



**SMM1 & another v SMM (Civil Application E079 of 2022)  
[2023] KECA 691 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 691 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E079 OF 2022  
SG KAIRU, JW LESSIT & GV ODUNGA, JJA  
MAY 26, 2023**

**BETWEEN**

**SMM1 ..... 1<sup>ST</sup> APPLICANT**

**JCM ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SMM ..... RESPONDENT**

*(Being an Application for stay of further proceedings of the order of the High Court at Mombasa rendered by Hon Justice J. Onyiego on 30th October, 2022 pending hearing and determination of the appeal against the said order in Voi High Court Succession Cause 3 of 2018)*

**RULING**

1. Before us is an application brought by way of Notice of Motion dated 3<sup>rd</sup> October, 2022 expressed to be brought pursuant to Rule 5(2) of the Court of Appeal Rules. In the said motion, the applicants seek an order staying the execution of the order rendered on 30<sup>th</sup> October, 2022 as well as further proceedings in Mombasa Succession Cause 3 of 2018 pending appeal.
2. First, a brief history. This dispute revolves around the Estate of the late ETM (EGH), the deceased herein. Following the renunciation of the executorship by the appointed executor, the High Court appointed the Public Trustee as the administrator of the deceased’s estate. However, the applicants opposed the appointment of the Public Trustee and sought review of the order appointing the Public Trustee as the Administrator. The Respondent herein also filed an objection to the issuance of the Grant and sought revocation of the same on the ground that she, being a daughter of the deceased and therefore a beneficiary to his estate, was omitted from the list of beneficiaries. By a consent entered on 17<sup>th</sup> March 2021, the appointment of the Public Trustee as the Administrator of the estate of the deceased was revoked and the applicants were appointed as executors of the deceased’s estate. That left only the Respondent’s application for objection and revocation.



3. By a ruling dated 30<sup>th</sup> October, 2022, the Respondent’s application was partially allowed. While the Court declared that the Respondent is the biological daughter of the deceased and therefore a beneficiary of the estate, it however declined to revoke the grant in the names of the Applicants. It, instead, directed the Applicants to file an application for confirmation of grant within 30 days from 30<sup>th</sup> October 2022 and in so doing ordered the Applicants to value the deceased’s estate to provide for liabilities before distribution.
4. The Applicants were, however, dissatisfied with the said decision and filed a Notice of Appeal dated 13<sup>th</sup> October 2022. In their Memorandum of Appeal, they assail the Learned Trial Judge for finding that the Respondent is a biological daughter of the deceased; for finding that she was entitled to maintenance from the estate of the deceased; and for disregarding the applicant’s expert witness evidence and placing reliance on kinship evidence. At the hearing of the appeal, the Applicant will urge this Court to set aside the impugned decision.
5. In support of the application, the Applicants relied on the supporting affidavit sworn by SMM1, the 1<sup>st</sup> Applicant herein, in which he averred that the orders sought in this application are necessary to ensure diligent preservation of the deceased’s estate; that the estate of the deceased is likely to suffer irreparable loss; and that the appeal will be rendered nugatory, if the orders sought are not granted. It was disclosed that the Respondent has already filed an application for reasonable provision of maintenance yet the appeal raises the issues of the propriety of the finding that the Respondent is a biological daughter of the deceased and therefore entitled to benefit from his estate. According to the Applicants, unless the stay sought is granted the estate risks suffering irreparable loss.
6. In opposing the application, the Respondent swore a replying affidavit on 8<sup>th</sup> March, 2023 in which she maintained that the DNA test was proof that she is a biological daughter of the deceased and that the Applicants placed reliance on a charlatan in the field of genetics and science of genealogy. It was also refuted that the appeal will be rendered as nugatory if the Respondent gets what the Respondent termed as “a diminutive amount out of the vast estate of the deceased”. The Respondent lamented the fact that she had been denied any benefit from the deceased’s estate for over 5 years yet her brothers were enjoying the said estate. She urged the Court to balance her rights to have access to the estate of her father as against the Applicants’ right to appeal. It was further averred that the Applicants failed to meet the threshold for the grant of an order for stay pending an appeal and that the application should be dismissed with costs to the Respondent.
7. When the matter was called out for virtual hearing before us on 28<sup>th</sup> March, 2023, Learned Counsel, Mrs. Wambugu, appeared for the Applicants while Mr. Ambwere appeared for the Respondent. Both Learned Counsel had filed their submissions which they briefly highlighted before us.
8. On behalf of the Applicants, it was urged that the appeal is arguable and not frivolous. The finding of the Learned Trial Judge that the Respondent was a beneficiary of the estate of the deceased herein was challenged on the ground that the same beneficiary’s name had been included as a beneficiary in respect of the estate of one FJM in Succession Cause No. 49 of 2017. To the Applicants, this, amongst other grounds, constitutes an arguable point for the purposes of an application for stay.
9. It was further submitted that should the pending proceedings before the trial court proceed, the estate of the deceased stands to lose as the Respondent shall then be entitled to reasonable provision from the estate yet the deceased died testate. In support of the application the Applicant cited the case of *Trust Bank Limited & Another v Investech Bank Limited & 3 Others* (2000) eKLR.
10. Submitting on behalf of the Respondent, Mr. Ambwere contended that the arguability test was met as the evidence of a charlatan could not be used to put a fight against the result of DNA test from a



