



**Muthemba v Muthemba & 2 others (Civil Application
E333 of 2022) [2023] KECA 522 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 522 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E333 OF 2022
DK MUSINGA, A ALI-ARONI & JM MATIVO, JJA
MAY 12, 2023**

BETWEEN

JANE NJERI MUTHEMBA APPLICANT

AND

DAVID MUNGAI MUTHEMBA 1ST RESPONDENT

JOHN MUNGAI MUTHEMBA 2ND RESPONDENT

EVANSON KABURU MUNGAI 3RD RESPONDENT

(Being an application for stay of proceedings and/or execution from the ruling/decision in the High Court, Nairobi (Muchelule, J.) 27th July, 2022 in Succession Cause No. 2501 of 2003)

RULING

1. A summary of the background to the applicant's application dated 18th August, 2022, the subject of this ruling, is essential to put the arguments for and against the application into a proper perspective. Fortunately, this background is essentially common ground or uncontroverted.
2. Briefly, by a ruling dated 20th December, 2021, the High Court (Muchelule, J.) revoked the appointment of Jane Njeri Mungai (the applicant herein) and the 1st respondent David Mungai Muthemba as administrators of the estate of the late Andrew Mungai Muthemba-deceased. The deceased died intestate on 3rd August, 2003, leaving behind two widows, namely, Joyce Wairimu Mungai who had five children, among them the 1st respondent and the applicant herein who had four children. In place of the said administrators, the trial court appointed the 3rd respondent, John Mungai Muthemba, Ricky Mungai Muthemba and Raymond Kihui Mungai as a co-administrators of the estate. The court directed the administration to be completed within 6 months from the date of the ruling unless extended by the court.



3. The court revoked the grant because the said administrators had failed to diligently administer the estate as required by section 76 (d) (ii) and (iii) of the Law of Succession Act. In addition, they had failed to produce a full and accurate inventory of the assets and liabilities of the estate and to file accurate accounts in court of all dealings under section 83(h) of the Act. The failure was contrary to a court order issued on 22nd February, 2021, requiring them to file the inventory and accounts of all dealings within 60 days from the date of the said order. In the ruling dated 20th December, 2021, the court ordered the administrators to comply with the order issued on 22nd February, 2021, within 45 days from the said date.
4. The applicant and the 1st respondent applied for review of the ruling dated 20th December, 2021, vide applications dated 20th January, 2022, and 24th January, 2022, respectively. By a ruling dated 27th July, 2022, the trial court dismissed both applications for not satisfying the requirements of Order 45 Rule 1 of the Civil Procedure Rules, 2010. The learned judge also noted that under section 66 of the Law of Succession Act, the final discretion as to who administers the estate lies with the court and that all the deceased's children have an equal claim to the administration.
5. Dissatisfied by the ruling dated 27th July, 2022, the applicant filed a notice of appeal dated 28th July, 2022, signaling her intention to appeal to this Court against the said ruling. In addition, by a letter of even date addressed to the Deputy Registrar of the High Court, Family Division, Nairobi, and copied to all the respondents' advocates, the applicant's advocate requested for certified copies of proceedings and the said ruling.
6. In the instant application, the applicant seeks the following orders:
 - a) Stay of execution of the ruling and order issued in Nairobi High Court Succession Cause No. 2501 of 2003; In the Matter of the Estate of Andrew Mungai Muthemba dated on the 21st December, 2021, as read with the decision of the said court dated on the 27th July, 2022, pending the hearing and determination of the applicant's intended appeal.
 - b) Stay of the orders issued in the said case revoking the appointment of the applicant and the 1st respondent as the administrators of the estate of Andrew Mungai Muthemba-deceased pending the hearing and determination of the applicant's intended appeal.
 - c) Such further orders as are necessary to meet the ends of justice.
 - d) Costs of and incidental to this application be provided by the court for in any event.
7. The application is founded on a raft of grounds listed on the face of the application and buttressed by the applicant's supporting affidavit dated 18th August, 2022 annexed thereto. It is her case that she has an arguable appeal because the learned judge ignored evidence, which demonstrated grounds for review of the orders made on the 21st December, 2021. She claims that the appointed persons are not fit to be administrators, so, the estate and the beneficiaries risk being prejudiced if this application is refused and her intended appeal will be rendered nugatory. Lastly, the balance of convenience weighs in her favour and the other beneficiaries.
8. In opposition to the application, John Mungai Muthemba, the 2nd respondent, filed a replying affidavit dated 26th September, 2022.
His main grounds are:
 - (a) The application is an abuse of court process.



