



REPUBLIC OF KENYA



**Indure & another v Wanyama (Civil Application E145 of 2023)  
[2024] KECA 832 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KECA 832 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E145 OF 2023  
HM OKWENGU, SG KAIRU & HA OMONDI, JJA  
JULY 19, 2024**

**BETWEEN**

**AGNES JEPNGETICH ONZELE INDURE ..... 1<sup>ST</sup> APPLICANT**

**KENNEDY KIDIAVAI INDURE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**VICTORIA NALIAKA WANYAMA ..... RESPONDENT**

*(An application for stay of execution of the judgment and decree  
of the High Court of Kenya at Bungoma (Riechi, J.) dated 16th  
November 2021 in High Court Succession Cause No. 367 of 2011)*

**RULING**

1. In their application dated 24<sup>th</sup> November 2023, the applicants, Agnes Jepngetich Onzele Indure and Kennedy Kidiavai Indure, seek an order under Rule 5(2)(b) of the [Court of Appeal Rules](#) for stay of execution of the judgment and decree issued on 16<sup>th</sup> November 2021 in Bungoma High Court Succession Cause No. 367 of 2011 in respect of the estate of Christopher Geoffrey Onzele Indure, deceased, pending the hearing and determination of their appeal, being Civil Appeal No. 18 of 2022.
2. The deceased, Christopher Geoffrey Onzele Indure died on 6<sup>th</sup> July 1997. The applicants, the widow and son, respectively of the deceased, applied and obtained grant of representation which was issued to them on 30<sup>th</sup> April 2012. Later, the respondent Victoria Naliaka Wanyama, asserting also to be a widow of the deceased, made an application for revocation or annulment of the grant, alternatively for an order that she be made a co-administrator of the estate. The applicants opposed that application.
3. In a judgment dated 16<sup>th</sup> November 2021, the High Court (Riechi, J.) found that the respondent “is the wife of the deceased Geoffrey Onzele Indure (Deceased) and therefore a dependant of the estate”,



and directed the applicants to file a summons for confirmation of grant within 45 days factoring in the respondent in the same.

4. Aggrieved, the applicants lodged Civil Appeal No.18 of 2022 which is pending hearing and determination by this Court. Thereafter, the applicants presented the application under consideration.
5. During the hearing of the application before us on 5<sup>th</sup> March 2024, the applicants were represented by learned counsel Mr. O. Bw'onchiri while the respondent was represented by learned counsel Mr. G. Murunga.
6. It is established that in applications of this nature, the applicant is required to demonstrate that the appeal or intended appeal is arguable. Secondly, that the appeal or intended appeal will be rendered nugatory if the orders sought are declined, and the appeal ultimately succeeds. See for instance *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2015] eKLR. In that regard, it is the applicants' case, based on the supporting affidavit of Agnes Jepngetchi Onzele Indure and the written and oral submissions by Mr. O. Bw'onchiri that the appeal arguable "with extremely high chances of success"; and that the appeal will be rendered nugatory if the grant of letters of administration is confirmed on the terms decreed by the learned Judge.
7. The respondent on the other hand in her replying affidavit and in submissions by Mr. Murunga has urged that the appeal is not arguable as it is incompetent; that leave to appeal was not obtained prior to instituting the appeal; that the applicants have also not demonstrated how the appeal will be rendered nugatory if the orders sought are not granted.
8. We have considered the application, the affidavits and the submissions. As regards the respondent's contention that the appeal does not lie because leave to appeal was not obtained, that in our view would be a matter for consideration in the context of an application to strike out the appeal under Rule 86 of the *Court of Appeal Rules* which is presently not before us.
9. As to whether the appeal is arguable, we bear in mind that an arguable appeal is not one that will necessarily succeed but one worthy of consideration. In that regard, the applicants have contended that the learned Judge erred in holding that the respondent is the widow of the deceased even though the 1<sup>st</sup> applicant and the deceased were said to have been in a monogamous marriage under the African Christian Marriage and Divorce Act and the deceased therefore lacked capacity to contract another marriage. We think the appeal is arguable.
10. On the nugatory aspect, this Court in *Reliance Bank Limited v Norlake Investments Ltd* [2002] 1 E.A. 227, stated that, "what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling." And in *Permanent Secretary Ministry of Roads & another v Fleur Investments Ltd* [2014] eKLR, the Court expounded that a trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law.
11. We are persuaded as urged by the applicants that should the judgment be executed and confirmation of grant proceeds on the basis decreed and the estate is distributed accordingly, the appeal, if successful will be rendered nugatory.
12. In the result, we allow the application in terms of prayer (b) thereof and order a stay of execution of the judgment and decree in Bungoma High Court Succession Cause No. 367 of 2011 issued on 16th November 2021 pending the hearing and determination of Appeal No. 18 of 2022.
13. Costs of the application shall be costs in the appeal.



DATED AND DELIVERED AT KISUMU THIS 19<sup>TH</sup> DAY OF JULY, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

