



**Kaguara & another v Uiru & 5 others (Civil Application E545 of 2022) [2023] KECA 193 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 193 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E545 OF 2022  
DK MUSINGA, F SICHALE & PM GACHOKA, JJA  
FEBRUARY 17, 2023**

**BETWEEN**

**NANCY WAIHERA KAGUARA ..... 1<sup>ST</sup> APPLICANT**

**SIMON MUNGAI UIRU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ALICE NYAKIO UIRU ..... 1<sup>ST</sup> RESPONDENT**

**RACHAEL MOI UIRU ..... 2<sup>ND</sup> RESPONDENT**

**WINNIE WAIRIMU UIRU ..... 3<sup>RD</sup> RESPONDENT**

**LUCY WANJIKU UIRU ..... 4<sup>TH</sup> RESPONDENT**

**ESTATE OF JANET WANJIRU UIRU ALIAS JANE WANJIRU  
KAGONYA ..... 5<sup>TH</sup> RESPONDENT**

**ESTATE OF GRACE WANJUHI MBUGUA ..... 6<sup>TH</sup> RESPONDENT**

*(Being an Application for Stay of execution from the Judgment and Decree of the High Court of Kenya in Kiambu (Mary Kasango, J.) delivered on 6th July 2022 in Succession Case No. 7 of 2018)*

**RULING**

1. Before us is a Notice of Motion dated 20<sup>th</sup> August 2022 expressed to be brought under rule 5(2) (b) of the Court of Appeal Rules, Order 42 of the Civil Procedure Code, Articles 152 (2) (d) and Article 47 of the Constitution of Kenya 2010, and seeking the following prayers:

a. ....



- b. This Honourable court do order stay of execution by restraining the Kiambu Land Surveyors visits on the subject land L.R. NO. Kiambaa/Ruaka/113 which is scheduled on 23<sup>rd</sup> August, 2022 pending the hearing of this application.
  - c. That a stay of execution be granted to restrain the Kiambu Land Surveyor from entering the subject land L.R. NO. Kiambaa/Ruaka/113 or to carry out sub-division of land process until this intended Appeal is heard and determined.
  - d. That there be stay of execution of the ruling delivered on 30<sup>th</sup> April, 2019 by Lady Justice C. Meoli and also a stay of execution of the ruling delivered on 6<sup>th</sup> July, 2022 by Justice Mary Kasango pending the hearing and determination of this intended Appeal.
2. To contextualize the application before us, and this being a succession case in which the parties have litigated for a long time, it is necessary for us to give a background of the dispute. This is a succession dispute that relates to the estate of Naftaly Uiru Kagwara alias Naftaly Iuiru Kagwara who died on 24.5.1998. It is common ground between the parties that the deceased possessed of a single asset, namely, land parcel LR NO. Kiambaa/Ruaka/113 which measured 6.9 acres.
  3. From the record before us, though only 5 beneficiaries were involved in the application for the grant of letters of administration, that was issued on 9<sup>th</sup> February, 2018, it is apparent through the multiple applications that were filed during the confirmation of grant that the deceased was survived by 8 children. The eight children are:
    - a. Peter Kagwara Uiru (deceased)
    - b. Simon Mungai Uiru
    - c. Alice Nyakio Uiru
    - d. Rachel Moi Uiru
    - e. Winnie Wairimu Uiru
    - f. Lucy Wanjiku Uiru
    - g. Janet Wanjiru Uiru alias Jane Wanjiru Kagunya – deceased
    - h. Grace Wanjohi Uiru alias Grace Wanjohi Mbugua – deceased
  4. The record shows that at the hearing of the summons for confirmation of grant, a dispute arose between the beneficiaries on the mode of distribution of the estate. The main issues in dispute were that: the deceased had prior to his death assigned 2 acres to each son, and apportioned to the daughters 3 acres to be shared equally between them; that he had identified the respective parcels which were well marked out on the ground; that the beneficiaries had developed their respective portions; and that relatives had been buried in their respective parcels of land.
  5. The trial court upon hearing the summons for the confirmation of the grant ruled as follows:
    - “ 12. As earlier observed, there is no credible evidence that the deceased settled or appointed any propriety (gifts intervivos) to any of the beneficiaries during his lifetime. In the circumstances, the court is of the considered view that all the children of the deceased are entitled to an equal share of the sole asset of his estate. The shares due to his deceased children Peter Kagwara Uiru, Janet Wanjiru Uiru alias Janet Wanjiru Kagunya and grace Wanjohi Mbugua will