- (b) Even though the applicant seeks to stay the ruling dated 20th December, 2021, no appeal has been preferred against the said ruling.
 - (c) In their applications dated 20th January, 2022 and 24th January, 2022, the applicant and the 1st respondent unsuccessfully applied for stay and review of the ruling dated 20th December, 2021 and by a ruling dated 27th January, 2021 the two applications were dismissed.
 - (d) The application does not meet the conditions under rule 5 (2) (b) of the *Court of Appeal Rules, 2022*.
 - (e) This Court in Civil Appeal No. 448 of 2018 resolved the distribution of the estate.
 - (f) The new administrators are in the process of administering and transferring the estate as per the said judgment.
 - (g) In view of the foregoing, the appeal cannot be rendered nugatory.
 - (h) No prejudice will be suffered because the estate has been distributed and what is remaining is transfer to the beneficiaries.
 - (i) The distribution of the estate is time bound under section 83 (g) of the *Law of Succession Act* and a stay order will frustrate the process.
 - (j) The applicant and the 1st respondent are yet to comply with the orders issued on 20th December, 2021, requiring them to file a report on their administration within 45 days from the date of the order.
9. Evanson Kaburu Mungai, the 3rd respondent, in opposition to the application swore the replying affidavit dated 18th November, 2022. The salient averments of his affidavit are:
- (i) that the applications for review of the said orders were dismissed on 27th July, 2022.
 - (ii) There is no appeal against the ruling delivered on 20th December, 2021.
 - (iii) The new administrators have since taken over the administration of the estate in accordance with the court's ruling; so, any interruption of the administration after almost one year will immensely prejudice the estate.
 - (iv) No positive order was issued on 27th July, 2022 so the application for stay is untenable.
10. The applicant filed a supplementary affidavit dated 15th November, 2022 essentially refuting the contents of the 2nd and 3rd respondent's affidavits and insisting that his appeal is arguable.
11. The 1st respondent did not file any pleadings nor did he participate in this application.
12. The hallmark of the applicant's counsel's submissions was that the intended appeal is arguable. To buttress his argument, counsel cited *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR in which this Court described an arguable appeal as:
- “..... This Court has often stated that an arguable ground is not one, which must succeed, but it should be one, which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable...”



13. On the nugatory aspect, counsel cited *Stanley Kangethe Kinyanjui v Tonny Ketter & 5 others (Supra)* which held:

“In determining whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen, will be reversible if the applicant succeeds in the appeal, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

14. Counsel also relied on this Court’s decision in *Reliance Bank Limited v Norlake Investments Ltd* (2002) 1 EA in which this Court held that whether absence of a stay order will render an appeal nugatory is determined on a case-to-case basis. Counsel submitted that there is a real risk of wanton destruction of the estate in absence of stay and the resultant prejudice will be irreversible.
15. In opposition to the application, the 2nd respondent’s counsel submitted that there is no notice of appeal against the ruling of 20th December, 2021, to set in motion this Court’s jurisdiction under Rule 5 (2) (b) because the notice of appeal filed was against the ruling of the 27th July, 2022, dismissing the applications for review. Counsel submitted that this Court lacks jurisdiction to grant the stay sought and relied on this Court’s decision in *Nguruman Limited v Shompole Group Ranch & another* (2014) eKLR, which held that once the court realizes that there is no notice of appeal, it must simply strike out the rule 5 (2)(b) application, unless it is withdrawn. To further buttress his argument, counsel relied on *Nairobi City Council v Resley* (2002) 2 EA 493 which held:

“It is trite law that without a notice of appeal against particular orders, we would have no jurisdiction to grant a stay of those orders and we cannot, therefore, accept Mr. Oduol’s argument to the effect that the notice of appeal against the ruling of 11th April, 2002, entitles him to apply for a stay of execution of orders made on 11th March, 2002. That argument is fallacious.” It is also trite law that once we have no jurisdiction, we must down tools and say we can go no further, we must stop here.”

