



**Kathambi & 2 others v Silas & another (Civil Application
267 of 2024) [2024] KECA 884 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 884 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 267 OF 2024
SG KAIRU, LA ACHODE & GWN MACHARIA, JJA
JULY 26, 2024**

BETWEEN

SARAH KATHAMBI 1ST APPELLANT

PURITY KINYA 2ND APPELLANT

MIRIAM MAKENA 3RD APPELLANT

AND

GRACE RIGIRI SILAS 1ST RESPONDENT

MATHEW KOBIA IGWETA 2ND RESPONDENT

*(Being an application for stay of the execution of the judgment, decree
and orders of the High Court at Milimani, (Riechi.J.) delivered
on the 21st of May 2024 in Family Appeal No. E034 of 2024)*

RULING

1. Sarah Kathambi, Purity Kinya and Miriam Makena, the 1st to 3rd applicants respectively, filed the application dated 29th May 2024 under Rule 5(2)(b) Court of Appeal Rules 2022 against Grace Rigiri Silas and Mathew Kobia Igweta, the 1st and 2nd respondents respectively. They seek substantive orders that:
 - i. Pending the hearing and determination of the appeal, this Court be pleased to stay the execution of the orders of Hon. Justice S. Riechi issued on the 21st of May 2024 in High Court Family Appeal No. E034 of 2024.
 - ii. Alternatively, the respondents: either by themselves, their assigns or agents be restrained from removing the remains of Silas Kamuta Igweta from Umash Funeral Home in execution of the



judgment and orders of the Hon. Justice S. Riechi issued on the 21st of May 2024 in High Court Family Appeal No. E034 of 2024.

2. The application is premised on the grounds on its face, and on the supporting affidavit of even date sworn by Purity Kinya. The grounds are that the learned judge, in the superior court allowed the appeal in favour of the respondents and gave orders that Silas Kamuta Igweta (the deceased) be buried at on Land Parcel No. Kianjai/Kianjai/2585. He further denied the applicants application for stay to allow the lodging of an appeal in this Court. They aver that this is a highly emotive burial dispute between two wives and their families who both claim the right to bury the deceased in their preferred pieces of land.
3. The applicants depose that they won the case in the trial court on account of the deceased's close familial bond with them; and that the deceased abandoned the home of the 1st respondent over 40 years ago, where he is now set to be buried. They aver that their appeal has arguable issues, amongst them being that the judge erred: by restricting the issues before the court to two, whereas there were other issues to consider, such as the close familial bond the applicants enjoyed with the deceased; in considering issues that were not pleaded before the lower court; by failing to consider the wishes of the deceased; and by disregarding binding case law governing the dispute before the court, therefore arriving at a wrong decision.
4. Therefore, it is deposed that the applicants have a strong arguable appeal that will be rendered nugatory if the deceased is buried in Kianjai/Kianjai/2585.
5. A brief background of this application is that upon the death of the deceased on 17th February 2024, a dispute arose between the parties herein on where his remains should be buried. Consequently, the respondents filed a suit against the applicants seeking orders that the deceased's remains be released for burial to the respondents who are his legitimate widow and son, and that the deceased's resting place be determined in accordance with Meru customary law. In rebuttal, the applicants filed a statement of defence and counterclaim and averred that the deceased should be interred at Lairangi/Mumui and the respondents should reimburse the applicants the monies spent on the deceased being: medical bills, Ksh.5,563,527.35 and maintenance, Kshs. 971,853. Upon hearing the matter, the learned magistrate ordered the deceased's remains to be released to the 1st applicant for final rites and burial be done at the Lairangi/ Mumui land.
6. Dissatisfied by the judgment, the respondents filed a memorandum of appeal at the High Court faulting the trial court: for not considering the averment made in the plaint and the documentary evidence provided; not considering who has the burial rites under the Ameru customary law; and for not appreciating that the burden of proof lay with the respondents in their counterclaim. The learned judge considered the appeal before him, and found that it had merit. He ordered the remains of the deceased to be released to his wives, the 1st applicant and 1st respondent jointly, and that the deceased be buried on land parcel No. Kianjai/Kianjai/2585 currently registered in his name.
7. In response to this application, the respondents filed a replying affidavit sworn on 14th June 2024 by Mathew Kobia Igweta, the 2nd respondent. He deposes that the applicants have not demonstrated that they have an arguable appeal, nor that the appeal will be rendered nugatory if the stay order is not granted. It is further deposed that the application as filed has since been overtaken by events as the respondents have already complied with the orders of the superior court and have moved the remains of the deceased from Umash Funeral Home for preparation for burial. Therefore, it is their averment that the application and entire appeal is an academic exercise and any orders issued by this Court will be in vain.



