



REPUBLIC OF KENYA



**Khisa & 4 others v Simiyu & 6 others (Civil Application
E016 of 2022) [2024] KECA 883 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 883 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E016 OF 2022
F SICHALE, LA ACHODE & WK KORIR, JJA
JULY 26, 2024**

BETWEEN

**CATHERINE NASIMIYU KHISA 1ST APPLICANT
GLADYS NAKHUMICHA KHISA 2ND APPLICANT
LILIAN NANJALA KHISA 3RD APPLICANT
STELLA NAFULA KHISA 4TH APPLICANT
LEWIS WANG'ASA WANJALA 5TH APPLICANT**

AND

**EDWARD SIMIYU 1ST RESPONDENT
CHRISOSTIM WEKESA KHISA 2ND RESPONDENT
CHRISPINUS NYONGESA 3RD RESPONDENT
FLETCHER VAGUZA 4TH RESPONDENT
ROSE ANYOSO NDEGE 5TH RESPONDENT
JOSEPHINE NEKESA WATTI 6TH RESPONDENT
LYDIA NYABOLE MIGOGO 7TH RESPONDENT**

(Being an Application for stay of execution pending the hearing and determination of an Appeal against the Judgment of Hon. S.N Riechi J delivered on 4th August 2021 and the Certificate of Grant dated 6th May 2022 in Bungoma HC Succ Cause No.75 of 2009)



RULING

1. Catherine Nasimiyu Khisa the 1st applicant filed this motion dated 16th November 2022 on behalf of the other applicants under Section 3A and 3B of the [Appellate Jurisdiction Act](#) and Rule 5(2) (b), 41 and 47 of the [Court of Appeal Rules](#) 2022, seeking substantive orders as follows:
 1. Stay of execution pending the hearing and determination of the Appeal against the Judgment of Hon. Justice S.N Riechi delivered on the 4th August 2021 and the Certificate of Grant dated 6th May 2022 in Bungoma High Court Succession Cause No.75 of 2009.
 2. Stay of proceedings in Bungoma ELC NO 9 of 2022 pending the hearing and determination of this Application and thereafter pending determination of the Appeal.
 3. Grant of a temporary injunction restraining the Respondents, their agents or servants from selling, leasing or charging the properties enlisted on the Certificate of Confirmation of Grant issued on the 6th May 2022 as well as the Rainbow Building Plot pending hearing of this Application and thereafter pending hearing and determination of this Appeal.”
2. The application is premised on the grounds on its face and the supporting affidavit of even date sworn by the Applicant. The summary of the averments is that judgment was delivered on 4th August 2021 by Hon S.N Riechi J. in Bungoma HC SC No. 75 of 2009. A Certificate of Confirmation of Grant was later issued on the 6th of May 2022.
3. The 1st and 2nd Applicants were the 3rd and the 4th Petitioners/ Administrators of the Estate of Shadrack Naliakho Khisa in Bungoma HC SC No. 75 of 2009. The Applicants were aggrieved and sought stay of execution of the judgment and leave to appeal.

The superior court granted 30 days of stay and leave to appeal on 27th October 2021. The Applicants filed the Record of Appeal and served it upon the Respondents.
4. The Applicants complain that a property known as Rainbow Building Plot, was omitted from the estate of the deceased. The 2nd Respondent instituted a suit to exclusively claim the Plot, however the court on 8th June 2016, ordered the 2nd Respondent to deposit rental income from the plot into the court pending determination of the cause. The funds are still with the court since the judgment did not apportion them to the beneficiaries. Therefore, the Rainbow Building Plot constitutes one of the subject matters of the appeal.
5. The Applicants argue that they will suffer irreparable harm if the orders sought are not granted, since, should their appeal succeed, the 7th respondent will have already alienated the said parcels. They urge that the temporary orders of injunction will not occasion the respondents prejudice if granted as they will not interfere with their utilization of the respective parcels of land as apportioned in the judgment. Therefore, it is in the interests of justice that the Application be allowed.
6. In response to the application, the 7th respondent filed a replying affidavit dated 30th June 2023 and averred that being a widow of the late son of the deceased, she is a beneficiary of the estate of the deceased. She is satisfied with the mode of distribution and argues that it is the applicants who have employed all tactics to deny her, her rightful share. In addition, she is unemployed and depends on



farming as a source of income. That the applicants seek to cause her enormous loss by limiting her right to exercise proprietorship over the allocated parcels of land. The respondent contends that the Application lacks merit since all the beneficiaries were contented with the mode of distribution and are abiding with the judgment of 4th August 2021.

