



REPUBLIC OF KENYA



KENYA LAW
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**King'ang'i v John & 2 others (Civil Application E135 of 2022)
[2023] KECA 562 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 562 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E135 OF 2022
W KARANJA, FA OCHIENG & LK KIMARU, JJA
MAY 12, 2023**

BETWEEN

GRACE NJERI KING'ANG'I APPLICANT

AND

DEDAN THIONG'O JOHN 1ST RESPONDENT

WALTER GITAU JOHN 2ND RESPONDENT

LIZIE NJOROGE 3RD RESPONDENT

(An application for stay of execution for costs pending the hearing and determination of Civil Appeal No. 439 of 2019 against a ruling of the High Court of Kenya at Nairobi (Muchelule, J.) dated 10th May, 2016 in HC Succ. Cause No. 793 of 1985)

RULING

1. Being dissatisfied with the ruling which upheld the mode of distribution of the estate of John King'ang'i Thiong'o hereinafter, "the deceased" under Kikuyu customary law on May 10, 2016, the applicant lodged a notice of appeal dated May 18, 2016 signifying her intention to appeal. Vide a memorandum of appeal dated August 29, 2019 she lodged Civil Appeal No. 439 of 2019.
2. About 6 years later, she moved the Court by a notice of motion application dated April 22, 2022 predicated upon Rule 5(2)(b) and 42 of the *Court of Appeal Rules*, Sections 3A, 3B & 4 of the *Appellate Jurisdiction Act* and Article 159(2) of the *Constitution*.
3. The applicant sought, inter alia, stay of execution of costs of Kshs. 201,067 resulting from the Decree of taxation dated August 11, 2021; setting aside of the ruling dated January 19, 2022; and stay of execution of all taxed costs pending the hearing and determination of Civil Appeal No. 439 of 2019. The applicant has moved this Court in her capacity as a beneficiary of the estate of the deceased.



4. The grounds in support of the application are that: the High Court failed to grant an order for stay of execution of costs; the applicant has a good appeal that raises bona fide issues with high chances of success; in the interest of justice; the appeal will be rendered nugatory; and the application has been brought without any delays.
5. In her supporting affidavit, the applicant stated that she was served with a Notice to Show Cause dated February 9, 2022 for costs of Kshs. 201,067; her application for stay pending appeal dated November 10, 2021 was dismissed on January 19, 2022; her appeal has triable issues such as, the exclusion of the applicant as a daughter of the deceased in the estate, omission of consents and citations of all surviving children and violation of gender rights of a woman as enshrined in the Constitution, the [Law of Succession Act](#) and International conventions; in dismissing the application for stay of execution for costs, the trial court failed to consider her complaint of non-service, lack of inclusion in computation of costs and the said costs were both unjustified and excessive; she is unable to pay the costs as she is financially drained and unemployed; she stands to suffer irreparable loss if committed to civil jail due to poor health; the respondents will not be prejudiced if stay is granted; and that the application has been brought without undue delay.
6. In response to the application, the respondents filed a replying affidavit sworn by the 3rd respondent's attorneys. They deponed to the fact that the application lacked merit by virtue of the applicant's own admission that she is a person of straw hence there is a real risk the 3rd respondent might not be able to recover the costs should the application be allowed; the applicant has had two similar applications dismissed before the High Court; the applicant has not demonstrated that the respondent would not be able to refund the costs in the event the appeal is successful; applicant has not demonstrated that she will suffer irreparable loss if stay is not granted; and that the applicant is guilty of laches having filed the appeal in 2019 and filing an application for stay of execution 3 years later without an explanation.
7. The application was canvassed by written submissions. Parties opted not to highlight the same.
8. In her submission, the applicant maintained that she was disinherited based on Kikuyu customary law when Article 27 prohibits any form of discrimination based on race, sex, mental status or culture. She stated that her application should not have been dismissed on the basis of her alleged marriage to one, Clement Maribe. She faulted the trial court for failing to make a finding in law that the claim was time barred after 24 years. She further faulted the trial court for its interpretation of Rules 7 and 26 of the probate and Administration Rules.
9. The applicant contended that despite satisfying the conditions set out in Order 42 Rule 6(2) of the [Civil Procedure Rules](#) and having demonstrated that she would suffer substantial loss, the application was dismissed. She maintained that there had been no inordinate delay and no prejudice would be suffered by the respondents. She insisted that the applicant was not served or involved in the computation of costs. She urged that the application be allowed.
10. The respondents while relying on the case of [Francis Kabaa v Nancy Wambui & another](#), Civil Application No. 298 of 1996 (UR 113/96) submitted that no stay can be issued against costs and that the applicant did not demonstrate that she would suffer substantive loss if stay was not granted. They contended that the applicant had not given an explanation as to why the application was filed 6 years after judgment was delivered. They further contended that the Notice to Show Cause is yet to be heard and the applicant's apprehension of being committed to civil jail was speculative and premature. They maintained that they were apprehensive that the applicant would not be in a position to refund the costs in the event the appeal does not succeed. They urged that the application be dismissed with costs.



