



**Gutuba v Wambugu & 3 others (Civil Appeal (Application)
E781 of 2022) [2024] KECA 1776 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1776 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E781 OF 2022
S OLE KANTAI, JM MATIVO & GWN MACHARIA, JJA
DECEMBER 6, 2024**

BETWEEN

MARY WAKARI GUTUBA APPLICANT

AND

WINGRACE WANJIKU WAMBUGU 1ST RESPONDENT

SUSAN WANJIRU KINYANJUI 2ND RESPONDENT

ESTHER WANGARI KARABA 3RD RESPONDENT

CAROLINE WANGARI MWAURA 4TH RESPONDENT

*(An application for injunction pending appeal from the Judgement
and decree of the High Court of Kenya at Nairobi (S. N. Mutuku, J.)
dated 27th September, 2021 in Succession Cause No. 2574 of 2015)*

RULING

1. Before us is a notice of motion dated 9th February, 2024 brought under Section 3A and 3B of the [Appellate Jurisdiction Act](#) and Rule 5 (2) (b) of this [Court's Rules](#) in which the applicant prays for a temporary injunction to restrain the respondents from implementing the decision to distribute the estate of David Mwaura Karaba-deceased as proposed in the judgment issued on 27th September, 2021 in HC Succession Cause No 2574 of 2015, in the matter of the Estate of David Mwaura Karaba-deceased pending the hearing and determination of the applicant's intended appeal.
2. The application is founded on the grounds listed therein and in the supporting affidavit of Mary Waraki Gituba (the applicant) sworn on 9th February, 2024 together with the annexures thereto. In opposition to the application, the 1st respondent (Wingrace Wanjiku Wambugu) filed a replying affidavit dated 23rd February, 2024 together with the annexures thereto, the 2nd respondent (Susan Wanjiru Kinyanjui)



filed a replying affidavit dated 28th February, 2024 and the 4th respondent (Caroline Wangari Mwaura) filed a replying affidavit dated 23rd February, 2024.

3. The application was canvassed through rival pleadings, written submissions and legal authorities presented by the parties' respective advocates in support of their respective positions. On 29th April, 2024 during the hearing of the application, the parties orally highlighted their written submissions.
4. The facts which gave rise to this application are straight forward and essentially common ground or uncontroverted. David Mwaura Karaba (deceased) died intestate on 11th September, 2015. Letters of Administration dated 3rd October, 2016 were issued in the name of his three widows and the deceased's mother. Two consent orders were entered into by the parties. One is the consent dated 1st March, 2016 whose terms were that Susan Wanjiru Kinyanjui, Mary Wakari Gutuba, Wangeci Wanjiku Wambugu and Esther Wangari Karaba were named as administrators of the estate of the deceased. As per the consent, they were directed to open a joint account at KCB Thika Branch where rent income from Thika Municipality Block 1/1774, 1/1775 and 1/919 was to be deposited and each of the three widows was to receive a monthly payment of Kshs 100,000.00 while the mother was to receive Kshs 50,000.00 per month for medical upkeep. Subsequently, the dispute was referred to mediation pursuant to which on 22nd March, 2018 a mediation settlement agreement was filed in the Superior Court. The settlement agreement altered the consent order dated 1st March, 2016 by overturning the recognition of the 1st and 2nd respondents as widows of the deceased.
5. After considering the mode of distribution of the estate, by a judgment dated on 27th September, 2021 the trial court found that it was not able to finalize distribution of the estate. Consequently, the learned judge invoked the provisions of Section 71 (2) (d) of the *Law of Succession Act* which permits postponement of confirmation of grant for such period or periods pending issue of further citations or otherwise, as may be necessary in the circumstances of the case. Accordingly, the learned judge issued the following orders:
 - a. That confirmation of the grant issued on 3rd October 2016 is hereby postponed for a further 60 days.
 - b. That the administratrices shall during the intervening period cause a valuation of the entire estate and file the report in court before the expiry of 60 days.
 - c. That the administratrices are granted leave to file further affidavit attaching documents of ownership of all the assets of the estate of the deceased and bank documents to show the amount of money in the joint bank account.
 - d. That the final orders on the four applications (summons) for confirmation shall be made upon compliance with the above orders.
 - e. That this matter shall be mentioned after 60 days before the presiding judge of the Division or any other judge.
6. Aggrieved by the above decision, the applicant wishes to appeal to this Court against the whole judgment. In support of the application, the applicant's learned counsel Mr. Mungai maintained that as evidenced by the memorandum of appeal, the appeal is not frivolous, therefore, it deserves interrogation by this Court. Counsel faulted the superior court for pronouncing that the respondents were entitled to share the property of the deceased's estate in the ratio 3:2:2:1 without determining the application for confirmation of grant or hearing the parties' evidence.



