



REPUBLIC OF KENYA



Mwangi v Ruhle & another; Kamau & another (Executor) (Civil Appeal (Application) E804 of 2022) [2024] KECA 1330 (KLR) (27 September 2024) (Ruling)

Neutral citation: [2024] KECA 1330 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E804 OF 2022
HM OKWENGU, A ALI-ARONI & JM MATIVO, JJA
SEPTEMBER 27, 2024**

BETWEEN

LUCY MUMBI MWANGI APPLICANT

AND

PAULA MARIA RUHLE 1ST RESPONDENT

CHRISTOPHER HANDSCHUH 2ND RESPONDENT

AND

JOSEPHINE WAMBUI KAMAU EXECUTOR

VIRGINIA WANGUI SHAW EXECUTOR

(Being an application for a stay of execution against the Ruling and Order of the High Court of Kenya at Nairobi (Muchelule, J.) delivered on 28th September 2022 in HC Succession Cause No. 758 of 2014)

RULING

1. Before the court is the applicant’s notice of motion dated 12th October 2022 brought under section 3, 3A and 3B of the [Appellate Jurisdiction Act](#), rule 5(2) (b) and 47 of the [Court of Appeal Rules](#) 2010, seeking *inter alia*:
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of the Intended Appeal, this Honourable Court be pleased to stay the execution of the Ruling delivered by Honourable Justice A. O. Muchelule on 28th September, 2022 and the resultant decree thereof;



- d. That the Applicant be at liberty to apply for such further orders and/ or directions as the Court may deem fit and just to grant;
 - e. That the Court makes such further and/or alternative orders as necessary to not only meet the ends of justice but to safeguard the subject matter of the Application and also of the intended appeal;
 - f. That costs of the application be provided for.
2. The application is supported by the grounds on the face of it and replicated in the affidavit of Lucy Mumbi Mwangi, the applicant which includes; that the applicant is likely to be evicted from her matrimonial home; that the estate is at risk of exposure and continues to waste away; that the 1st respondent has never stepped foot into the country and therefore cannot administer the estate as she is domiciled out of the country; that the applicant is the lawful wife of the deceased having been married under Kikuyu Customary Law and had lived with the deceased in their matrimonial home, on L.R No. 7413/19 and 7413/20 from the year 2009 until the deceased's demise on 12th June 2013; and that the deceased had adopted the applicant's two children as his own and stayed with them at the matrimonial home.
 3. The applicant further deposed that after the death of the deceased, the 2nd respondent took possession, occupation, and management of the matrimonial home and removed the applicant therefrom; that he also chased away a tenant who was occupying the guest cottage and brought in a new tenant and began collecting rent from the tenant; further that the applicant never met the 1st respondent during the 5 years that she lived with the deceased; that on 17th November 2014 the 1st and 2nd executors obtained a Grant of Probate and took over the management of the estate, but the 1st and 2nd executors renounced their rights to probate on 2nd May 2017 and 14th October 2019 respectively; that the 2nd respondent produced a Will allegedly signed by the deceased in which the deceased bequeathed all the property to him; further, that the deceased left behind several properties; that a ruling delivered by the court on the various applications all the applications were dismissing save the 1st respondent's, holding that the only beneficiary of the deceased's estate is the 1st respondent.
 4. The 1st respondent opposed the application by a replying affidavit sworn on 7th December, 2022, where she deposed that the applicant did not live with the deceased in Karen nor his holiday home in Diani; that the deceased did not have any children with the applicant, neither did he adopt the applicant's children; that she is the sole beneficiary of the deceased's estate in accordance with the deceased Will drawn by the firm of Archer & Wilcox and who were appointed as the executors of the Will until she turned 25 years; that there is no danger that the estate would go to waste; that she has since obtained a grant which was confirmed on 14th November 2022; that the applicant in collusion with one of the caretakers, Celestine Wasua, obtained keys for a night stay and the caretaker disappeared to her rural home after informing another servant, Josphat Mbuvi that the applicant had moved into the house and refused to vacate; and that should the stay be granted, the applicant should give an undertaking on damages and provide security for rent from 24th June 2021.
 5. The 2nd respondent filed a replying affidavit sworn on 13th December 2022. He deposed that the deceased last Will is the one dated 13th January 2013, in which he is named as the sole beneficiary of the estate; that he was shocked upon the delivery of the ruling on 25th September 2022 as the judge did not determine his application for substitution but proceeded to determine the entire dispute including declaring the Will of 13th January 2013 invalid and declaring the 1st respondent as the sole beneficiary; that he was not given a chance to present any evidence or cross-examine the other witnesses; that the matter was determined without affording parties a fair trial; that he has filed a notice of appeal and



associates himself with the applicant and the objector in so far as they seek a stay of the said ruling and orders arising therefrom.