11. We have considered the application, the grounds in support thereof, the replying affidavit, the submissions, the authorities cited and the law. The jurisdiction under Rule 5(2)(b) of this *Court's Rules* is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.
12. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2) (b) of this *Court's Rules* are well settled. The Supreme Court in *Teachers Service Commission v Kenya National Union of Teachers*, Sup. Ct. Appl. No. 16 of 2015 considered the nature and scope of the jurisdiction of this Court under Rule 5(2) (b) as follows:

“It is clear to us that Rule 5(2) (b) is essentially a tool of preservation. It safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that Court over the years...Rule 5(2) (b) of the Court of Appeal Rules, 2010 is derived from Article 164(3) of the Constitution. It illuminates the Court of Appeal’s inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal.”
13. Similarly, this Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) 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. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
14. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the court’s satisfaction.
15. 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 applicant in order to warrant ventilation before this Court. In the case of *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR this Court described an arguable appeal in the following terms:

“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) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”
16. We have carefully considered the grounds set out in the motion and the memorandum of appeal dated August 29, 2019. We have also noted that neither a notice of appeal nor a draft memorandum of appeal was filed with regard to the ruling of January 19, 2022 or the certificate of taxation. Leave was also not sought to appeal to this Court. This being a succession matter, Rule 39(b) of the *Court of Appeal Rules* requires one to obtain leave of the High Court within 14 days from the date of the ruling or judgment being appealed against. This Court has had the opportunity to address itself on the matter in the case



of Rhoda Wairimu Kioi & Another v Mary Wangui Karanja & Another [2014] eKLR where the court stated:

“We think we have said enough to demonstrate that under the *Law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court exercising its original jurisdiction with the leave of the High Court or where the application for leave is refused, with leave of this court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.... that leave of the High Court in succession matters is necessary in the former’s exercise of its original jurisdiction and that where that application for leave has been rejected by the High Court, it can be made to this court.”

17. In the instant application, we are persuaded that there is need and indeed a legal requirement that appeals from the High Court to the Court of Appeal in succession matters lie with the leave of the High Court. Such leave, as was held in the Rhoda Kioi case (supra) is desirable for purposes of expeditious disposal of succession matters in order to bring disputes to an end and allow families settle. The applicant did not attempt to seek leave of either court, she also failed to address this Court on the same issue. Therefore, the appeal with regard to the ruling dated May 10, 2016 as filed is incompetent and bad in law for want of leave.
18. In the case of *Dennis Mogambi Mang’are v Attorney General & 3 Others*, Civil Application No. NAI 265 of 2011 (UR 175/2011) this Court held that:

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”
19. The applicant did not annex a draft memorandum of appeal to this application with regard to the issue of costs. Therefore, we are not in a position to tell whether the grounds intended to be raised in the appeal are arguable or not. It is not enough for the applicant to just state that she was dissatisfied with the impugned ruling. We are alive to the fact that the absence of a memorandum of appeal is not of itself, fatal. It may be possible, sometimes to decipher the grounds of the intended appeal from the body of the application or from the depositions in the affidavit in support.
20. However, as the applicant did not obtain leave of the Court, to lodge an appeal, we cannot delve into the merits of the application, as no appeal can lie without leave.
21. The upshot is that we decline to grant stay of execution of costs pending the hearing and determination of the appeal. The application is accordingly dismissed with no order as to costs as it appears this is a family dispute.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL



F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

