



**Mbarire & another v Mbarire & another (Civil Application
E004 of 2021) [2024] KECA 699 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KECA 699 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E004 OF 2021
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
JUNE 21, 2024**

BETWEEN

JOHN MIRITI MBARIRE 1ST APPLICANT

ROSE NJERI AYANGA 2ND APPLICANT

AND

NICHOLAS IRERI MBARIRE 1ST RESPONDENT

LUCY GATUNE NJIRU 2ND RESPONDENT

*(Being an application for stay of execution against the judgment of the High Court at Kerugoya
(L. W. Gitari, J.) dated 7th December, 2017 in Kerugoya HC Succ. Cause No. 3 of 2017)*

RULING

Background

1. John Miriti Mbarire (the 1st applicant) and Rose Njeri Ayanga, (the 2nd applicant) have vide a notice of motion dated 15th October, 2020 brought pursuant to the provisions of Rule 5(2)(b) of the [Court of Appeal Rules](#) (this Court's Rules) sought the following orders:
 - a. That there be a stay of execution of the judgment dated 7th December, 2017 pending the hearing and determination of the intended appeal; and
 - b. That the costs of this application be provided for. Nicholas Ireri Mbarire and Lucy Gatune Njiru are the 1st and 2nd respondents, respectively.
2. The motion is premised on the grounds that:
 - a. By a judgment delivered on 7th December, 2017, the High Court, (L. W. Gitari, J) which distributed the Estate of the late Joyce Kanjiru Njiru;



- b. The judgment that was delivered orally in open court differed with the written judgment; and
- c. The applicants' efforts to have the same clarified by the learned Judge failed.
3. The motion is supported by the affidavit sworn by the 1st applicant on his own behalf and that of the 2nd applicant. The 1st applicant deposed that the 1st and 2nd respondents are his brother and sister, respectively; that on 7th December, 2017, the High Court (L.W. Gitari, J) delivered a judgment distributing the estate of their mother (Joyce Kanjiru Njiru);
- that a certificate of confirmation was then extracted from the judgment; and that the applicants were dissatisfied with the judgment and filed a notice of appeal and applied for certified copies of proceedings.
4. The 1st applicant further deposed that when the learned Judge was reading the judgment in open court, she adopted the mode of distribution suggested by the applicants; that immediately after reading the judgment, the respondents applied for a copy of the judgment and proceedings for purposes of appeal; that the learned Judge stated that the judgment had some typographical errors that required correction and advised them to obtain a copy later in the day; that to the surprise of the applicants, when a copy of the typed judgment was released, it had been changed and adopted the mode of distribution proposed by the respondents; that in an effort to correct the anomaly, the applicants filed an application seeking to stay the judgment; that the application was dismissed by the learned Judge on 13th April, 2018; that in opposing the application, the 1st respondent in his replying affidavit clearly admitted having applied for proceedings for purposes of appeal; that the 2nd respondent confirmed in her affidavit that they had intended to file an appeal; and that the learned Judge in her ruling of 13th April, 2018 clearly admitted that "the court may have read the wrong table orally in court which may have been an oversight."
5. The 1st applicant further deposed that the respondents have gone to court to urge the court to order the Deputy Registrar to execute all instruments, and conveyance documents pertaining to the estate of their deceased mother; that armed with the impugned ruling, the 2nd respondent has in unclear circumstances obtained a power of attorney allegedly from one Yvonne Mercy Debenhem to deal with the disputed estate's property, LR No. 2787/395-Nanyuki Municipality (the suit property); that their deceased mother had sub divided the suit property and given it out specifically to beneficiaries to facilitate registration of such subdivision and issuance of title; and that the 1st respondent was allocated 11 acres elsewhere.
6. The applicant further deposed that the 2nd respondent in an effort to endear herself with the tenants had reduced the rent payable and is persistently harassing the applicants; and that in view of the foregoing there is need for a stay pending determination of the intended appeal by this Court.
7. The motion was opposed vide a replying affidavit sworn by the 2nd respondent who deposed inter alia that the applicants initially filed an application for stay dated 18th December, 2017 at the High Court at Kerugoya; that the said application was dismissed on 13th April, 2018; that it is two (2) years since the dismissal of the said application; that the delay in filing the instant application is unreasonable; that the applicants have not demonstrated that they stand to suffer substantial loss which would render the intended appeal nugatory; that the estate of Joyce Kanjiru Njiru was divided equally without discrimination; that the gist of the applicants' application is to apply inequality and discrimination which is contrary to Section 38 of the *Law of Succession Act*; that the power of attorney in her favour was properly registered by the Lands Office after the relevant documents were lodged; that she and three (3) other beneficiaries seek to enjoy the fruits of their judgment; and that the instant application lacks merit and is a waste of judicial time and should be dismissed. The 2nd respondent annexed a copy of the



proposed subdivision of the suit property duly signed by the 1st respondent and the Deputy Registrar pursuant to a court order issued on 19th August, 2020.