7. The respective parties filed written submissions. Betty Koech & Co. Advocates, filed submissions on behalf of the applicants dated 21st November 2022 stating that the applicants have an arguable Appeal. That the grounds of the appeal are in regard to the inequitable apportionment of the estate and the failure to apportion rental proceeds held in court. They relied on the Court of Appeal case of *University of Nairobi vs Ricatti Business of East of Africa* [2020] eKLR.
8. The applicants urge that the appeal will be rendered nugatory should the orders sought not be allowed, as the 7th respondent will exercise proprietorship over the properties that comprise the subject matter of the appeal. That the applicants will not be able to recover the same from third parties if the properties were to be sold and cannot be compensated by the 7th Respondent as she is not a person of means. They support their stance with the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR. They conclude that this Application has merit and pray for the preservation of the subject matter of the Appeal.
9. The 7th respondent filed written submissions through Oira & Company Advocates, dated 30th June 2023. They argue that the *Civil Procedure Act* and *the Rules* apply in unique circumstances as the *Law of Succession Act* under rule 63 of the *Probate and Administration Rules*. That the Law of Succession Act is sui generis, with its own unique and special procedures which regulate proceedings in probate courts as was stated in *Josephine Wambui Wanyoike vs Margaret Wanjiru Kamau & Another* [2013] eKLR. That stay of execution is not one of the reliefs that can be granted by a probate court.
10. During the plenary hearing, learned counsel M/S Koech appeared for the applicants, while learned counsel Mr. Omagwa Angima appeared for the 5th respondent and learned counsel Mr. Oira appeared for 7th respondent. Mr Bwonchiri representing the rest of the respondents was absent although duly served.
11. We proceed to establish whether the applicants have satisfied the now well settled twin principles that must exist for us to exercise our unfettered discretion under *rule 5 (2) (b)* and grant the stay orders. First, we must consider whether the appeal is arguable. We note that an arguable appeal does not mean that it should be one that will necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Further, 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 this stage, as doing so may embarrass the ultimate hearing of the main appeal. See *Stanley Kangethe Kinyanjui v. Tony Ketter & Others* (2013) eKLR.
12. The second factor is whether the appeal would be rendered nugatory if the stay of execution is not granted. The term

“nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling as was stated in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232. Whether or not an appeal will be rendered nugatory depends on whether or not what is being sought to be stayed if allowed to happen will be reversible. If it is not reversible, the Court may consider whether damages will be adequate compensation to the aggrieved party. See *Multimedia University & Another V. Professor Gitile N. Naituli and Attorney General V. Okiya Omtatah Okoiti & Another* (2019) eKLR.



13. The principles on which this Court acts, in exercise of its discretion in such a matter, is therefore, first, to decide whether the Applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. We have relied on the jurisprudence underlying the determination of matters brought under rule 5(2)(b) as summarized in the case of *Stanley Kangethe Kinyanjui (supra)*.
14. The applicants have argued that preserving the subject matter herein (the assets of the deceased's estate) would prevent the appeal from being rendered nugatory. The grounds of the intended appeal are mainly that the distribution of the estate is inequitable and that there was failure to apportion rental proceeds held in court with regard to one of the estate assets. The respondents on the other hand contend that the application lacks merit since all the beneficiaries were contented with the mode of distribution and are abiding with the judgment of 4th August 2021. We are cognizant of the fact that a single bona fide ground of appeal is sufficient for an appeal to be considered arguable. We are therefore satisfied that in the instant application the grounds of the intended appeal are not idle and are worth consideration on merit, thus, this principle has been met.
15. We move to consider whether the Applicant has satisfied the second principle that the appeal will be rendered nugatory if the orders sought are not granted. The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. In so doing we have balanced this right against that of the successful litigants who should not be deprived of the fruits of their judgment. None of the parties should be left to suffer prejudice that cannot be compensated by an award of costs.
16. In this context a stay of execution is necessary to preserve the subject matter of the appeal. We are satisfied that it would be prejudicial and detrimental to the applicants should the respondents dispose of the asset. In addition, it has not been demonstrated that granting of stay would affect the utilization of other assets that have been distributed and which fall outside the scope of the subject matter. Therefore, the Respondents would not suffer prejudice. For this reason, we conclude that it is in the interest of justice for the suit property to be preserved until the intended appeal is determined. It is not disputed that the 7th Respondent is not a person of means and if the suit property is disposed of, it may be difficult for her to compensate the Applicants should the appeal succeed.
17. From the foregoing, we find that the applicant has satisfied the twin principles as required for the orders of stay of execution to be granted. Having so far found, the orders of stay of execution will suffice and we will not go further to assess whether there is sufficient cause to grant the temporary injunction sought.

Consequently, we find that the notice of motion dated 21st December, 2021 has merit and is hereby allowed.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JULY, 2024.

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

