



**Njoka v Njoka & 3 others (Civil Appeal (Application)
E161 of 2023) [2024] KECA 629 (KLR) (31 May 2024) (Ruling)**

Neutral citation: [2024] KECA 629 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E161 OF 2023
MA WARSAME, FA OCHIENG & JM MATIVO, JJA
MAY 31, 2024**

BETWEEN

ELIZABETH WANJIKU NJOKA APPLICANT

AND

TERESIA NJERI NJOKA 1ST RESPONDENT

MARGARET DAMAT 2ND RESPONDENT

LUCY WANJIRU 3RD RESPONDENT

JOSEPH NJUGUNA 4TH RESPONDENT

(An application for stay of execution of Orders made by the High Court of Kenya at Nakuru (Muhochi, J.) dated 29th September, 2023 in Succession Cause 497 of 2013)

RULING

1. A brief history of the litigation before the High Court which culminated in the applicant's application dated 14th November 2023, the subject of this ruling is necessary in order to properly contextualize the diametrically opposed arguments urged by the parties in support of or in opposition to the said application. Briefly, the late Philip Njoka Kamau (deceased) died testate on 1st

May 2012. A grant of probate in respect of the deceased's estate was issued to the late Juma Kiplenge on 19th November 2013. However, Juma Kiplenge died on 7th October 2022 before he could administer the estate. By an application dated 16th November 2022, the applicant herein, Elizabeth Wanjiku Njoka applied for revocation and or annulment of the said grant. She also prayed that a grant of letters of Administration with will annexed in respect of the aforesaid deceased's estate be issued to either the Public Trustee or to Mrs. Elizabeth Wanjiku Waithaka. The applicant also prayed for costs of the application.



2. The gravamen of the applicant's case was that, the late Juma Kiplenge who was appointed as the sole executor in respect of the estate of late Philip Njoka Kamau (deceased) died on 7th October 2022 before he administered the estate thereby rendering the grant inoperative. Following the Court's directions issued on 21st October 2022 in Nakuru High Court Misc. Suit No. 33 of 2016, recommending appointment of an administrator and substitution of the late Juma Kiplenge, the applicant proposed one Elizabeth Wanjiku Waithaka to be the sole executor. She questioned the respondents' impartiality as administrators of the deceased's estate.
3. The application was opposed by the 1st respondent on grounds that Elizabeth Wanjiku Waithaka was a stranger to her and also largely unknown to the rest of the deceased's immediate family members. The 1st respondent deponed that she had been reliably informed that Elizabeth Waithaka is a daughter of one Mary Muthoni Kamau who is a sister to the late Philip Njoka Kamau and the said Mary Muthoni is fighting the estate of the deceased in Nakuru High Court Succession Cause No. 288 of 1989; Estate of Beatrice Nyahangi Kamau as an interested party and therefore she is totally conflicted to be appointed as an administrator of the deceased's estate. The 1st respondent maintained that the entire family of the deceased had met and resolved that fresh grant of letters of administration be issued to the three surviving widows of the deceased, namely; Teresia Njeri Njoka, (1st respondent) Margaret Damat (2nd respondent) and Lucy Wanjiru Njoka (3rd respondent) together with the deceased's son Joseph Njuguna Njoka (the 4th respondent). Consequently, they filed the application dated 18th November 2022 pursuant to Section 76 (e) of the Law of Succession Act and Rules 44 and 73 of the Probate and Administration Rules in which they prayed for the revocation and/or annulment of the Grant of Probate of written will issued to Juma Kiplenge on 19th November 2013 and the costs of the application.
4. The 2nd and 3rd Respondents similarly opposed the applicant's aforesaid application vide their replying affidavit sworn on 9th January 2023. They associated themselves with the averments of the 1st respondent and urged this Court to accept their choice as the most reasonable. The 4th respondent also opposed the application through his replying affidavit filed on 13th December 2022. He fully supported the issuance of grant of letters of administration to the respondents herein as prayed in their application dated 18th November 2022.
5. Contemporaneous with their application, the 1st to 4th respondents filed a petition dated 18th November 2022 petitioning the High Court for a grant of letters of Administration de bonis non with written will annexed, of the estate of the deceased Philip Njoka Kamau for the un-administered estate. In support of the petition, they relied on the supporting affidavit similarly sworn on 18th November 2022 and they committed that they would faithfully administer the estate of the deceased in accordance with the law and they will render a just and true account of the estate whenever required by the law to do so.
6. In the impugned ruling dated 29th September 2023, the learned Judge revoked the Grant issued to the late Juma Kiplenge, and proceeded to determine the germane issue raised in the two competing applications, which was best suited to be appointed as an administrator of the deceased's estate to complete its administration. Upon considering the two applications and petition, the learned judge held that there was no evidence that the respondents were intermeddlers of the deceased's estate. Guided by the provisions of Section 66 of the Law of Succession Act, the learned judge held that the 1st to 4th respondents, rank in priority over the Public Trustee or Mrs. Elizabeth Wanjiku Waithaka to administer the deceased's estate. The learned Judge also held that the respondents represent all the households of the deceased and there was no doubt that they were the right persons to apply for a grant