go to their respective estates for distribution among the beneficiaries surviving them in accordance with the Law of Succession there being no evidence that they all predeceased their father. And secondly, because none of their representatives in this case have presented evidence of appointment as their legal representatives.

13. Thus the land parcel LR NO. Kiambaa/Ruaka/113 will be distributed as follows:
  1. Simon Mungai Uiru - 0.8625 acres
  2. Alice Nyakio Uiru - 0.8625 acres
  3. Rachel Moi Uiru - 0.8625 acres
  4. Winnie Wairimu Uiru - 0.8625 acres
  5. Lucy Wanjiku Uiru - 0.8625 acres
  6. Estate of Peter Kagwara - 0.8625 acres
  7. Estate of Janet Wanjiru Uiru alias - 0.8625 acres Jane Wanjiru Kagunya
  8. Estate of Grace Wanjuhi Mbugua - 0.8625 acres

The grant herein is confirmed in terms of the foregoing distribution therefore.

14. During her testimony, Nancy Waithera Kagwara admitted that the person named Patrick Kihui Kamau purchased a portion of the suit land through a transaction entered into with her deceased husband prior to the confirmation of the grant. The said alleged purchaser is not a child of the deceased or a beneficiary to the estate of the deceased herein therefore and any claims he might have in that regard ought to be directed against the estate of Peter Kagwara Uiru.
15. In view of the contention that has characterized this long-drawn dispute, it is reasonable to predict that the beneficiaries in this case by themselves may not agree on the manner of subdividing the suit property so that each party obtains its rightful share. In the interest of justice, and in order to bring the disputation to an end the court directs that the Kiambu District Surveyor visits the suit property in the presence of all beneficiaries and their advocates and to prepare at least three alternative proposals as to how the suit land may be subdivided in a manner that takes into account the developments thereon and that is economically viable and equitable, and as much as possible ensuring that all the beneficiaries end up holding roughly equal portions of land. The surveyors report is to be filed into court on or before 25<sup>th</sup> July, 2019 when the matter will be mentioned.
16. Regarding the contempt application filed on 26<sup>th</sup> November 2018, the court upholds the preliminary objection raised by Mr. Kimani. The application is based on the *contempt of Court Act*, an Act of Parliament declared unconstitutional on 9<sup>th</sup> November, 2018 in Constitutional Petition No. 87 of 2017 *Kenya Human Rights Commission v Attorney General and Another*



[2018] eKLR. The invocation of Article 159 (2) (d) of *the Constitution* by Miss Kibebo cannot cure the defect. The application filed on 26<sup>th</sup> November 2018 is struck out therefore. While so doing the court notes that there are many pending applications filed by the parties, some of them similar.

17. The practice of parties filing numerous applications in the same matter and for similar orders is frowned upon as it obfuscates issues while wasting precious judicial time. Now that the court has determined the respective shares due to the stated beneficiaries, the court hereby deems all pending applications filed prior to this ruling as spent.

18. Nonetheless, in order to pre-empt actions by any parties aimed at defeating the execution of the final orders of this court, it is hereby ordered that the status quo in respect of the suit property as obtaining at the date of this ruling be maintained, and more particularly that with regard to the development captured in the Deputy Registrar's Report dated 9<sup>th</sup> December 2018, the court extends the status quo order given on 26<sup>th</sup> February 2019 as to installation of tenants therein."

6. From the record before us, there is no evidence that any of the beneficiaries appealed the ruling of the learned Judge (C. Meoli, J.) that was delivered on 30<sup>th</sup> April 2019.

