



**Mosu v Matheka & another (Civil Application E046 of 2024)  
[2024] KECA 861 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KECA 861 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E046 OF 2024  
SG KAIRU, JW LESSIT & GWN MACHARIA, JJA  
JULY 12, 2024**

**BETWEEN**

**FRANCISCA NDUKU MOSU ..... APPLICANT**

**AND**

**ALFRED MUTUNGA MATHEKA ..... 1<sup>ST</sup> RESPONDENT**

**ESTHER MUMBE MATHEKA ..... 2<sup>ND</sup> RESPONDENT**

*(An application for stay of the ruling and orders of the High Court of Kenya at Nairobi (Ogola, J.) given on 21st November 2023 in HCFP&A Case No. 3182 of 2007)*

**RULING**

1. In her application dated 8<sup>th</sup> February 2024, the applicant, Francisca Nduku Mosu, who maintains that she is the widow of Meshack Mwanzia Matheka, deceased, in respect of whose estate the succession proceedings relate, has applied for orders to stay implementation of the ruling and orders of the High Court given on 21<sup>st</sup> November 2023 by “ensuring there is no distribution of the estate, eviction from any property or interference with the current status quo in regard to the estate” pending the hearing and determination of her intended appeal. She intends to appeal against the ruling delivered on 21<sup>st</sup> November 2023 in which the High Court (E. K. Ogola, J.) dismissed her Summons for Revocation of Grant dated 5<sup>th</sup> April 2011 issued to the respondents, Esther Mumbe Matheka and Alfred Mutunga Matheka, the mother and brother respectively of the deceased.
2. The background, in brief, is that the deceased died on 5<sup>th</sup> February 2007. The applicant, asserting to be the widow of the deceased, applied for grant of letters of administration in Nairobi Succession Cause No. 2175 of 2007. That cause was later transferred to Machakos and assigned Succession Cause No. 164 of 2008. A grant of letter of administration was issued to her in that cause on 3<sup>rd</sup> July 2008.



3. Unknown to the applicant, the mother and brother of the deceased, the respondents in this application, had instituted Nairobi Succession Cause No.3182 of 2007 in respect of the estate of the deceased in which they asserted that the deceased died a bachelor with no children. According to the applicant, she only got to know of the Cause No. 3182 of 2007 when the respondents, apparently accompanied by police officers, attempted to carry away an asset of the estate of the deceased, namely a Container that was in Donholm Nairobi. The applicant then moved the High Court in Nairobi, by Summons for Revocation of Grant dated 5<sup>th</sup> April 2011 seeking orders for revocation or annulment of the grant of letters of administration in favour of the respondents. That application was based on the grounds that the respondents obtained the grant by concealment of material facts, namely that the deceased was married to the applicant and together had a child.
4. After hearing the matter, in which oral evidence was adduced by the parties, the learned Judge of the High Court was not satisfied that the applicant had discharged her burden of proof to establish, to the required standard, that she was married to the deceased under Kamba Customary law. Accordingly, the Judge dismissed the applicant's application. Aggrieved, the applicant filed a Notice of Appeal on which the present application is hinged.
5. We heard the application, virtually, on 9<sup>th</sup> April 2024. Relying on the grounds on the face of the application, the supporting affidavit sworn by the applicant, and written and oral submissions, learned counsel for the applicant Miss. Swaka holding brief for Mr. Kirimi urged that the intended appeal is arguable. For instance, it was urged, the dispute is over ownership of property which the applicant owns, and which is a matter within the jurisdiction of the Environment and Land Court, and not a succession matter; and that there is also the question of ownership of a cereal store business which the applicant claims to have established. In addition, there is the question whether the Judge erred in concluding that the applicant was not the wife of the deceased.
6. It was submitted that unless the orders sought are granted, the appeal will be rendered nugatory; that the business she established is at risk of being taken over; that there is a risk of her eviction from the property known as Tassia House No. 97/1141/140 claimed by the respondents to comprise an asset of the estate; and that the tenants occupying the same who know the applicant as the landlord, will be destabilised.
7. In opposition to the application, learned counsel for the respondents Mr. Kanyoro relied on a replying affidavit sworn by the 2<sup>nd</sup> respondent as well as written submissions which he orally highlighted. It was submitted that the intended appeal is not arguable; that the learned Judge correctly found that the applicant did not prove to have been the wife of the deceased; that ownership of the property by the deceased is not in question; that the applicant obtained a grant of letters of administration in Machakos, by concealing material facts; and that in any event, there is no evidence that the appeal will be rendered nugatory.
8. We have considered the application, the affidavits and the submissions. To succeed, the applicant is required to demonstrate that her appeal or intended appeal is arguable and that unless the orders sought are granted, the appeal or intended appeal, if successful, will be rendered nugatory. See, *Trust Bank Limited and another v Investech Bank Limited and 3 others* [2000] eKLR.
9. In her memorandum of appeal, the applicant has raised issues, amongst others, that the Judge erred in finding that she was not a wife of the deceased for purposes of succession; that the Judge failed to take into account the other succession cause in which the applicant was appointed the administrator of the estate of the deceased, which grant was not revoked; and that Judge erred in concluding that the property known as Tassia House No. 97/1141/140 was owned by the deceased. The respondents on the other hand have contested the applicant's claims in that regard.



10. Given the rival positions taken by the parties, and mindful, as we are, that an arguable appeal is not one that must necessarily succeed, and that a single bona fide issue is sufficient for this purpose, we do not think the intended appeal is frivolous. It is arguable. In that regard, see *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.
11. On the nugatory aspect, the Court in the case of *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 expressed that, that term is to be given its full meaning and does not only mean worthless, futile or invalid but also means trifling. It is also an established principle that 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. The applicant has asserted that the effect of the impugned ruling is that she is “exposed” to “eviction and harrassment from her sole and legally owned property Tassia House No. 97/1141/140 which she and the tenants” have “been in occupation and possession for over twenty years.” The respondents on the other hand maintain that the “applicant has never resided on Plot No. 97/1141/140 and does not risk eviction” as she has alleged.
12. In those circumstances, the order that commends itself to us, which we hereby make, is that the status quo currently obtaining with respect to management and control of the property known as Tassia House No. 97/1141/140 shall be maintained pending the hearing and determination of the appeal. There shall also be no sale or transfer of the said property by any of the parties herein.
13. Costs of the application shall be costs in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF JULY, 2024.**

**S. GATEMBU KAIRU, FCIARB**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**G.W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

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

**SIGNED**

**DEPUTY REGISTRAR**

