMED ALI 2ND APPLICANT

AND

SOFIA ALI 1ST RESPONDENT

FARIDA ALI 2ND RESPONDENT

AND

SUSAN ROBINSON INTERESTED PARTY

(Being an application for stay of execution pending the hearing and determination of an intended appeal from the Judgment of the High Court of Kenya at Eldoret (H. Omondi, J.) dated 12th February 2020 in Citation Case No. 45 of 2017)

RULING

1. Before us is an application dated 3rd May 2023, in which the applicants pray for the following orders pending the hearing and determination of this application and the intended appeal:
 - “ a) There be a stay of execution of the judgment and orders issued on 12th February 2020.
 - b. Costs of the application be in the cause.”



2. The application is brought under Rule 5(2)(b) of the *Court of Appeal Rules*, and Section 3B of the *Appellate Jurisdiction Act*. The application is based on the following grounds:

- “ a) The impugned judgment was in favour of the respondents against the interests of the applicants.
- b. Being dissatisfied, the applicants have appealed against the said judgment.
- c. The respondents have shown their intention to execute the decree.
- d. The applicants have an arguable appeal with very good prospects of success.
- e. The appeal shall be rendered nugatory if the respondents proceed with the execution of the judgment.
- f. It is only fair and just that the said execution is stopped pending the hearing and determination of this application and appeal.”

3. The application was further supported by the affidavit of Truphena Tapen Kuko sworn on 3rd May 2023 in which she reiterated the grounds on the face of the application and stated that:

- “ a) The applicants lodged a notice of appeal on 12th February 2020 and also filed a letter requesting typed proceedings.
- b. A record of appeal has also been filed in Eldoret Civil Appeal No. 22 of 2021.
- c. The prayer for a stay of execution was denied by the trial court.
- d. The respondents shall suffer no prejudice if the orders sought are granted, while the applicants will suffer loss which cannot be compensated by an award of damages.
- e. The application has been filed without delay and it is in the interest of justice that it is allowed.”

4. The respondents through the replying affidavit of the 1st respondent sworn on 11th August 2023 and also on behalf of the 2nd respondent stated that:

- “ a) The applicants did not seek leave to appeal against the impugned judgment as required by law.
- b. The applicants' application for a stay of execution before the trial court was dismissed vide the court's ruling dated 30th April 2021.
- c. The application has been filed after an undue delay of 2 ½ years.
- d. The court can only address itself on the issue of leave to appeal as the application is fatally defective for want of leave as provided for under section 50 of the *Law of Succession Act*, as this application arises from a succession cause.
- e. The applicants' application for leave before the trial court was dismissed by the order of the court dated 24th February 2020; and the memorandum of appeal dated 23rd April 2021 is also defective having been filed out of time.
- f. Without leave, this court cannot entertain the present application.



- g. The application is only meant to delay the succession proceedings.
 - h. The application be dismissed with costs.”
5. When the application came up for hearing on 22nd November 2023, Mr. Sala, learned counsel appeared for the applicants whereas Mr. Orange, learned counsel appeared for the respondents. Counsel relied on their respective written submissions which they opted to briefly highlight.
 6. Mr. Sala submitted that the leave issue as raised in the replying affidavit was not prayed for. In any event, the issue of leave from the High Court is one of the rights in line with Sections 65 and 75 of the *Civil Procedure Act*.
 7. Counsel pointed out that the application is merited as the respondents have since moved the court to seek confirmation of grant, and to have the applicants removed as administrators.
The application came up for hearing on 26th January 2024.
 8. Counsel submitted that the reason for the delay in filing the record of appeal was that it took too long for the court to type the proceedings. In any event, the notice of appeal was filed eight (8) days after the judgment.
 9. The applicants cited the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 in submitting that the delay in prosecuting the application is not inordinate as their application for stay orders before the trial court was denied.
 10. While relying on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the applicants submitted that the intended appeal will be rendered nugatory as the respondents have already applied for the confirmation of the grant. In any event, the house in contestation is worth 70 million, and once it is sold and the proceeds divided among beneficiaries, recovering the said property or its value will be very hard.
 11. Opposing the application, Mr. Orange contended that leave to appeal is not covered by the *Civil Procedure Act* but rather by the *Law of Succession Act*. Counsel pointed out that since leave was not obtained, the application is fatally defective.
 12. Counsel submitted that the reason the respondents sought the removal of the applicants as administrators was due to a lack of cooperation. They have been collecting rent and keeping it to themselves to the detriment of the other beneficiaries.
 13. The respondents pointed out that the application has been filed over 2½ years after judgment was delivered and no reason has been given for the delay.
 14. They were of the view that the applicants would suffer no substantial loss as they were challenging a 30% share of the deceased’s property.
 15. We have thoroughly considered the application, along with the supporting documents, affidavits, counsels’ submissions, relevant case law, and legal provisions.
 16. The respondents contend that this Court cannot entertain the present application, the same having arisen from a succession cause and the applicants having failed to obtain leave to appeal as provided for under Section 50 of the *Law of Succession Act*. In the case of *National Industrial Credit Bank Ltd*



v Aquinas Francis Wasike & Another [2006] eKLR, the court while addressing the issue of the validity of the notice of appeal stated thus:

