



**Opondo & another v Sanya & another (Civil Application
E029 of 2023) [2023] KECA 662 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KECA 662 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E029 OF 2023
DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA
JUNE 9, 2023**

BETWEEN

IRENE OPONDO 1ST APPLICANT

PAMELA OCHAR 2ND APPLICANT

AND

MARY ADHIAMBO SANYA 1ST RESPONDENT

JANET ANYANGO OGUTA 2ND RESPONDENT

*(Being an application for stay of execution pending appeal from
the Judgment and Decree of the High Court of Kenya at Machakos
(Muigai, J.) dated 14th July 2022 in Succession Appeal No. 4 of 2020)*

RULING

1. By a Notice of Motion dated February 2, 2023 made pursuant to rule 5(2) (b) of the *Court of Appeal Rules* and supported by the affidavit of even date sworn by Irene Opondo, the applicants seek orders that, pending hearing and determination of this appeal, there be stay of execution of the orders made on July 14, 2022 in Succession Appeal No 4 of 2020.
2. The genesis of this matter trace to the respondents, who in their capacity as widow and daughter respectively, petitioned for and obtained grant of letters of administration of the Estate of the late Modkaya Ouma Oguta in CM Succession Cause No. 21 of 2017. They then applied for confirmation of the grant and proposed that the only asset for distribution, L R Mavoko Municipality 12715/3208, be held by them in trust for all the other beneficiaries. Eventually, the 1st applicant was joined in the cause, in her capacity as the deceased's 2nd wife.
3. The 1st applicant along with the 2nd applicant, a sister to the deceased, who held the asset's title as some sort of lien, objected to the proposed mode of distribution as they had granted the deceased a loan over



L. R. Mavoko Municipality 12715/3208, and that they were therefore entitled to a larger portion of the estate. The trial court declined to determine the validity of the 2nd applicant's claim as a creditor, saying that was not within its jurisdiction when sitting as a succession court, and that it would best be pursued in a civil claim.

4. In its decision, the trial court ordered that the asset be sold and the proceeds of sale be shared in the ratio of 55:45% between the first wife and the second wife on the basis that the first wife had more children; and that the proceeds from the sale be shared among the deceased's children and wives in the ratio assigned to them; and that, while for the minors, the same be deposited in an interest earning account to be opened in consultation between the administrators and their lawyers.
5. The respondents appealed to the High Court on the grounds that the 1st applicant did not prove that she was a wife nor did she demonstrate why she should be considered a beneficiary of the estate; and that only the 1st respondent and the deceased's six children were entitled to a share in the estate; and that the suit property was jointly owned by the 1st respondent and the deceased.
6. By the judgment dated July 14, 2022, the High Court held that the 1st respondents and the deceased were joint owners of the suit property, and that, upon his death, she automatically became the owner, and that she did not need to file a succession cause to seek transfer of ownership. Accordingly, the suit property did not form part of the deceased's estate, and was not available for distribution.
7. The applicants, apprehensive that the respondents might transfer the property; and, that there being a risk of being evicted at any time, filed this appeal and sought stay of execution of the High Court's judgment. The applicants contend that they have an arguable appeal with high chances of success as the trial court erred in relying on a contested sale agreement to find that the 1st respondent had automatic rights to the property as the surviving co-owner. Yet, the title document was only in the name of the deceased, and the trial court disregarded the fact that the deceased was in a polygamous union at the time of his demise.
8. They also contended that there was an obvious risk of transfer of the suit property to the respondents who will thereafter dispose of it and render the appeal nugatory unless stay is granted, because the 1st applicant will lose her right to the suit property as a beneficiary and on her son's behalf.
9. The effect of the impugned judgment was that the respondent was able to register the suit property in her name, and that, although the applicant was a wife to the deceased, the estate was impecunious, and there was nothing to distribute.
10. Opposing the application, the respondents, through the replying affidavit sworn by Mary Adhiambo Sanya, the 1st respondent, dated February 9, 2023, argues that its application to evict the applicant is still pending determination and, as such, this application is premature; and that, in any event, the respondent has the financial capability to adequately compensate the applicant should the appeal succeed.
11. We have considered this application, the affidavit in support, and the contending submissions filed by the parties. The application before us is made under rule 5(2) (b) of the Court of Appeal Rules. The principles upon which such an application is granted are now well known, having been laid out in various decisions of this Court. For instance, in *Housing Finance Company of Kenya Limited v Sharock Kber Mohamed Ali Hirji & Anor* [2015] eKLR, this Court stated:

