



**In re Estate of Paul Njane Njengi alias Paul Gitau Njengi (Deceased) (Civil Appeal (Application) E189 of 2023) [2024] KECA 1439 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1439 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NAKURU**  
**CIVIL APPEAL (APPLICATION) E189 OF 2023**  
**FA OCHIENG, JM MATIVO & WK KORIR, JJA**  
**OCTOBER 11, 2024**  
**IN THE MATTER OF THE ESTATE OF PAUL NJANE**  
**NJENGI ALIAS PAUL GITAU NJENGI (DECEASED)**

**BETWEEN**

JANE WANGARI NJANE ..... 1<sup>ST</sup> APPLICANT  
PETER NJUGUNA NJANE ..... 2<sup>ND</sup> APPLICANT  
ANN WANJIKU NJANE ..... 3<sup>RD</sup> APPLICANT  
SAMSON KARIUKI NJANE ..... 4<sup>TH</sup> APPLICANT  
ELIZABETH NJERI NJANE (SUIING THROUGH THE HUSBAND &  
GUARDIAN AD LITEM STEPHEN WACHIRA MWANGI) ..... 5<sup>TH</sup> APPLICANT  
JOYCE WAMBUI NJANE ..... 6<sup>TH</sup> APPLICANT

**AND**

SAMUEL NJENGI NJANE ..... 1<sup>ST</sup> RESPONDENT  
MARY NAYIKO NJANE ..... 2<sup>ND</sup> RESPONDENT  
JAMES NJENGI NJANE ..... 3<sup>RD</sup> RESPONDENT

*(Being an application seeking stay of further proceedings and/or distribution of the deceased's estate in Nakuru High Court (Mohochi, J.) dated 19th September, 2023 in Succession Cause No. 349 of 2001)*

**RULING**

1. Before us is an application dated 14<sup>th</sup> December, 2023 brought by Samson Kariuki Njane (the 4<sup>th</sup> applicant) under Section 3A and 3B of the [Appellate Jurisdiction Act](#), Rules 1 (2), 5 (2) (b) & 31 of the



*Court of Appeal Rules, 2022*. In the main, the applicants pray for stay of further proceedings in Nakuru High Court Succession Cause Number 349 of 2001 and/or distribution of the estate of Paul Njane Njengi-deceased pending the hearing and determination of their intended appeal.

2. The motion is supported by grounds on its body and the 4<sup>th</sup> applicant's supporting affidavit sworn on 11<sup>th</sup> December, 2023 together with annexures thereto. It has been opposed by the 1<sup>st</sup> respondent vide replying affidavit sworn on 29<sup>th</sup> January, 2024 together with annexures thereto. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not file any responses to the application nor did they participate in the proceedings before us.
3. The application was canvassed by way of rival pleadings, written submissions and legal authorities relied upon by advocates for the respective parties in support of their respective positions. The applicants' submissions are dated 8<sup>th</sup> January, 2024 while the 1<sup>st</sup> respondent's submissions are dated 30<sup>th</sup> January, 2024. When the application came up for hearing before us on 16<sup>th</sup> April, 2024 learned counsel Mr. Kinyanjui appeared for the applicants while Ms. Njoroge learned counsel appeared for the 1<sup>st</sup> respondent. Both parties relied on their respective written submissions which they briefly highlighted.
4. A brief history of the litigation before the High Court is necessary in order to put the issues urged before us into a proper context. By an application dated 29<sup>th</sup> November, 2021 the applicants applied for revocation of the Grant and Certificate of Confirmation of Grant issued to Martha Wairimu Njane and Mary Nyakio Njane on 25<sup>th</sup> January, 2021 in respect of the estate of the late Paul Gitau Njengi alias Paul Njane Njengi and an order that the determination of the question of the distribution of the estate proceeds to full hearing and it be determined on the basis of each individual as a unit as per the *Law of Succession Act*.
5. It was the applicants' case that they were never involved in the conversation leading to the distribution, and that not all properties of the deceased were included, that the adopted consent dated 25<sup>th</sup> January, 2021 is distinguishable from their signed consent dated 9<sup>th</sup> June, 2016 which according to them had an equality clause. That their initial consent was for issue of grant and not its confirmation, that the distribution formula should be 50:50 and that should the grant be revoked a fresh Probate and Administration process should commence.
6. The respondents opposed the application vide the replying affidavit of Martha Wairimu sworn on 21<sup>st</sup> March, 2022. It is their case that vide a consent dated 28<sup>th</sup> February, 2020, there was an agreement that the 1<sup>st</sup> house was to get 30% and the 2<sup>nd</sup> house 68%. The consent was adopted in court on 25<sup>th</sup> January, 2021 therefore, the revocation of grant was an afterthought.
7. On 19<sup>th</sup> September, 2023 Mohochi, J, found no merit in the applicants' application dated 29<sup>th</sup> November, 2021 and dismissed it on grounds that fraud was not established as a basis for revocation of the grant and that the court on 17<sup>th</sup> March, 2021 adopted the consent and Mary Nyakio Njane is obligated to ensure compliance of all court directives and orders, and her attempt to re-negate on her own consent is regrettable.
8. Aggrieved by the above orders, the applicants are before this Court pursuant to Rule 5(2) (b) of the *Court of Appeal Rules, 2022*. The ground in support of their application for stay of further proceedings and/distribution of the estate are as follows: On arguability, that their intended appeal raises serious arguable issues and has a high chance of success as evidenced by their five grounds raised in the memorandum of appeal dated 23<sup>rd</sup> October, 2023. The gravamen of their grounds are that: the proposed distribution is unfair because the learned judge failed to consider the number of units in each house; the applicants did not consent to the mode of distribution and they were not present during the confirmation of the grant.