“The applicant filed its notice of appeal against the said decision on 26th May 2005; the Court accordingly has jurisdiction to hear and determine the motion for stay. Mr. Ohagga, learned counsel for the respondents Aquinas Francis Wasike (1st respondent) and Lantech Ltd. (2nd respondent) tried to argue before us that the notice of appeal filed by the applicant is invalid and that, therefore, the Court cannot grant the order of stay prayed for. We, however, take note of the fact that no application has been made by the respondents for the striking out of the notice of appeal and as the Court has repeatedly pointed out Rule 5 (2) (b) does not provide that

“..... where a valid notice of appeal;”

the Rule simply provides that:-

“In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74.....

Rule 74 itself does not talk about a valid notice of appeal. The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of Rule 80 under which a notice of appeal can be struck out. We do not see any reason for determining the validity or otherwise of a notice of appeal when an application under Rule 5 (2) (b) is being considered.”

17. It follows therefore that the issue for determination before us is a prayer for a stay of execution under Rule 5(2)(b) of the *Court of Appeal Rules*. The applicants have filed their notice of appeal dated 12th February 2020, and the said notice has not been challenged or struck out; this Court is therefore clothed with the authority to determine the application herein.
18. Our jurisdiction under Rule 5(2)(b) is original, independent, and discretionary. However, we must exercise this discretion judiciously and rationally, and not out of impulsiveness or sympathy.
19. Rule 5(2)(b) is a procedural provision that allows the court to protect the subject matter of an appeal when it has already been filed. In the case of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR, the court held that:
 - i. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 Others v Nderitu & Another* (1989) KLR 459.
 - ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
 - iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin (1963) Ltd.* (1990) KLR 365.
 - iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar



circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.

- v. An applicant must satisfy the court on both of the twin principles.
 - vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
 - 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. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
 - 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. *Damji Pragji (supra)*.
 - ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
 - viii. 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.
 - ix. Where it is alleged by the applicant that an
20. It follows therefore that, to succeed in an application for a stay of execution, the applicants must show that their intended appeal is arguable. Once this has been established, the applicants must also demonstrate that if their appeal were to be successful, it would be rendered nugatory absent stay. This principle was demonstrated in the case of *Trust Bank Limited & Another v Investech Bank Limited & 3 Others* [2000] eKLR.
21. In the case of *Dennis Mogambi Mang'are v Attorney General & 3 Others* [2012] eKLR, this Court held that:
- “An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”
22. On whether or not the applicants have established a valid basis for an arguable appeal, the applicants merely stated that they have an arguable appeal with high chances of success. They did not expound on the issues they intend to raise in their appeal which they stated had already been filed. The respondents stated that the applicants were challenging a 30% share of the estate in question. To our minds, no single issue has been raised by the applicants in this application to show that they have an arguable appeal.
23. It is trite that the law aids the vigilant and not the indolent. The judgment appealed against was delivered on 12th February 2020 and a notice of appeal was lodged on the same date. At the time of filing this application, it had been about 2½ years. The applicants attributed the delay in filing the present application to a delay in obtaining typed proceedings. We find this explanation to be lacking in quality of persuasion, as an application for a stay does not require typed proceedings to be filed.
24. It is common ground that the applicants were the administrators of the estate of the deceased, and due to a lack of cooperation the respondents moved the court to have them removed as administrators



and the matter is pending before the court. The applicants submitted that the appeal will be rendered nugatory if the stay order is not granted and the court proceeds with the confirmation of the grant, which will have the effect of a house worth Kshs. 70 Million being divided among the beneficiaries of the deceased. They were also apprehensive that they would suffer substantial losses if the division was done.

25. This being a succession cause, we find that when the deceased dies without a will or the will is contested and the estate is declared intestate, the property of the deceased is to be divided equitably among the beneficiaries. It follows therefore that no substantial losses will befall the applicants in the event the property in question is divided among the beneficiaries as they will receive their equitable share of the estate of the deceased.

26. In the case of *Reliance Bank Ltd v Norlake Investments Ltd* [2002] I EA 227, the court held that the factors which can render an appeal nugatory are to be considered within the circumstances of each particular case, and in doing so, the Court is bound to consider the conflicting claims of both sides. In the circumstances of that particular case, the Court stated *inter alia*:

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”

27. In the application before us, the applicants have not demonstrated to our satisfaction the hardship they are likely to suffer should a stay of execution order not be granted. We find that no prejudice will be occasioned to the applicants.

28. In the result, we are not inclined to exercise the Court’s discretion in favour of the applicants. Consequently, the application dated 3rd May 2023 lacks merit and is accordingly dismissed.

29. This being a matter involving family members, we direct each party to bear their own costs.
Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF MARCH, 2024.

F. OCHIENG

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR

