



**Lukalo & another v Lukalo (Civil Application E167 of 2022)  
[2024] KECA 1122 (KLR) (30 August 2024) (Ruling)**

Neutral citation: [2024] KECA 1122 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E167 OF 2022  
HM OKWENGU, HA OMONDI & PM GACHOKA, JJA  
AUGUST 30, 2024**

**BETWEEN**

**BEATRICE LUKALO ..... 1<sup>ST</sup> APPLICANT**

**MARGARET OSOLIKA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**TOM LUKALO ..... RESPONDENT**

*(An application for stay of proceedings from the judgment and decree of the High Court of Kenya at Kakamega (Musyoka, J.) delivered on 27th May, 2022 in Kakamega HCSC No. 408 of 1998)*

**RULING**

1. By a Notice of Motion dated 29<sup>th</sup> November 2023, made under rule 5(2) (b) 2010 (now 2022 Rules), the applicants have urged this Court to stay the court proceedings emanating from Kakamega HC Succ. Cause No. 408 of 1998 pending the hearing and determination of the appeal. The application is supported by the grounds on the face of it and the affidavit of the 2<sup>nd</sup> applicant sworn on 29<sup>th</sup> November 2023.
2. This application is a continuation of a raging succession dispute and to contextualize it, it is necessary to capture the background, albeit in summary. The dispute relates to the estate of the late Ezekiel Lukalo Aluda. By a judgment of this Court, differently constituted (Onyango Otieno, Azangalala & Kantai, JJ.A.), delivered on 11<sup>th</sup> July 2014, this Court set aside orders made in the succession cause for the distribution of the estate and cancelled the certificate of grant. It directed the hearing of the succession dispute on the issue of the distribution of the estate amongst the rightful beneficiaries. Consequently, in an elaborate judgment delivered on 27<sup>th</sup> May 2022, the High Court (Musyoka, J.) identified 13 beneficiaries of the estate. However, the learned judge held it was premature to distribute the estate before parties led further evidence on the status of some titles; whether some beneficiaries had received gifts inter vivos; whether some properties had been sold, and who were beneficiaries of the transactions,



among other issues. The learned judge gave directions to the effect that he would allocate a mention date after 90 days from the date of the judgement to allow the parties to decide on the course of action they wished to take before making the final orders on the distribution of the estate. The judge also granted the parties leave of 28 days to challenge his decision, if necessary.

3. The applicants are aggrieved by the said judgment and filed a Notice of Appeal as well as this application. The gist of the Motion is that the trial court disregarded the directions issued by this Court dated 11<sup>th</sup> July 2014, in its judgment dated 27<sup>th</sup> May 2022. Consequently, the learned judge made serious contradictions by including beneficiaries who have not survived the deceased's estate, and calling for fresh evidence in the dispute. The applicants further faulted the trial court for failing to declare that only three properties that survived the deceased namely Trans Nzoia/[Kipsoen/1048](#), North Maragoli/Kegindi/471 and North Maragoli/Kisatiru/782.
4. The applicants contended that the application was arguable for the following reasons: the legitimate beneficiaries stood to suffer irreparable harm; the appeal would be rendered an academic exercise if stay was not granted; it was only just that the application be allowed; and the application was filed timeously.
5. The application is opposed. In his replying affidavit dated 4<sup>th</sup> December 2023, the respondent urged this Court to dismiss the application for the following reasons: that the application failed to meet the threshold set out in rule 5 (2) (b) of this Court's Rules; the deceased's estate is yet to be distributed; the application is premature; and that the applicants were intent on frustrating the distribution process.
6. The applicants in response, filed a further affidavit sworn on 4<sup>th</sup> January 2024. They reiterated the averments set out in their application save to add that the trial court was only required to consider the undisputed facts in the distribution of the deceased's estate; and the matter was poised to be mentioned before the trial court for further directions, and therefore this Court needed to stay the proceedings.
7. The application was heard virtually on 19<sup>th</sup> March 2024. The applicants were represented by learned counsel Mr. Wachakana while learned counsel Mr. Munyendo was present for the respondent. The applicants relied on their written submissions dated 14<sup>th</sup> December 2024. They rehashed the contents of their application and affidavits praying that the application be allowed as it met the threshold for grant of an order for stay of proceedings. The respondent relied on his written submissions dated 12<sup>th</sup> May 2024. He urged this Court to dismiss the application as it was frivolous since there was no decree capable of execution. Finally, the trial judge was yet to distribute the estate.
8. The principles enunciated in an application under rule 5 (2) (b) of this Court's Rules for an order of stay of proceedings pending appeal or intended appeal, are settled. An applicant must demonstrate that the intended appeal or appeal (if any) is arguable and not merely frivolous. Secondly, that the appeal, or intended appeal, if successful, would be rendered nugatory absent stay. (See Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR).
9. In the grounds in support of the application, the applicants have argued that the learned judge contradicted the judgment of the Court of Appeal to the extent that some beneficiaries that are identified as wives are married elsewhere; and that some beneficiaries are not children of the deceased. It is trite that an arguable ground must not necessarily succeed. In the case of Kenya Commercial Bank Limited vs. Nicholas Ombija [2009] eKLR, this Court stated as follows: "An "arguable" appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court." In our view, those grounds raised by the applicants are arguable. As to whether they will succeed, that will be dealt with by the bench that will hear and determine the appeal. Accordingly, the applicants have met the first limb of rule 5(2) (b).



10. On the second limb, whether the appeal will be rendered nugatory, we note that the learned judge did not make final orders and that there is no decree capable of execution. The parties were given a chance to lead further evidence on the distribution of the estate before final orders could be issued. This means that the applicants have a chance to lead evidence and prove the issues that they are aggrieved with. In such a case it is difficult to understand what will be rendered nugatory as argued by the applicants. We are not satisfied that the intended appeal will be rendered nugatory as each party will have a chance to appeal against the orders that will be made on the distribution of the estate. Therefore, the applicants have failed to satisfy the second limb of the twin principles for the grant of the order for stay of proceedings.
11. In conclusion, as the applicants had to satisfy both limbs of the twin principles; and as already stated, the applicants have failed to meet the second limb of the twin principles, that the intended appeal will be rendered nugatory absent stay; we dismiss the application with costs to the respondent.

**DATED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF AUGUST, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**M. GACHOKA C.Arb, FCIArb**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