6. The objector also filed a replying affidavit sworn on 8th December 2022, wherein she deposed that when the parties appeared before the judge, the only pending issue before the court was who would administer the estate pending hearing and determination of the pending summons; that the applicant's submissions before the superior court sought for dismissal of the applications and for her to be appointed as the sole administrator as she would ensure the estate is not wasted and would be in a position to defend all adverse claims against the estate; that the objector did not file submissions having been content with the position that the administrator is essential to enable the court adjudicate on the numerous issues; that the judge was in error when he went into the merits of the pending motions contrary to earlier directions given by the court on the mode of proceeding; that she has filed a notice of appeal and that the factual evidence set out in her statements can only be given efficacy if subjected to cross-examination of the witnesses.
7. At the hearing of the application learned counsel for the applicant highlighted written submissions dated 9th December 2022, contending that the applicant has an arguable appeal as demonstrated in the memorandum of appeal and that the intended appeal, if successful will be rendered nugatory as the applicant is at risk of being evicted from her matrimonial home, despite being the lawful wife of the deceased and that the estate is at risk of exposure; and continues to waste away since the 1st respondent has never stepped foot in Kenya.
8. The 1st respondent's learned counsel highlighted submissions dated 20th December 2022 and stated that it is not clear why the applicant did not seek stay of the execution in the High Court; that there is no substantial loss that will result if the stay orders are not issued, given that the applicant was found not to be a wife of the deceased; and since she is not in occupation of the house which she claims to be her matrimonial home issuing a stay of execution will affect all other activities of the estate that may result in substantial loss to her; that the applicant should provide sufficient security as granting stay will leave the estate without a substantial executor or administrator; that though security may not be a requisite in the Court of Appeal sitting in its original jurisdiction, however once a party has filed a notice of appeal, the court needs to consider the substantial loss against litigant's rights to enjoy the fruits of litigation; that this case has been pending in court from 2014 and as the beneficiary of her father's Will, she should be allowed to enjoy the estate, unless special circumstances prove otherwise, or a just cause is shown.
9. The 2nd respondent's learned counsel highlighted submissions and relied on a list of authorities both dated 14th February 2023, and contents that the appeal is arguable; that the judge erred when making a ruling on issues that had not been fully argued by the parties and proceeding to determine the entire dispute instead of confining the ruling to the application for substitution. On the nugatory aspect, learned counsel submits that parties stand to suffer irreversible loss and that may be incapable of being adequately compensated by an award of damages if a stay is not granted; that it is probable if the property is not preserved it may change hands before the appeal is heard and determined in which case the appeal will be rendered nugatory; that if the 1st respondent is allowed to proceed with enforcement of the decree seeking redress in court will prove futile and the parties will be prejudiced and the appeal and cross-appeal will be rendered nugatory.
10. The objector's learned counsel highlighted submissions dated 21st December 2022 and relied on a list of authorities of even date, supporting the application and submitted that the application for stay is merited; that the appeal is arguable and will be rendered nugatory if the application is allowed; that the judge erred in making a ruling on issues that had not been argued by the parties before the court and determining key issues touching on the whole suit before parties were heard; that the parties limited



their scope to the issue of who was to administer the estate, pending the hearing and determination of the summons filed earlier on. Learned counsel relied on the case of *Airland Tours & Travel Limited vs. National Industrial Credit Bank*, HCCC No. 1234 of 2002 where it was held that in an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not based on contradictory affidavit evidence or disputed propositions of law.

11. To appreciate the application before us, we find it necessary to give a summary of the facts that were before the trial court leading to the ruling which is the subject of the appeal pending hearing. The matter revolves around the estate of Peter Ruhle (deceased), who died on the 12th of June, 2013. Four individuals laid claim to his estate; the deceased only daughter Paula Maria Ruhle, who is said to be based in Germany, Lucy Mumbi Mwangi and Josephine Wambui Kamau who both claim to have been married to the deceased under Kikuyu Customary Law and Christopher Handschuh.
12. The intended appeal and by extension this application arises from the court's determination of the four applications filed by each of the parties named above, dated 11th February 2016, 9th August 2021, 25th August 2021, and 21st September 2021.