7. Two years later, the 1<sup>st</sup> applicant, Nancy Waithera Kaguara, filed an application dated 5<sup>th</sup> February 2021, seeking prayers for review of the orders issued on 30<sup>th</sup> April 2019. The prayers sought can be summarized as follows: orders staying the execution of the judgment together with the ongoing surveyor's sub-division exercise; that leave be granted to the Firm of J.W. Wanjohi & Co. Advocates to come on record for the applicant in place of the firm of Kairu Kimani & Co. Advocates; review of the judgment and that the order for the equal distribution of the estate into parcels of 0.8625 acres be set aside; and an order that the estate is distributed in accordance in the manner in which the deceased had shared out the estate before his death.

8. The 2<sup>nd</sup> application, filed contemporaneously with the application seeking review was filed by Patrick Kihui Kamau on 18<sup>th</sup> February 2022. He sought to be joined as an interested party. He further prayed that his application be considered before the distribution of the estate and that, the current status of the parcel of land be maintained.

9. The applicants filed affidavits and submissions in support of the applications.

On their part, the respondents opposed the applications except for the 1<sup>st</sup> respondent who supported the application.

10. The two applications were argued before the learned judge (Kasango, J.) and upon hearing the parties the learned Judge held as follows:

" 15. The main grounds that the above rule recognizes that can be a basis of review are: discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and very importantly, the application must be made without unreasonable delay.

16. The Ruling Nancy seeks review was delivered on 30<sup>th</sup> April 2019. The application for review is dated 5<sup>th</sup> February, 2021. No explanation whatsoever



was offered by Nancy for delaying filing that application. On that ground alone, the application and prayer for review will fail.

17. The second reason the application will fail is because Nancy fails to inform this Court what new and important evidence she discovered or what evidence was there of mistake or error apparent on the face of the record.
  18. Nancy alleges that the learned Justice C. Meoli failed to consider the site visit and the evidence recorded before the magistrate's court. The Magistrate's court file was before the High Court when Justice C. Meoli delivered her Ruling. That Magistrates court file was transferred to this Court because the Court was informed that the magistrate's court did not have pecuniary jurisdiction. The proceeding before that Court therefore, it would seem were undertaken by a court without jurisdiction.
  19. But perhaps much more than that it is manifestly clear that Nancy seeks review of the Ruling because she is aggrieved by the finding of the learned judge. She said as much when she disposed, "I am opposed to the ruling." She is aggrieved that her late husband share was reduced when the daughters of the deceased were included in the distribution of the estate. It would seem that Nancy by her application brought an appeal which is disguised as a review application.' This Court cannot sit as an appellate Court to a court of coordinate jurisdiction. I cannot substitute my opinion to that of Justice C. Meoli to the evidence submitted at the trial.
  20. If Nancy view is that Justice C. Meoli made an error, although my appreciation of this matter is that there is no such error, Nancy should have filed an appeal to the Court of Appeal.
  21. The application dated 5<sup>th</sup> February, 2021 is dismissed with costs."
11. Having given the background, we now turn to the application that is now before us. It is important we point out that the intended appeal which is the basis for this application for stay, is in respect of the dismissal of the application for review. We say so as the applicants, have by mistake or design, tried to mix up issues arising from the ruling that was issued on 30<sup>th</sup> April 2019.
  12. It is trite law, that to succeed in an application made under rule 5 (2) (b), an applicant must satisfy the twin principles that are enumerated in many decisions of this Court, namely:
    - a. An applicant must demonstrate that they have an arguable appeal; and
    - b. That the intended appeal or appeal, if successful, , will be rendered nugatory if the execution of the decree, order or proceedings is not stayed.
  13. On the first limb of the twin principles, this Court held in *David Morton Silversein v Atsango Chesoni* [2002] eKLR that for an order of stay to issue, the applicant must first demonstrate that the appeal or intended appeal is arguable, that is, it is not frivolous, and that the appeal or intended appeal would in the absence of stay be rendered nugatory. [See also *Reliable Bank Ltd. (in liquidation) v Norlake Investments* [2002] 1 EA 227, *Nation Newspapers Limited v Peter Baraza Rabando*, CA No.1 [2007] eKLR and *Republic v Kenya Anti-Corruption Commission & 2 others* [2009] eKLR 31.
  14. On sufficiency of the grounds to warrant a grant of the stay of the orders sought, this Court in *Transouth Conveyors Limited v Kenya Revenue Authority & Another* [2007] eKLR, CA No. 37 of 2007,