16. Counsel cited *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* (2020) eKLR and submitted that the intended appeal is not arguable.
17. On the nugatory aspect, counsel submitted that the applicant unsuccessfully sought to review the ruling dated 20th December, 2021, and the application was dismissed *vide* the ruling dated 27th July, 2022, for failure to meet the conditions for review under Order 45 Rule 1 of the *Civil Procedure Rules*, 2010. In the circumstances, counsel submitted that there is no positive order capable of being stayed arising from the said ruling refusing review. Counsel submitted that by opting to apply for review of the said ruling, the applicant extinguished her right to appeal against her removal as an administrator. In addition, counsel submitted that in absence of an appeal against the removal of the applicant as an administrator, the appeal cannot be rendered nugatory. Further, no positive order was issued capable of being stayed. In addition, counsel argued that the ruling delivered on 20th December, 2021, has fully been implemented, and in any event, the applicant is still in contempt of this Court’s orders.
18. Counsel submitted that the distribution of the estate was settled by a judgment of this Court in Civil Appeal No. 448 of 2018. In addition, the new administrators are in the process of administering and transferring the estate to the beneficiaries as per the said judgment. As a result, counsel argued that the appeal cannot be rendered nugatory and cited *Reliance Bank Limited v Norlake Investments Limited*(Supra)



19. The 3rd respondent's counsel submitted that no appeal or intended appeal has been filed against the ruling delivered on 20th December, 2021. He also argued that the orders sought have been overtaken by events because the new administrators have since assumed their role as administrators. In addition, counsel submitted that the applicant seeks to stay a negative order issued on 27th July, 2022, and cited *Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah* (206) eKLR and *Mombasa Seaport Duty Free Limited v Kenya Ports Authority* CA No NAI 242 of 2006 in support of the proposition that a negative order cannot be stayed.
20. Also, counsel submitted that the intended appeal is not arguable, that the applicant has not annexed the draft appeal nor did the applicant file a Notice of Appeal against the ruling she seeks to stay nor has she raised any grounds to challenge the ruling dated 27th July, 2022. To buttress his argument, counsel cited *Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union*, Civil Application No. NAI 72 of 2001 in support of the holding that an applicant needs to show that at least there is one issue upon which the court should pronounce its decision.
21. On the nugatory aspect, counsel cited *Kausbik Panchamatia & 3 others v Prime Bank Limited & Another* (2020) eKLR which followed *Stanley Kangethe Kinyanjui v Tony Keter & 5 others* (Supra) in support of the definition of the word nugatory. Counsel argued that the orders sought will prejudice the administration of the estate and if the applicant suffers any loss, damages can adequately compensate her.
22. First, we will address the respondents' argument that much as the applicant seeks to stay the ruling delivered on 20th December, 2021, she never filed a notice of appeal against the said ruling. Primarily, a notice of appeal is the basis, foundation and backbone of every appeal. Where a notice of appeal is found to be absent, defective or incompetent, the Court of Appeal has the power to strike it out or to discontinue any purported appeal or proceedings for which there is no notice of appeal. The rationale for foregoing position stands on the strength of the succinct provisions of Rule 77 (1) of the *Court of Appeal Rules*, 2022. This rule provides in peremptory terms that a person who desires to appeal to the Court of Appeal shall give notice in writing, which notice shall be lodged in two copies, with the Registrar of the Superior Court.
23. It is settled law that whenever a court or tribunal finds that the originating process of any matter before it is incompetent or it has not been initiated by due process of law, such a process or matter is invalid and a nullity and should be struck out without much ado. An initiating process, whether court summons, originating summons or a notice of appeal must be valid to confer jurisdiction on a court to adjudicate on a subject matter in dispute between parties. The above position was aptly underscored by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* (2014) eKLR as follows:

“A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite. The California Supreme Court while reversing the Court of Appeal decision that had dismissed the appellant's notice of appeal as having been filed out of time in *Silverbrand vs County of Los Angeles* (2009) 46 Cal. 4th 106, 113 stated inter alia:

“As noted by the Court of Appeal, the filing of a timely notice of appeal is a jurisdictional prerequisite. “Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal.” (*Sic*) The



purpose of this requirement is to promote the finality of judgements by forcing the losing party to take an appeal expeditiously or not at all.”

