



**Mugo v Mugo & another (Civil Application E062 of 2024)
[2024] KECA 1904 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1904 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E062 OF 2024
K M'INOTI, M NGUGI & LA ACHODE, JJA
OCTOBER 11, 2024**

BETWEEN

MARION WANIRU MUGO APPLICANT

AND

LEAH NYAMBURA MUGO 1ST RESPONDENT

GEORGE WAMBURA MUGO 2ND RESPONDENT

(Being an application for stay of execution of the ruling and order of the High Court (Family Division) at Nairobi (Chemitei, J) delivered on 25th January 2024) in HC Succession Cause No. 3442 of 2003)

RULING

1. Marion Wanjiru Mugo, the applicant, filed an application dated 14th February 2024 under rule 5(2)(b) of this [Court's Rules](#) seeking substantive orders that:
 - i. This Court be pleased to stay the execution of the ruling dated 25th January 2024 and orders to be extracted therefrom pending the hearing and determination of this application and appeal.
 - ii. This Court be pleased to restrain the respondents, their agents and/or their servants from disposing, transferring and otherwise dealing with all assets forming part of the estate of the late David Mari Mugo (the deceased) pending the hearing and determination of this application and appeal, save for any actions towards maintaining the estate and collection of any rent from any part of the estate.
2. The application was premised on the grounds on its face and the affidavit of even date sworn by the applicant. The grounds are that on the 25th January 2024, the superior court ordered the applicant to return all the documents in her custody in respect of the estate of the deceased to the respondents. The applicant filed a notice of appeal dated 7th February 2024 in this Court against the said ruling.



3. The applicant then received a demand notice dated 2nd February 2024 from the respondents' counsel, demanding the release of the documents within seven days from the date of the demand. She avers that she is apprehensive that if the ruling and order are not stayed, she will not get a fair share of the deceased's estate from the distribution by the respondents. She deposes that she has an arguable appeal and as such, the execution of the ruling and any subsequent disposition of the assets of the estate will render the appeal a meaningless endeavour.
4. The backdrop of this application is that the applicant filed an application dated 28th October 2022 in the superior court seeking interim orders to stop the respondents from selling David Mugo Marai's (the deceased) property without the consent of the court, or the beneficiaries of the estate, and for the respondents to be removed as the administrators and be replaced by the applicant and one Tom Richard Marai Mugo. The application was opposed vide a joint affidavit of the respondents sworn on 14th July 2023. Upon considering the matter before him, the learned Judge dismissed the application for lack of merit and ordered the applicant to surrender any legal document she was holding on behalf of the estate.
5. In opposition to the present application, the respondents swore a joint replying affidavit on 26th February 2024. They deposed that the applicant has not disclosed to this Court that she is not an administrator of the deceased's estate and that she stole some documents belonging to the estate with the intention of bulldozing herself into administering it, despite the fact that none of the other beneficiaries want her to administer the estate.
6. It was further deposed that the succession in the matter of the estate of the deceased has already been concluded and that the Certificate of Confirmation of Grant legally guides the administrators. The mode of distribution was consented to by all the beneficiaries, including the applicant. As such, it is not possible for the applicant to suffer loss if the respondents collect the documents from her and conclude the administration of the estate since she will get her share as per the confirmed grant.
7. Consequently, the respondents aver that the applicant has failed to demonstrate that she has an arguable appeal and that she would suffer irreparable loss if the orders sought are not granted.
8. In response to the reply, the applicant swore and filed a further affidavit date 28th February 2024. She avers that she does not deny that she is not an administrator of the estate. Further, that she did not steal the title documents as they were given to her by her siblings for safe keeping.
9. The applicant avers that since the beginning of the administration of the estate, she has always surrendered any documents required by the respondents for the administration of the estate. The administrators, however, withheld vital information and documentary evidence pertaining to the proceeds and sale of the Gatatha shares from the beneficiaries. They thereby raised serious doubt as to the equity of distribution of the sale proceeds of the remainder of the estate, as required under the confirmed grant. She reiterates that the application has satisfied both the arguable and nugatory aspects under rule 5(2) (b) of this *Court's rules*.
10. The firm of FMC Advocates LLP filed written submissions dated 1st March 2024 on behalf of the applicant, while the firm of Muthii W.M & Associates filed submissions dated 6th March 2024 for the respondents.
11. The applicant submits that the respondents sold the shares in Gatatha Farmers Cooperative Limited, but withheld information, such as the agreement between the personal representatives and the buyer, the identity of the buyer, and the actual sale price. That such non-disclosure connotes bad faith in the administration of the estate. It is her submissions that in the superior court, nearly all the information



