



REPUBLIC OF KENYA



**Philip v Karimi & 2 others (Civil Application E047 of 2023)
[2024] KECA 255 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KECA 255 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E047 OF 2023
W KARANJA, LK KIMARU & J MOHAMMED, JJA
MARCH 8, 2024**

BETWEEN

MARION MUTHONI PHILIP APPLICANT

AND

HELLEN KARIMI 1ST RESPONDENT

PETER KIRIINYA 2ND RESPONDENT

STELLA KARINTHONI RINGERA 3RD RESPONDENT

(Being an application for an order of injunction and stay of execution pending the hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Meru (Ong'injo, J.) dated 12th October, 2018 in Succession Cause No. 206 of 2001)

RULING

1. Before the Court is a notice of motion dated 25th May, 2023, under Rule 5(2)(b) of the Court of Appeal Rules, substantively seeking:
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. That the honourable Court be pleased to issue an order of temporary injunction restraining the 1st respondent and/or her servants or agents from evicting the applicant from the matrimonial home situated in land parcel numbers Ntima/Igoki/12304 -12308, pending hearing and determination of Nyeri Court of Appeal Civil Appeal No. 277 of 2019.



- v. That the honourable Court be pleased to issue an order of inhibition, inhibiting any dealings with land parcels Ntima/Igoki/12304, Ntima/Igoki/12305, Ntima/Igoki/12306, Ntima/Igoki/12307, Ntima/Igoki/12308 and Kiirua/Nkando/575, either by way of transfer, sale, lease, charge, or otherwise, pending the hearing and determination of Nyeri Court of Appeal Civil Appeal No. 277 of 2019.
 - vi. That this honourable Court be pleased to stay execution of the judgment/decree delivered on 12th October 2018 by Justice A. Ong’ingo in Meru Succession Cause No.206 of 2001, pending the hearing and determination of this appeal.
 - vii. That the orders issued hereof be served upon the Land Registrar- Meru Land Registry for registration and compliance.
 - viii. That costs of the application be provided for.
2. The application is supported by grounds on its body and a supporting affidavit sworn by the applicant on 25th May 2023, together with annexures thereto. The applicant deposed that she is a widow of the deceased, and lives on land parcel numbers Ntima/Igoki/6066 and Ntima/Igoki/5142. She averred that the 1st respondent, following the judgment of the High Court amalgamated parcels Ntima/Igoki/6066 and Ntima/Igoki/5142 into parcel number Ntima Igoki/11632, and has further subdivided parcel number 11632 to Ntima/Igoki/12304-12308. The applicant deposed that she has been served with an eviction notice and stands to be evicted from her matrimonial home. She averred that she is apprehensive that the 1st respondent will dispose of the suit parcels of land before the intended appeal is heard and determined. She deposed that the intended appeal has high chances of success, and will be rendered nugatory, unless the orders sought are granted.
 3. The application was opposed by a replying affidavit sworn by the 1st respondent dated 16th August, 2023. According to the 1st respondent, the High Court confirmed the grant on 12th October, 2018, and the instant application is a belated attempt by the applicant to stall the process of distribution of the deceased’s estate. The 1st respondent deposed that Ntima/Igoki/6066 and Ntima/Igoki/5142 had to be amalgamated so as to achieve equitable sharing among the beneficiaries as was directed by the judgment of the High Court. She deposed that the applicant is not a beneficiary of the deceased’s estate and has been in forceful occupation of Ntima/Igoki/12305 despite court orders directing her to move out of the home. The 1st respondent averred that the applicant has no arguable appeal as she is not a beneficiary of the estate of the deceased, and that the rightful beneficiaries are satisfied with mode of distribution affirmed by the High Court. She deposed that the intended appeal, if successful, will not be rendered nugatory if the orders sought are not granted, as the applicant has no interest to protect with respect to the deceased’s estate.
 4. The application was canvassed by way of written submissions filed by the applicant and the 1st respondent. The 2nd and 3rd respondents did not file any replying affidavit or written submissions with respect to the application.
 5. It was submitted for the applicant that she stands the risk of being evicted from the suit properties, where she resides, and that she has no other place of abode. Counsel for the applicant expressed fear that the respondent may deal with the suit properties in a manner likely to defeat the interests of the applicant, if the orders for stay, inhibition, and injunctive reliefs are not issued by this Court, and which will render the applicant’s appeal nugatory, if successful. In the circumstances, he urged us to allow the application as prayed.



6. Counsel for the respondent, Mr. Kariuki, reiterated the contents of the replying affidavit sworn by the 1st respondent on 16th August, 2023. He submitted that the certificate of confirmation of grant issued by the High Court has already been implemented, save for two parcels of land pending transmission to the respective beneficiaries. He explained that the applicant was all along aware of the process, and moreover, that she is neither a beneficiary, nor a dependant, of the deceased's estate. For these reasons, Mr. Kariuki was of the view that the applicant had failed to demonstrate that her intended appeal is arguable, or would be rendered nugatory, in the event that the appeal succeeds. He invited us to dismiss the application in its entirety.
7. We have considered the application, the grounds in support thereof, the replying affidavit, the rival submissions, the authorities cited and the law.
8. For this Court to grant any order under Rule 5(2)(b) of this *Court's Rules*, an applicant has to show, firstly that his/her intended appeal is arguable, and secondly, that unless he/she is granted the orders sought, the intended appeal, if successful, will be rendered nugatory. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court, and one which is not frivolous. A single bona fide arguable ground of appeal is sufficient to satisfy this prerequisite. See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR.
9. Applying the above threshold, and being mindful not to prejudice the hearing of the intended appeal, we are of the view that the grounds of appeal set out in the draft memorandum of appeal annexed to the application are arguable. The main issue in contention is whether the applicant was a dependant of the deceased, and thereby entitled to inherit from his estate.
10. Turning to the second principle, will the intended appeal, if successful, be rendered nugatory if we decline to issue the orders sought? It is the applicant's case that she faces the threat of eviction from her matrimonial home, if the orders sought are not granted. Though the applicant terms the property as her matrimonial home, it is clear from the record that by her own admission, she never resided on the suit property during the time she was separated from the deceased up until his death. Given these set of facts we do not see how the appeal would be rendered nugatory were she to be required to vacate the premises.
11. From the foregoing, it is our finding that the instant application, though arguable, will not be rendered nugatory, if the order sought is not granted. The position in law is that the twin principles must both be satisfied before a party can be granted relief under Rule 5(2)(b) of the *Court of Appeal Rules*. Since only one prerequisite has been satisfied, the application fails.
12. The upshot therefore is that the applicant's notice of motion application is dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU



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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