of letters of administration de bonis non for purposes of completing the administration of the estate. Accordingly, the Court rejected the applicant's proposal and proceeded to issue the following orders: -

- i. That the grant herein made on 19th November 2013 is hereby revoked, having become useless and inoperative following the death of the named executor, Juma Kiplenge.
 - ii. That Ms. Teresia Njeri Njoka, Ms. Margaret Damat, Ms. Lucy Wanjiru Njoka and Mr. Joseph Njuguna are hereby appointed Joint-Administrators of the estate of Philip Njoka Kamau (Deceased).
 - iii. That a grant with exception, of letters of administration with the Will Annexed, is hereby issued to the Administrators for the purpose of executing the Will and administration of the estate of the deceased.
 - iv. The Administrators shall be expected to forthwith within 45 days to prepare and file a comprehensive status update of the estate noting to include All expenses incurred, Revenues collected, assets, liabilities and any other encumbrances on the estate.
 - v. That the Administrators shall complete the execution of the Will and administration of the estate including all pending litigations against the estate.
 - vi. Any Party Aggrieved by this ruling is granted 30-day leave to appeal.
 - vii. That the matter shall be mentioned after 45 days, on the 8th December, 2023 for the purpose of a status update of the estate by the Joint Administrators and further directions.
 - viii. That costs shall be in the cause.
7. Aggrieved by the above verdict, the applicant filed before the superior court the application dated 2nd October 2023 seeking to set aside order (iii) above and to stay orders (i) and (iv) above. Upon considering the said application, the learned Judge stayed his ruling delivered on 29th September 2023 for 45 days to allow the applicant to pursue her appeal to this Court.
8. In her application dated 14th November 2023, the subject of this ruling, the applicant moved this Court under Rule 5 (2) (b) of the *Court of Appeal Rules*, 2022. In the main, the applicant prays for stay of execution of the orders made by the superior court on 29th September 2023 pending the hearing and determination of her appeal against the said ruling.
9. The motion is supported by grounds on its body and the applicant's supporting affidavit sworn on 14th November 2023 and a further affidavit sworn on 23rd December 2023 together with annexures thereto. It has been opposed by the 1st respondent vide replying affidavit sworn on 16th May 2024 together with annexures thereto. The 4th respondent opposed the application vide replying affidavit sworn on 18th December 2023. The 2nd and 3rd respondents fully associated themselves with the replying affidavits sworn by the 1st and 4th respondents in their replying affidavit sworn on 7th February 2024. Consequently, since all the respondents are speaking the same language their respective cases will be urged together.
10. The grounds in support of her argument that her appeal is arguable are: (a) the superior court overlooked two orders made by Ndung'u J. on 26th July 2017 in Nakuru High Court in Misc. Suit No. 33 of 2016, holding that the said suit was for separation of the estate of the late spouses and a ruling delivered by Matheka, J. on 25th January 2021 in Nakuru High Court Succession Cause No. 497 of 2013 in the matter of the estate of Philip Njoka Kamau deceased, from which the instant appeal emanates, ordering that all proceedings save replacement of the late Juma Kiplenge executor be stayed