trained building economist. It was refuted that the nugatory test was met because there is no danger of any property being wasted and that instead, the Respondent is being kept away from benefiting the fruits of her judgement as daughter of the deceased. On the nugatory aspect, it was submitted that the grant of stay would subject the Respondent to further hardship since the Applicants continue to sell the deceased's properties yet the Respondent is only seeking reasonable provision. The Court was urged to dismiss the application with costs.

11. We have considered the application, the submissions both written and oral and the law.
12. The principles that guide the consideration of an application of this nature are now well settled. Our jurisdiction in these matters is conferred by the filing of a Notice of Appeal. For an applicant to succeed he/she must demonstrate, at the hearing of the application, that the appeal, or intended appeal, as the case may be, is arguable, or, as is often said, not frivolous. The applicant must, in addition, show that the appeal would be rendered nugatory, absent stay.
13. We have seen the intended grounds of appeal as disclosed in the draft memorandum of appeal. In satisfying the Court that the appeal or intended appeal is not frivolous, the applicant ought to identify the errors which are attributed to the court from which the appeal arises and not merely regurgitate the findings of the court below. However, this Court, in determining the application is not expected to interrogate the alleged errors as if it was hearing the appeal. In appreciation of this fact, it was held in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR that:

“It is to be remembered that in an application such as this the grounds are not to be argued; all an applicant is required to do is to point out to the Court the ground or grounds which he believes are arguable and leave it to the Court to decide on the issue of whether or not the matters raised are arguable.”
14. This Court in *Stanley Kang'ethe v Tony Keter & 5 others* [2013] eKLR emphasised that as regards the question whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004. It is therefore important for the applicant to satisfy the Court that the ground or intended ground is bona fide without satisfying the Court that the said ground will necessarily succeed. As long as the point raised is bona fide and ought to be argued fully before the Court, the same meets the arguability or non-frivolity test. See *Joseph Gitabi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
15. However, it is not the multiplicity of the grounds that determines whether or not the appeal or intended appeal is frivolous or vice versa. As this Court held in *Somak Travels Ltd vs Gladys Aganyo* [2016] eKLR:

“It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this Court.”
16. In this case, the Applicants contend that the Learned Trial Judge erred in finding that the Respondent, who is already listed as a beneficiary in another succession cause, can once again lay a claim to the estate of the deceased herein in her capacity as a daughter of the deceased. On our part, we find that this point is not frivolous. It is clearly an arguable point and that is the farthest we can go as regards that issue.
17. On the nugatory aspect, which an applicant must also demonstrate, it has been held by this Court that the term ‘nugatory’ has to be given its full meaning since it does not only mean worthless, futile or



invalid but also means trifling. Further, whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed, if allowed to happen, will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved. See *Stanley Kangethe Kinyanjui vs. Tony Ketter and 5 others* (supra). It may also be that the event, even though reversible, if it were to take place, the process of undoing it might be quite onerous. What the Court is required to do is to give effect to the overriding objective stipulated in sections 3A and 3B of the Appellate Jurisdiction Act, in the exercise of its powers under the said Act or in the interpretation of any of its provisions.

18. In *Kenya Commercial Bank Limited v. Kenya Planters Co-Operative Union* Civil Application No. Nai. 85 of 2010 this Court held that:

“where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case.”

19. It therefore follows that the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intentment of the overriding objective as stipulated in section 3A as read with section 3B of the Appellate Jurisdiction Act are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman vs. Amboseli Resort Limited* [2004] 2 KLR 589.

20. In this case, the effect of the decision made by the Learned Trial Judge is that the Respondent is entitled to benefit from the estate of the deceased. It is that very decision that is sought to be challenged. In our view, the determination of the reasonable provision which the Respondent intends to pursue will have the effect of disposing of part of the estate, were it to succeed. That, it is our view, ought to be held in abeyance as this Court finally determines the Respondent’s status and entitlement to the deceased’s estate. Since the Respondent concedes that the deceased’s estate is vast, we do not find any serious prejudice that is likely to be caused to the Respondent if the proceedings before the trial court were temporarily suspended.

21. Therefore, whereas we find no warrant for granting stay of execution pending appeal as there is no imminent danger of execution, we hereby direct that further proceedings in Voi High Court Succession Cause No. 3 of 2018 be stayed pending the hearing and determination of the appeal from the decision of Onyiego, J made on 30<sup>th</sup> October, 2022.

22. The costs of this application shall abide the outcome of the appeal.

23. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 26<sup>TH</sup> DAY OF MAY, 2023.**



**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

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**G. V. ODUNGA**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