24. Also, the Supreme Court in *Bookpoint Limited v Guardian Bank Limited & Another* (2021) eKLR emphasized the jurisdictional significance of filing a Notice of Appeal as follows:

“(21) It therefore follows that the applicant ought to have lodged its notice of appeal on or before the 4th of January, 2021. It did not, and neither has it sought extension of time to file its notice of appeal out of time. Consequently, there is no valid notice of appeal on record and given the jurisdictional importance of a notice of appeal as stated in the *Nicholas Salat case*, this motion for extension to file an appeal out of time is an act in futility. For even if the court were to be persuaded, upon consideration of the motion on its merit, and be inclined to extend time for filing of the appeal, there is no foundation (notice of appeal) upon which such an appeal would be premised.” Emphasis added)

25. We have perused the entire record. The applicant only filed a notice of appeal against the ruling delivered on 27th July, 2022, dismissing the two applications for review. In fact, ground one of the applicant’s grounds listed on the face of the application clearly states that she is aggrieved by the ruling dated 27th July, 2022. There is no mention of the ruling delivered on 20th December, 2021. Conversely, we note that the applicant in all her documents repeatedly referred to a ruling delivered on 21st December, 2021. We are unable to locate the said ruling from the documents before us. Notably, the 2nd and 3rd respondents frequently pointed out that no notice of appeal was filed against the ruling delivered on 20th December, 2021, but the applicant never disputed that fact, nor did she explain whether indeed there existed a ruling delivered on 21st December, 2021, or whether it was a typographical error.

26. Nevertheless, having carefully read the entire record, we are persuaded that no ruling was delivered on 21st December, 2021. But what is clear is that no notice of appeal was filed against the ruling dated 20th December, 2021 or even against the ruling purportedly dated 21st December, 2021 or at all in accordance with rule 77 (1) of the *Court of Appeal Rules*, 2022. That being the position, the applicant’s application to the extent that it seeks to stay the orders issued on 20th December, 2021, is a non-starter and therefore it falls for dismissal.

27. Having found as herein above that the only notice of appeal was filed against the ruling delivered on 27th July, 2022, we now address the application on merits to the extent that it seeks to stay the said ruling. The ruling in question dismissed the applicant’s application for review. That being the position, there is no positive order capable of staying. On this ground, the applicant’s application fails.

28. Notwithstanding the above finding, this being a rule 5 (2) (b) application, the principles upon which such an application may be granted have been reiterated in several decisions. (See in *Stanley Kangethe Kinjui v Tony Ketter & 5 Others* (Supra) In summary, the jurisdiction is discretionary. Even though the discretion is wide, it must be exercised judicially depending on the circumstances of a particular case. In exercising the discretion, the court must be satisfied that two elements are established. One, an applicant must demonstrate he has an arguable appeal. Two, he must demonstrate that unless the stay is granted, the appeal will be rendered nugatory.

29. On the first prerequisite, that is 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. (See *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others* (Supra)).



30. We are alive to the fact that at this stage we cannot delve into the merits of the appeal. That duty lies with the bench hearing the appeal. However, we note that the applicant never annexed to her application her draft memorandum of appeal. However, from her application we can discern the reasons why she claims to have an arguable appeal, which we highlighted earlier, so, it will add no value to rehash them here. We have within the confines of our mandate in an application of this nature evaluated the said grounds but conscious that we are not required to make definitive findings on the grounds cited while determining an application under rule 5 (2) (b). It will suffice for us to mention that the applicant before the trial court applied for review of the ruling dated 20th December, 2021. The court dismissed the application for failing to meet the tests under Order 45 Rule 1 of the *Civil Procedure Rules*, 2010. We have taken note of the reasons why the court revoked the grant. We also note from the record the uncontroverted averment that the distribution of the estate in accordance with the Court of Appeal judgment is complete. What is pending is formal transfer of the properties to the beneficiaries. No argument was cited touching on deprivation of ones shares or dissatisfaction on the distribution, which in any event was settled by a judgment of this Court. The grievance is revocation of the appointment of the applicant and the 1st respondent as administrators. We also noted the reasons for the revocation and the learned judge's view that the final discretion as to who is appointed as an administrator lies with the court, and the fact that all the beneficiaries have an equal claim to administer the estate. The foregoing being the position, it is our view that the applicant has not demonstrated the existence of an arguable appeal.
31. Having concluded as herein above that the applicant has not satisfied the court that he has an arguable appeal, we find and hold that it will serve no utilitarian value to address the nugatory aspect. Accordingly, we dismiss the application dated 18th August 2022, with costs to the 2nd and 3rd respondents.

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

D. K. MUSINGA

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