pending the separation of the couple's estates; (b) the Superior Court ignored the holding of Matheka, J. in the ruling delivered on 25th January 2021, that what each spouse's estate constitutes or is made of is not known and will be known after the trial of and determination of Nakuru High Court in Misc. Suit No. 33 of 2016, which is part heard before Matheka, J.

11. On the nugatory aspect, the applicant averred that the respondents have purported to assent in favour of the 4th respondent a purported bequest property known as Njoro/Ngata Block1/65 and they have embarked on constructing for him a residential house from funds derived from the estate of the deceased even as confirmation of grant is awaited. Therefore, unless stay is granted, her right to appeal against the impugned orders and her right to access to justice guaranteed under Article 48 of the Constitution would be rendered nugatory, further her right to prosecute the suit in the High Court will be rendered nugatory.
12. In opposition to the application, the respondents averred that the applicant's appeal is not arguable since the late Philip Njoka Kamau died in October 2012 and left behind a written will, in which he recognized and acknowledged all his 5 wives/houses and bequeathed all his property to each of the houses. For the houses of the deceased wives, he bequeathed the properties directly to the children of the said houses including the applicant and the 4th respondent who are the children of the late Alice Kahaki who died in 1983. Further, the authenticity of the said Will has never been challenged by any party in any suit. It is only the validity of the bequests in the will that is challenged.
13. It is the respondents' case that contrary to what the applicant posits, the Superior Court did not order the administrators to forthwith proceed with the execution and administration, but rather the court only stated the general mandate of the administrators of the estate which is to complete the execution of the will and administration of the estate including all pending litigation against the estate and indeed no timelines were set for the said execution/administration since the court was alive to the fact that the administrators would first have to deal with all pending litigation against the estate and the 45 days' timeline was specifically for the filing of the status report on the estate and that was necessary bearing in mind the estate was previously administered by an executor who had since died. Furthermore, no application for confirmation of grant has to date been filed before the superior court for the applicant to have a reason to seek for orders of stay of execution pending determination of Nakuru High Court in Misc. Suit No. 33 of 2016.
14. The respondents also deponed that if the applicant had any difficulty in interpretation of the impugned orders she ought to have sought clarifications, bearing in mind that the court had also set a mention for further direction on 8th December 2023. The respondents deponed that the applicant mistook stay of proceedings order issued in Nakuru High Court in Misc. Suit No. 33 of 2016 with stay of execution. However, the said stay of proceedings was rendered moot following the death of Juma Kiplenge, the executor of the Will. Furthermore, the mootness of the proceeding in Nakuru High Court in Misc. Suit No. 33 of 2016 was appreciated by the applicant herself when she filed proceeding in Nakuru HC Succ. 497 of 2013 which is the subject of the instant application.
15. The application was canvassed through rival pleadings, written submissions and legal authorities relied upon by the advocates for the parties in support of their respective positions. The applicant's submissions are dated 13th December 2023 and 7th February 2024. The 1st respondent's submissions are dated 16th May 2024 while the 4th respondent's submissions are dated 13th January 2024. When the application came up for virtual hearing on 22nd May 2024, Dr. Kamau Kuria SC. appeared for the applicant, Ms. Gatu Magana learned counsel appeared for the 1st respondent, Mr. Musembi Ndolo learned counsel appeared for the 2nd and 3rd respondents and Ms. Wangari learned counsel appeared



for the 4th respondent. All the parties relied on their respective written submissions which they briefly highlighted during the hearing.