“ 10. The principles governing the exercise of the court's jurisdiction under rule 5(2) (b) of our rules are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have



an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. We need only restate these principles from *Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd* – Civil Appl No Nai 93 of 2002 (UR), thus: -

“Hitherto, this Court has consistently maintained that for an application under rule 5(2)(b) to succeed, the applicant must satisfy the court on two matters, namely: -

- a. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
- b. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”

Lastly, both limbs must be demonstrated to exist before one can obtain relief under rule 5(2) (b). (See *Republic v Kenya Anti-Corruption Commission & 2 others* [2009] KLR 31).”

12. In the submissions, the applicants’ counsel cited *Stanley Kang’ethe Kinyanjui v Tony Keter & 5 Others*, Civil Application Nai. 31 of 2012, in which this Court stated that, for stay of execution to be granted, the applicant must satisfy the Court that there is an arguable appeal and that, and if stay is not granted, the appeal, if successful, will be rendered nugatory. Counsel made reference to the grounds cited in the draft memorandum of appeal and argued that the applicant has demonstrated that the intended appeal is arguable.

Counsel also cites *Damji Pragma Mandavia v Sarah Lee Household and Body Care (K) Ltd* Civil Application Nrb No 345 of 2004 (UR) in support of the proposition that, in law, it is sufficient that a single *bona fide* arguable point of law is raised; and that an arguable appeal need not be one that will necessarily succeed, but one that is sufficient for interrogation by the Court and one that is not frivolous.

13. On the nugatory aspect, Counsel cited the case of *James Thomas Andafu v Joseph Makokha Akbulunya* [2018] eKLR, argues that there is a real risk of the property being alienated in absence of stay orders because the 1st respondent, upon being registered as the owner of the property, will be at liberty to alienate; and that we must bear in mind that each case revolves around its own peculiar circumstances and facts, so we are duty bound to consider the conflicting claims of each side.
14. The respondents, drawing from the case of *Yusuf Kifuma Chanzu v Equity Bank Limited and Another* [2014] eKLR), maintain that all the issues raised in the draft memorandum of appeal were considered in great detail at the High Court and exhaustively determined by the High Court and therefore not arguable; that the property rightly belongs to the first respondent by virtue of having survived the co-owner; the respondents also confirm that a notice did issue to the applicant to vacate the premises, but no injury will be caused as the 1st applicant has an alternative abode, courtesy of a new-found beau.
15. On the first principle, as to whether or not the appeal is arguable, we have considered 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 Keter & 5 Others (supra)*. Our perusal of the Memorandum of Appeal shows that it raises several arguable issues, and, in particular, the issue whether the respondent was a joint owner of the suit property as to be declared *ipso facto* prime for registration; and as who are the legal heirs of the deceased, entitled to a share of the estate.



16. As regards the Appeal being rendered nugatory, in the case of *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others (supra)* this Court stated:

“ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

In determining whether an appeal will be rendered nugatory, the position in law is that this 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. This court has held in the case of *Reliance Bank Limited vs Norlake Investment Limited* [2002]1 EA 227 that the factors which render an Appeal nugatory are to be considered within the circumstances of each case and in so doing the court is bound to consider the conflicting claims of both sides.

17. In the case of *African Safari Club Limited vs Safe Rentals Limited*, Nai Civ. App [2010] eKLR this court held:

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

18. In short, the court is to decide which party’s hardship is greater. With that in mind, we take note that the claims that the 1st applicant is the one in occupation of the property, and from the 1st respondent’s own admission, she lives there with school going children whose plight had caused her to plead for more time; if the applicants’ prayer for stay of execution is denied and the appeal eventually succeeds, it is our view that such trauma and inconvenience cannot be adequately compensated by an award of damages, if at all.

19. Not only has the 1st respondent filed an application seeking adverse orders against the 1st applicant’s presence on the suit property, she confirms that she has also issued a notice to vacate, so that if the eviction is actualized, and the property put out of the respondent’s reach through some alienating transaction, then a successful appeal may not easily reverse the situation. It is in light of this that we find that the 1st applicant has met the twin principles, of an arguable appeal, which would be rendered nugatory if the order for stay is not granted.

20. Consequently, the application is allowed. The costs shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