The application dated 9th August 2021 was by the 1st respondent, who claimed her interest based on a written Will dated 21st August 2012, wherein the deceased appointed Philip John Ransley and Virginia Wangui Shaw as the 1st and 2nd executors, and bequeathed all his properties to the 1st applicant, upon attaining the age of 25 years. Based on the said Will, the executors got a grant issued to them on 3rd November 2014 but later renounced their executorship. The executors' action is what precipitated the application by the 1st respondent where she sought to be substituted as the executor of the Will.
13. The application dated 25th August 2021 was filed by the 2nd respondent on the basis that the deceased left a subsequent Will dated 13th January 2013, wherein the deceased bequeathed all his properties to him, having revoked all previous Wills. The said Will had no executor and as a residuary legatee of the deceased's last Will he sought to be appointed as the administrator of the estate.
14. The application dated 11th February 2016 was by Josephine Wambui Kamau (the objector) who questioned the validity of the Will dated 21st August 2013 on the basis that it was not executed and sought nullification of the same. She also sought for the revocation of the grant issued to the executors, claiming that she was married to the deceased under Kikuyu Customary Laws and that her daughter from a previous marriage, had been taken in by the deceased who took up the responsibilities of a father.
15. Last, was the application dated 21st August 2021 by the applicant herein seeking revocation of the grant that had been issued to the executors on grounds that she was married to the deceased under Kikuyu Customary Laws and that the deceased had adopted her two minor children, whom they stayed with until his death when she chased her away.
16. In his ruling dated 28th July 2022, Muchelule, J (as he then was), indicated that counsel for the parties had on the 24th of January 2022 agreed to have all four applications heard together by way of affidavits, written statements, and respective submissions, which position is alluded to by the 1st respondent's counsel.
17. In summary the judge in his ruling made the following findings;
 - i. The deceased did not make the Will dated 13th January 2013. The only valid Will was the one dated 21st August 2012.



- ii. Concerning Josephine Wambui Kamau, no Kikuyu ceremonies of Ngurario and dowry negotiations were undertaken. The said ingredients were necessary for a Kikuyu customary marriage and without them, there was no marriage.
 - iii. As for the applicant Lucy Mumbi Mwangi the said Kikuyu marriage ceremonies were not performed.
 - iv. As regards the 1st respondent, she was the only child of the deceased and the only beneficiary of the deceased Will dated 21st August 2021, which Will was valid.
 - v. The application for the 1st respondent dated 11th February 2016 was allowed.
18. To succeed in an application under rule 5 (2)(b) of the *Court of Appeal Rules*, an applicant has to satisfy twin principles that are enumerated in several decisions of this Court namely:
- i. An applicant must demonstrate that he has an arguable appeal; and
 - ii. That the intended appeal (or appeal if already filed) will be rendered nugatory if the execution of the decree, order, or proceedings are not stayed.
19. On the first limb of the twin principle, this Court held in *David Morton Silverstein vs. Atsango Chesoni* [2002] eKLR that for an order of stay to be issued, the applicant must first demonstrate that the appeal or intended appeal is arguable, it is not frivolous and that the appeal or intended appeal, would absent stay be rendered nugatory.
20. Regarding the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay of the orders sought, this Court in *Yellow Horse Inns Ltd vs. A. A Kawir Transporters & 4 Others* [2014] eKLR, observed that an applicant need not show multiple arguable points, as one would suffice. Neither is the applicant required to show that the arguable point would succeed, as this Court held in Kenya *Commercial Bank Limited vs. Nicholas Ombija* [2009] eKLR.
21. On the arguability of the appeal, the applicant in her draft memorandum of appeal raises 19 grounds. We need not recite the grounds in full, but take the liberty to summarize them as follows: that the learned judge failed to consider all the evidence that was presented in the applications dated 21st September 2021; misapprehending the meaning and legal position of a wife; by not finding that the applicant was married to the deceased; by finding that the only beneficiary of the estate of the deceased was the 1st respondent and by failing to consider relevant authorities.
22. It is not for this Court as constituted to determine the merits or otherwise of the grounds raised, the issue is determinable by the bench that will eventually hear the matter. In addition, we find that the grounds may need to be ventilated at a full hearing of the matter.
23. Turning to the second limb as to whether the appeal would be rendered nugatory if stay orders are not granted, this Court in the much-quoted case of *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR stated that:
- ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile, or invalid. It also means trifling.
 - x. 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; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”



Further, this Court in the case of *Permanent Secretary Ministry of Roads & Another vs. Fleur Investment Limited* [2014] eKLR referred to the holding in the case of *Reliance Bank Limited vs. Norlake Investment Ltd* [2002] E. A where the court stated:

“..... 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.”

The court went further to state 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.”

24. The applicant in her affidavit deposed that she was evicted from the property she allegedly lived in with the deceased person; she claims further that there is a likelihood of wastage of the estate in the event of execution of the ruling; and further that the 1st respondent is not a resident of this country. As earlier stated the case revolves around the estate of a deceased person and considering all factors, we find that there is need to preserve the estate pending hearing and determination of the appeal.
25. The applicant having demonstrated the twin principles, we grant the application for stay under rule 5 (2) (b) of this *Court’s Rules*.

Costs of the application will abide by the outcome of the appeal.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL ALI-ARONI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