16. Dr. Kamau Kuria SC reiterated the contents of the applicant's affidavits and submitted that the applicant has an arguable appeal since the trial Judge overlooked the rulings of Ndungu, J. and Matheka, J. issued in 2017 and 2021 respectively. In support of his submission, counsel cited *Dennis Mogambi Mang'are vs Attorney General & 3 Others* [2012] eKLR where this Court held that an arguable appeal is not one that must necessarily succeed, it is one that is deserving of the court's consideration.
17. On whether the applicant's appeal would be rendered nugatory if stay of execution orders are not granted, Senior counsel maintained that the applicant seeks to protect the subject matter of the intended appeal which is made up of estates of her husband, her late father, Phillip Njoka Kamau and her late mother Alice Kahaki Njoki and the said assets are listed in the appellant's plaint in Nakuru High Court in Misc. Suit No. 33 of 2016 and that unless the stay sought is granted, not only will the right of appeal be rendered nugatory but also the right to access justice through the separation suit and her late mother's succession cause, which will have no assets to be distributed.
18. On the part of the 1st respondent Ms. Magana relied on the 1st respondent's replying affidavit and submitted that the four administrators have been involved in the management of the estate of the late Philip Njoka Kamau and that a stay of execution of the impugned order would result into a vacuum and the operations of the estate would come to a grinding halt.
19. Mr. Musembi Ndolo, learned counsel for the 2nd and 3rd respondents adopted the submission by the 1st and 4th respondents and maintained that stay orders if granted would be prejudicial to the running of the estate, since the estate would be without administrators and therefor it will be subjected to waste.
20. On the part of the 4th respondent, Ms. Wangari adopted the 4th respondent's replying affidavit and also adopted the submission by the 1st respondent. Ms. Wangari submitted that there would not be any prejudice to be suffered if the orders of stay are not granted since the new administrators' role was very specific and did not include distribution of the estate, since that issue is still pending in court.
21. Ms. Wangari also submitted that the decision by the trial judge did not in any way vary the directions to stay the proceedings in Nakuru Succ No. 497 of 2013 pending the hearing of Nakuru Misc. No 33 of 2016 but rather the trial court gave clear directions for the newly appointed administrators to apply for substitution in the pending suits. Consequently, no prejudice will be occasioned, in the event this Court allows the appeal because a new grant can be issued to the new administrators. Therefore, the decision of the trial court is reversible. The appeal if successful will not be rendered nugatory. The new administrators will be appointed and proceed to administer the estate.
22. Lastly, Ms. Wangari contended that it shall not be in the interests of justice to stay the order on the appointment of administrators of the estate as this may lead to wastage of the estate without a person appointed by the court to run the estate and who can be held to account.
23. We have considered the application, the affidavits in support of and that in opposition thereto, as well as the parties' rival submissions and the authorities cited. Our invitation to intervene on behalf of the applicant has been invoked under Rule 5 (2) (b) of the *Court of Appeal Rules. Kenya National Union*



of Teachers and 3 Others, Civil Application No. 16 of 2015, the Supreme Court considering the nature and scope of the jurisdiction under Rule 5 (2) (b) of the *Court of Appeal Rules* stated:

“(23) It is clear to us that Rule 5 (2) (b) is essentially a tool of preservation. It safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that Court over the years.

...

(27) Rule 5 (2) (b) of the *Court of Appeal Rules* of 2010 is derived from Article 164 (3) of the *Constitution*. It illuminates the Court of Appeal’s inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal. Although we would not go as far as describing such discretionary jurisdiction as ‘original’ (the term ‘inherent’ more accurately in our view captures the nature of that jurisdiction), the Court of Appeal has nonetheless defined the contours of this discretion succinctly and consistently and has employed it effectively to aid the conduct of its appellate jurisdiction.”

24. Granted, Rule (5) (2) (b) applications arise at an interlocutory stage, and orders issued thereunder are for the purpose of protecting the subject-matter of the appeal. In addition, this Court exercises its original and discretionary jurisdiction, when issuing orders under the said provision. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5 (2) (b) of this Court’s Rules are well settled. An applicant is required to demonstrate first, that the appeal or the intended appeal is arguable and second, 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.