observed that a single issue will suffice and an applicant need not establish a multiplicity of arguable issues. Neither is the applicant required to show that the point would succeed. (See *Kenya Commercial Bank limited v Nicholas Ombija* [2009] eKLR. It only needs to be an issue that raises a serious question of law worthy of consideration of the Court, or one in respect of which a reasonable argument can be put forward in support (see *Retreat Villas Limited v Equatorial Commercial Bank Limited & 2 Others*, CA No. 40 of 2006).

15. Indeed, we note that in prayer (d) of the application, the applicants are seeking to stay both the judgment of the High Court (Meoli, J.) and the High Court (Kasango, J.), yet there is no notice of appeal against the decision of the High Court (Meoli, J.) It is trite law that a party can only invoke the jurisdiction of this Court by filing a notice of appeal in accordance with the rules. The applicant is trying to sneak in issues that were determined in the ruling made on 30<sup>th</sup> April 2019. This act is mischievous and an abuse of the court process. That being the position, that prayer for stay is incurably defective. An appeal against the ruling delivered on 30<sup>th</sup> April 2019 was an option open to the applicants at that time. However, it is too late in the day to seek to challenge that ruling.
16. At this stage, the only grounds that an applicant can raise should relate to the ruling delivered by the High Court (M. Kasango, J.) on 5<sup>th</sup> February 2021. The applicant has raised 10 grounds that can be summarized as follows: that all the parties herein are sons and daughters of the late Naftaly Uiru Kagwara who during his lifetime had settled and shared his estate, which is a single parcel of land L.R. NO. KIAMBAA/RUAKA/113 measuring 6.9 Acres to his children under the doctrine of gifts *intervivos*; that both the applicants and respondents have respected their late fathers' wish and have continued to occupy and develop their respective lands with permanent buildings, some having also buried their loved ones on their allocated portion of land.
17. Further grounds are that the applicants were shocked to receive a letter dated 5<sup>th</sup> August 2022 drawn by Kiambu Land Registrar indicating that officers from his office shall visit the land on 23<sup>rd</sup> August 2022 to execute the ruling delivered in succession cause No. 7 of 2018, which is the subject matter of the appeal, yet no decree which has been extracted; that the applicants were served with the surveyors' letter on 17<sup>th</sup> August 2022 without any explanation of the delay; the applicants are apprehensive that unless the survey exercise is stayed the same shall compromise the applicants' intended appeal, since the size and acreage of the respective parcels of land will have been altered.
18. At this stage, we are not required to consider the merit of the grounds, as that is the preserve of the bench that will hear the appeal. But having said that, where the grounds are plainly frivolous the Court will not hesitate to express its doubt on their arguability. Looking at the grounds in the memorandum of appeal, the inescapable conclusion is that the applicants' appeal is at cross purposes with the impugned ruling on the application for review as the fore-mentioned grounds mainly deal with issues that were considered by the learned judge (Meoli, J.) in her ruling dated 30<sup>th</sup> April 2019 which is not before us. We are therefore doubtful on the arguability of the appeal. Consequently, the applicant has failed to satisfy the first limb of the applicable principles.
19. Having failed on the first limb of an application for stay orders, there would be no need for us to consider the second limb on whether the intended appeal will be rendered nugatory. As stated earlier, an applicant needs to demonstrate both arguability and the nugatory aspect, and proving only one limb will not suffice.
20. It must be clear by now that this application is without merit and is for dismissal. Accordingly, we dismiss the application with no orders as to costs as this is a family dispute.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2023.**



**D. K. MUSINGA (P)**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**M. GACHOKA, CIArb, FCIArb**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