8. When the matter came up for hearing, Messrs D. Muinde & Associates appeared for the applicants. The 2nd respondent was unrepresented and filed written submissions on her own behalf and that of the 1st respondent. The parties sought to rely on their written submissions.
9. It was submitted for the applicants that the applicants have an arguable appeal inter alia, on the grounds that the learned Judge misinterpreted the provisions of Section 38 of the Law of Succession Act. Counsel submitted that the learned Judge distributed a portion of the suit property to one Yvonne Mercy Debenham (Yvonne) and Henry Munene (Henry) were not children of the deceased as they were a granddaughter and grandson of the deceased respectively. Counsel submitted that the parents of Yvonne and Henry predeceased the deceased (Joyce Kanjiru Njiru). Counsel asserted that Henry and Yvonne as grandchildren of the deceased could only benefit from the estate of the deceased if that right had first accrued to their parents.
10. On the nugatory aspect, it was submitted that in the respondents' replying affidavit, it was admitted that the respondents are proceeding to subdivide the suit property. Counsel submitted that this will have the effect of completely replacing the mother titles with new smaller titles in the names of the respondents. Counsel submitted that the intended appeal will be rendered nugatory if the orders sought are not granted as the subject matter being portions of the suit property will have disappeared as the respondents may transfer their individual parcels to innocent third parties thereby making it practically impossible to restore the parties to the position they were before the impugned judgment. Counsel urged us to allow the application with costs.
11. The 2nd respondent who was unrepresented submitted on her own behalf and that of the 1st respondent that the intended appeal is not arguable.

The 2nd respondent submitted that the court in distributing the estate of the deceased was guided by the principle of equality as opposed to equity; the 2nd respondent asserted that the provisions of Section 38 of the Law of Succession Act are mandatory. That all seven (7) beneficiaries of the estate of the deceased have been included in the equal distribution without discrimination.
12. The 2nd respondent submitted that he applicants have unreasonably delay filing the instant application. Further, that the applicants will not suffer loss if the orders sought are not granted as the suit property has been divided equally between the seven (7) beneficiaries of the estate with their respective names indicated on the sub-division plan. The 2nd respondent urged us to dismiss the application with costs.

Determination

13. We have considered the application, the grounds in support thereof, the authorities cited and the law. The jurisdiction under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice.
14. 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. This Court in the case of Trust Bank Limited and Another v Investech Bank Limited & 3 Others [2000] 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...”

15. 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 applicants in order to warrant ventilation before this Court. See: *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR where 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.”
16. On the nugatory aspect, the position in law is that this depends on whether or not what is sought to be stayed if allowed to happen is irreversible; or if it is not reversible, whether damages will reasonably compensate the aggrieved party. See: *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* (*supra*).
17. It is the applicants’ contention that the suit property may be subdivided and sold rendering the intended appeal nugatory, absent stay. The respondents contended that the proposed subdivision has been signed by the Deputy Registrar and that the 1st respondent has divided the suit property into seven (7) equal portions. Further, that each beneficiary of the estate has been allocated a plot and the respective names of all the beneficiaries have been indicated on the subdivision plan. The respondents therefore urge that the intended appeal will not be rendered nugatory, absent stay.
18. This Court in *Charles Wabome Gethi v Angela Wairimu Gethi* [2008] eKLR stated as follows:

“The applicant does not claim that the suit land would be disposed of. The applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the appeal, if successful would be rendered nugatory.”
19. By parity of reasoning and upon weighing the competing interests of the parties herein, we find that the applicants have not established that they will suffer substantial loss and that the appeal if successful will be rendered nugatory, absent stay.
20. It is well settled that for an application under Rule 5(2)(b) of this Court’s Rules to succeed, the applicant must satisfy both limbs of the twin principles. (See: *Republic v Kenya Anti-Corruption Commission & 2 others* (2009) KLR 31, and *Reliance Bank Ltd v Norlake Investments Limited* (2012) 1 EA 227).
21. Having failed to satisfy the nugatory aspect of Rule 5(2)(b) of this *Court’s Rules* we need not proceed to determine the 2nd aspect of whether the intended appeal is arguable.
22. In the circumstances, the applicants have failed to satisfy both limbs of the requirements under Rule 5(2)(b) of this *Court’s Rules*. The upshot is that the notice of motion dated 15th October, 2020 is dismissed.
23. This being a family matter, the order that commends itself to us is that each party will bear its own costs.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF JUNE, 2024.

JAMILA MOHAMMED



.....
JUDGE OF APPEAL

L. KIMARU

.....
JUDGE OF APPEAL

A. O. MUCHELULE

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