9. On the nugatory aspect, the applicant averred that the respondents are threatening to distribute the estate to the detriment of the applicants and unless the stay of further proceedings and the intended distribution of the deceased estate in Nakuru Succession Cause No. 349 of 2001 are granted, the present application and the intended appeal shall be rendered nugatory as the estate will have been distributed to the detriment of the estates' beneficiaries. Mr. Kinyanjui cited this Court's decision in *Alice Wamaitba & Another vs. Faith Nyambura & Another* [2020] eKLR in support of the proposition that distribution of the assets would render the appeal nugatory should the appeal succeed.
10. In opposition to the application, the 1<sup>st</sup> respondent averred the applicant's appeal is not arguable since the instant appeal is a strategy to ensure the estate is not valued and to enable distribution as per the consent recorded on 28<sup>th</sup> February, 2020 and which the applicants mother seems to have second thoughts, yet the grant could only be annulled if there was fraud, misrepresentation or concealment of material facts but the 2<sup>nd</sup> administrator who is the applicant's mother and who represented her house together with her son James Njengi signed the consent.
11. It is the 1<sup>st</sup> respondent's case that the applicants have not demonstrated exceptional circumstances to warrant grant of stay of proceedings in a case that has been pending in court for over 23 years and which only awaits a valuation report to distribute the estate as per the parties' consent. To buttress her submission Ms. Njoroge cited *David Morton Silverstein vs. Atsango Chesoni* [2002] eKLR in support of the holding that each case must depend on its own facts and the facts of this particular case do not show that the appeal will be rendered nugatory if stay is not granted.
12. We have given due consideration to the application, the affidavits in support of and that in opposition thereto, as well as the rival submissions filed and made before us and the authorities cited. The principles that apply in applications under Rule 5 (2) (b) of this *Court's Rules* for stay of execution or of further proceedings, or for injunctive relief pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings in the impugned judgment, decree or order were not stayed.
13. These principles were enunciated in, among others, the following judicial pronouncements of this Court, including those cited by the parties. On the first limb of this twin principle, this Court held in *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC* [2020] eKLR that, for stay orders to issue in similar cases, the applicants must first demonstrate that the appeal or intended appeal is arguable i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory (see also *Kenya Tea Growers Association and Another v Kenya Planters Agricultural Workers Union* [2012] eKLR; and *Abmed Musa Ismail v Kumba Ole Ntamorua and 4 Others* [2014] eKLR).
14. We have carefully examined the impugned ruling. We are alive to the fact that at this stage, we are not required to make definitive findings of fact or law. At the centre of the dispute between the parties is a consent order recorded in court settling the mode of distribution of the estate which has never been set aside or reviewed. The learned judge in the impugned ruling observed as follows:
  - “ 12. An attempt at re-opening and reviewing this consent was dismissed by this Court on 17th March 2023.
  13. The application for revocation of the grant is a “red herring” by the 2nd house and Mary Nyakio Njane to review the consent or set it aside all together.



14. The court finds that no fraud has been demonstrated as a basis of revocation of the grant.
15. It is trite law that consent orders should rarely be disturbed and if so, then it should be on extremely narrow parameters.”
15. From the above excerpt, it is manifestly clear that the said consent still stands. It is also clear the applicants opted to apply for the revocation of the grant and overlooked the fact that the parties had recorded a consent which had been adopted as an order of the court. The foregoing being the position, the applicants’ intended appeal cannot be said to pass the first pre-requisite, which is to demonstrate the existence of an arguable appeal so long as the said consent remains in force effectively determining the mode of distribution of the estate. An order of stay if granted, would be tantamount to overturning the said consent through the back door. We decline the invitation to do so. Accordingly, we need not address ourselves to the second limb of the twin principle for grant of orders under Rule 5(2) (b) of this [Court’s Rules](#). Accordingly, we find nothing to warrant stay of proceedings in the trial court pending the intended appeal.
16. Finally, it would be remiss of us not to pronounce ourselves on this Court’s discretionary power to stay proceedings in the Superior Court pending appeal. We bear in mind the fact that this discretionary power is exercisable by the court upon consideration of the facts and circumstances of each case. As was stated by this Court in [David Morton Silverstein v Atsango Chesoni](#) [2002] eKLR:

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court’s own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts...”
17. In the [Halsbury’s Laws of England](#), 4<sup>th</sup> Edition. Vol. 37, at p.330 and p.332, it is stated:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.

.....

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

.....

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”.



18. Similarly, in *Marriot Africa International Ltd v Margaret Nyakinyua Marigu & 4 Others*, CA No. Nai. E152 of 2022, this Court stated as follows:

“Whilst this Court has unfettered jurisdiction to issue an order of stay of proceedings, it must be satisfied that there are genuine and compelling grounds to justify such an order, whose effect may be to undermine one of the fundamental constitutional principles, namely that justice shall not be delayed.”

19. In view of the foregoing, we find that the applicants have failed to satisfy the twin principle for grant of the orders sought pursuant to Rule 5 (2) (b) of this *Court's Rules*. Accordingly, the notice of motion dated 14<sup>th</sup> December, 2023 fails and is hereby dismissed with costs to the respondents. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.**

**F. OCHIENG**

**JUDGE OF APPEAL**

.....

**J. MATIVO**

**JUDGE OF APPEAL**

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**W. KORIR**

**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR.**