8. The applicants filed their written submissions dated 6th June 2024 through the firm of M/s Danstan Omari & Associates, while the respondents filed theirs dated 17th June 2024 through the firm of M/s Matheka Oketch & Company Advocates.
9. In their submissions, the applicants reiterate the grounds in the application and the supporting affidavit. They also submit that if the appeal succeeds, it will be rendered nugatory absent stay; and that it will require an order for exhumation which will cause the deceased's family embarrassment, as a people who caused the exhumation of an old man who was loved and revered by the Ameru people. They submit that the African culture requires that the deceased should rest in peace and transition to the after-life. They rely on this Court's decision of Stanley Kang'ethe Kinyajui v. Tony Ketter & 5 Others (2013) eKLR in their submissions.
10. In opposition, the respondents reiterate their replying affidavit. They add that evidence as to ownership of the property where the deceased was earlier ordered to be buried as directed by the lower court was presented by the parties; and that the impugned judgment was thorough, well-reasoned and grounded in established legal principles governing burial disputes. They too rely on this Court's case of Stanley Kang'ethe Kinyajui (supra), to urge that the appeal will not be rendered nugatory should it succeed if the application is not granted, as the Court's decision can still be given effect post-burial. They urge for the dismissal of this application.
11. We have considered the application, the affidavits in support and in reply and the rival submissions of the parties. The jurisdiction to grant stay lies at the discretion of this Court as provided in rule 5 (2) (b) which stipulates that:

“ Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may- (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings in such terms as the court may think just.”
12. The jurisdiction under rule 5(2) (b) is exercised based on the settled twin principles that have been restated in a plethora of this Court's decisions. That is, the applicant must show first, that the appeal is arguable and second, that it is likely to be rendered nugatory if the orders sought are not granted. This Court succinctly stated in Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR that:

“ 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...”
13. For an applicant to benefit from the discretion of this Court, both limbs must be satisfied. Before we delve into the two principles, we note that it is not in dispute that the deceased's body was moved from Umash Funeral Home to a different funeral parlour, albeit his remains are yet to be interred and therefore, this application has not been overtaken by events.



14. On the first principle as to whether the appeal is arguable, we are guided by this Court’s description of an arguable appeal in Stanley Kang’ethe Kinyanjui v. Tony Ketter & 5 Others [2013] eKLR where it was held as follows:

- “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.”

15. We have considered the grounds set out in the motion. We are cognizant that a single bona fide arguable ground raised by the applicants will suffice. Without stating more lest we embarrass the bench that will hear the appeal, we are of the view that the grounds raised in the memorandum of appeal are not idle and ought to be given a chance to be ventilated. Hence, the applicant has satisfied the first limb.

16. On the second limb, it is evident that if this order is not granted as sought and the appeal succeeds, it will be rendered nugatory. Enforcement of the orders post-interment would entail exhumation and relocation of the remains of the deceased. This would not only be costly but would subject the family to unnecessary hardship and indignity. It is thus vital for the Court to determine the deceased’s final resting place upfront.

Therefore, we are satisfied that the second limb has also been satisfied.

17. Consequently, we find that the applicants have satisfied both limbs under Rule 5 (2) (b) of this Court’s Rules. The upshot is that the Notice of Motion dated 29th May 2024 is found to have merit and is allowed with the following orders:

- i. The interment of the deceased’s remains be and is hereby stayed pending the hearing and determination of the main appeal.
- ii. If the appeal is not filed, to be filed within the next thirty (30) days, and thereafter be fixed for hearing on priority basis.
- iii. Costs shall be in the cause.

DATED AND DELIVERED IN NAIROBI THIS 26TH DAY OF JULY, 2024

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