25. On the first principle, 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. In *Stanley Kang’ethe Kinyanjui vs Tony Ketter & 5 Others* [2013] eKLR this Court 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.”

26. The applicant has raised 21 grounds in her memorandum of appeal dated 6th November 2023. One of the grounds is that the learned Judge ignored the finding of Matheka, J. in the ruling delivered on 17th January 2021 that there is a need to deal with the issue as to what forms the estate. In response, the respondents have maintained that the authenticity of the Will by the late Philip Njoka Kamau has never been challenged by any party in any suit and it is only the validity of the bequests in the will that is challenged. At this stage we are not required to make definitive findings of fact or law. That is a function for the bench that will hear and determine the appeal. We are also aware that even one arguable ground will suffice, and that an arguable ground is not necessarily one that will succeed. We have considered the grounds cited in the applicant’s appeal. Whether or not the trial court erred as argued by the applicant in her 21 grounds is arguable. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable. Accordingly, we are persuaded that the applicant has satisfied the first limb under Rule 5 (2) (b).



27. Regarding the second prerequisite, whether the appeal, if successful, would be rendered nugatory in the event we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others* (supra) this Court stated that:
- “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - x). 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.”
28. In *Reliance Bank Ltd vs Norlake Investments Ltd* [2002] I EA227, this 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.
29. The applicant has argued that to protect the subject matter of the intended appeal which is made up of estates of her late father, Phillip Njoka Kamau and her late mother Alice Kahaki Njoki and the said assets are listed in the appellant’s plaint in Nakuru High Court in Misc. Suit No. 33 of 2016 there is need for the orders of stay of execution. On the part of the respondents, they maintained that the operations of the estate of the late Philip Njoka Kamau will be crippled leading to wastage of the estate if the orders of stay of execution are granted. The respondents also maintained that there is no threat of execution since the administrators’ brief is limited to administration and not distribution of the estate. They also argued that the grant is yet to be confirmed and no application for grant has been filed.
30. The subject matter of the appeal is who should administer the deceased’s estate. The High Court gave appointed Joint- Administrators of the estate of Philip Njoka Kamau (Deceased) drawn from all the houses of the deceased. It is noteworthy that the administrators were given the mandate handle all pending litigations against the estate, and were also to prepare and file a comprehensive status update of the estate noting to include all expenses incurred, revenues collected, assets, liabilities and any other encumbrances on the estate.
31. We have considered the conflicting claims of both sides. We find and hold that the applicant has not demonstrated that her appeal would be rendered nugatory if stay is not granted. She has not placed any evidence on record to suggest that the respondents have disposed of any properties forming part of the estate. We also find it is in the interest of the estate of the late Philip Njoka Kamau to have the joint administrators, in the place of the late Juma Kiplenge the executor who is now deceased, to avert wastage of the estate for want of administrators. Besides, this Court would be hesitant to stay orders issued by the trial Court in respect of rendering of accounts directed at the respondents in the impugned ruling as that would amount to staying performance of a legitimate statutory duty imposed on the administrators by the *Law of Succession Act*. Indeed, the duty to account is paramount and in the interest of the entire estate.
32. In view of the foregoing, we hold the view that the applicant has failed to satisfy both limbs of arguability and the nugatory aspect under Rule 5 (2) (b) of this *Court’s Rules*. As severally held by this Court, in order for a party to succeed in an application such as this one, both limbs must be satisfied and demonstrating only one will not aid the applicant (See *Stanley Kangethe vs Keter* (Supra). Accordingly, we are not inclined to exercise our discretion in favour of the applicants. Consequently, the application dated 3rd May 2023 lacks merit and is accordingly dismissed. This dispute involves family members, therefore we direct each party to bear his/her own costs.

Orders accordingly.



DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF MAY, 2024.

M. WARSAME

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