- concerning the administration of the estate was not disclosed to her. She had to file an objection for the respondents to disclose vital information.
12. She argues that she has satisfied the two principles required under rule 5 (2) (b) as set out in this Court's decision in *Stanley Kangethe Kinyanjui v Tony Peter and 5 others* [2013] eKLR.
 13. In opposition, the respondents submit that an appeal in succession matters is not as of right and the applicant has not sought leave in the superior court to file this appeal. Also, that the timelines for seeking leave have already passed. Hence, if this Court does allow the application for stay, it will be pending an intended appeal that is likely not to come to fruition.
 14. It is contended that the applicant has not demonstrated how she will suffer loss if the administrators complete the administration of the estate, as she is not contesting the mode of distribution. That the administrators are only restricted to distribute the assets in accordance with the certificate of confirmation of grant. The respondents urge that if this Court is inclined to allow the application, then the applicant should be ordered to deposit security for costs, given that she continues to hold the estate at ransom without justification.
 15. We have considered the application, the affidavits in support and in reply and the rival submissions on record. Our jurisdiction as found in rule 5(2) (b) prescribes two requirements that must be satisfied for the instant application to succeed. The applicant must satisfy the Court first, that the intended appeal is arguable, or that it is not frivolous and second, that unless the relief sought is granted, the appeal will be rendered nugatory if it succeeds.
 16. These requirements were discussed in *Trust Bank Limited & Another v Investech Bank Ltd and 3 Others* [2000] KECA 11 (KLR) thus:

The jurisdiction of the Court under rule 5(2) (b) aforestated, is original and discretionary, and it is trite law that to succeed an applicant has to show firstly, that his appeal or intended appeal is arguable, or put another way, it is not frivolous; and secondly, that unless he is granted a stay the appeal or intended appeal, if successful, will be rendered nugatory. Those are the guiding principles but these principles must be considered against the facts and circumstances of each case, which we now propose to set out as gleaned from the pleadings, the affidavit evidence in support of the High Court application for summary judgment, the oral evidence which was given in the course of the proceedings of that application, and the affidavit evidence in support of both the applications before you."
 17. 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 a multiplicity of arguable points. One arguable ground will suffice.
 18. On the first limb in this application, we have considered the memorandum of appeal. We are cognizant that an arguable appeal is not necessarily one that must succeed. The ground therein, that the learned Judge erred in failing to consider non- disclosure of all information pertaining to the sale of the shares that form part of the assets to be distributed to the beneficiaries, is not frivolous. It is worth being given a chance to be ventilated. That, together with the question as to whether the intended appeal is likely not to come to fruition, leave to appeal having not been sought, are best left for consideration in the intended appeal.



19. On the second limb, the nugatory aspect, this Court in the case of *Kenya Industrial Estate & Another v Matilda Tenge Machia*, Civil Application No.211 of 2020 stated:

“On the nugatory aspect, 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.”

20. We have examined the record and we are not satisfied that if the orders sought are not granted the appeal will be rendered nugatory. The applicant has not demonstrated to this Court how she will suffer loss if the administrators complete the administration of the estate, since the mode of distribution is not contested. She has not demonstrated any prejudice she stands to suffer, or any evidence of intermeddling on the part of the respondents at this point.

21. It is not evident that if she releases the documents in her possession, the respondents will not comply with the mode of distribution which she, too, agreed to in the certificate of confirmation grant. We therefore, find that the applicant has not satisfied the second limb under rule 5(2) (b) of this *Court's rules*.

It is our view that the subject matter herein will not be rendered nugatory absent stay.

22. Lastly, as regards security for costs, rule (5)(2)(b) does not make an undertaking as to costs a pre-condition for grant of the reliefs stipulated therein. The Court is empowered to grant any of the reliefs on such terms as it deems just. In short, a party cannot be denied a remedy under rule 5(2) (b) for reasons that they have failed to give security for costs.

23. Ultimately, the applicant having failed to satisfy both limbs, the application dated 14th February 2024 fails and is therefore, dismissed.

Costs to abide the outcome of the appeal.

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

K. M'INOTI

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JUDGE OF APPEAL

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MUMBI NGUGI

JUDGE OF APPEAL

K. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