7. On the question whether the intended appeal would be rendered nugatory unless the orders sought are granted, the applicant maintains that the respondents have commenced a unilateral valuation of property which is an intrusion into the management of the deceased's estate and by the time the appeal is heard, the title and ownership of the properties may have been interfered with under the guise of implementing the Superior Court's judgment.
8. In opposition to the application, the 1st respondent submitted that the applicant agreed by consent to file documents, she participated in the proceedings at all stages until judgment was delivered by the Superior Court and it is the affidavit evidence, submissions by the parties and the consent orders adopted on different dates which guided the Superior Court in arriving at its judgment delivered on 27th September, 2021. Therefore, it cannot be argued that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved as was held in *Baker v Canada (Minister of Citizenship and Immigration)*, [1992] 2 SCR 817.
9. Regarding the nugatory aspect, the 1st respondent's counsel maintained that the valuation orders were issued on 27th September, 2021 which is about 3½ years back but to date distribution has not been done and hence the beneficiaries cannot enjoy the fruits of their inheritance. Further, the applicant's acts and non-cooperation has occasioned delays in settling valuation fees because the payment must be released from the estate accounts, therefore the applicant has stalled the matter. Furthermore, the proceedings before the superior court are still ongoing and thus the allegations that properties will be disposed of rendering the appeal nugatory is speculative and lacks basis.
10. Our invitation to intervene on behalf of the applicants has been invoked under Rule 5 (2) (b) of the *Court of Appeal Rules, 2022*. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5 (2) (b) of this Court's Rules are settled. (See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR). An applicant seeking relief premised on the above Rule is required to demonstrate that the appeal or the intended appeal is arguable and second, that the appeal will be rendered nugatory should it ultimately succeed after the substratum of the appeal is no more or out of reach of the successful appellant.
11. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicants to warrant ventilation before this Court on appeal. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. In considering an application brought under Rule 5 (2) (b) we must not make definitive or final findings of either fact or law because doing so may embarrass the ultimate hearing of the main appeal. (See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others (supra)*).
12. An arguable appeal is not one that must succeed and an applicant need not proffer a multiplicity of arguable points. One ground is sufficient. For a point to be arguable it needs merely to raise a bona fide point of law or fact sufficient to call for an answer from the respondent and is worthy of the Court's consideration.
13. We have carefully considered the grounds set out in the motion and in the applicant's memorandum of appeal dated 10th November, 2022. Whether or not the case ought to have proceeded by way of oral evidence as opposed to affidavit evidence is an arguable ground. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the applicant has met the first pre-requisite.
14. Turning to the second prerequisite, whether the appeal, if successful, would be rendered nugatory in the event we decline to grant the orders sought and the intended appeal succeeds, we bear in mind that



the term nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid, it also means trifling. 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. (See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* (*supra*)).

15. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits. It is the applicant's case that the respondents are in a haste to realize the valuation of the properties of the estate and nothing stops them from disposing them or using them or developing them in a way that may change the character of the property. In defence, the 1st respondent maintained that since the issuance of the Judgment on 27th September, 2021, 3½ years have lapsed but to date distribution has not been done and that proceedings before the Superior Court are still ongoing and thus the allegation that the properties will be disposed of rendering the appeal nugatory is speculative.
16. In the case of *Reliance Bank Ltd v Norlake Investments Ltd* [2002] I EA 227, the court held that the factors which can render an appeal nugatory are to be considered within the circumstances of each particular case, and in doing so, the Court is bound to consider the conflicting claims of both sides. In the circumstances of that particular case, the Court stated inter alia:

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”
17. In the application before us, the applicant has not demonstrated to our satisfaction the hardship she is likely to suffer should a stay of execution order not be granted bearing in mind she is one of the administratrices of the estate of the deceased. Further, the dispute is still pending before the trial Court. We find that no prejudice will be occasioned to the applicant.
18. Accordingly, as the applicant has not satisfied us on the second limb under Rule 5 (2) (b), we find that her application is without merit, and it is hereby dismissed. This being a family matter, there shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

S. ole KANTAI

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JUDGE OF APPEAL

J. MATIVO

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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.

