



REPUBLIC OF KENYA



KENYA LAW
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**Kanja v Kiarie & another (Civil Appeal (Application))
E298 of 2021 [2023] KECA 943 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 943 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E298 OF 2021
HM OKWENGU, FA OCHIENG & JM MATIVO, JJA
JULY 28, 2023**

BETWEEN

STEPHEN MWATHA KANJA APPLICANT

AND

BETH MIRIGO 1ST RESPONDENT

PETER KIARIE 2ND RESPONDENT

(Being an application for stay of execution pending appeal from the Ruling and Order of the High Court of Kenya at Nairobi (M. Odero, J) delivered on 16th July 2021 in Nairobi HC Succ. Cause No. 100 of 2004)

RULING

1. By a notice of motion dated August 25, 2021, the applicant Stephen Mwatha Kanja has moved this Court under Rules 5(2)(b) of the [Court of Appeal Rules](#) and Sections 3A & 3B of the [Appellate Jurisdiction Act](#). The applicant seeks an order of stay of execution of the confirmed grant dated July 16, 2021. He also seeks an order of injunction restraining the respondents, their employers, agents or anyone claiming under them from dealing with, transferring or disposing of, or in any way interfering with the estate of Gituchu Magochi.
2. The application is supported by the grounds stated on the face of the motion and an affidavit sworn by the applicant. In brief, the applicant had filed a protest opposing the summons for confirmation of grant together with the mode of distribution that had been filed in the succession cause by the respondents who are the applicant's co-administrators.
3. By a ruling delivered on July 16, 2021, the High Court allowed the confirmation of grant and issued a certificate of confirmed grant. The applicant being aggrieved by the ruling has filed an appeal to this Court which appeal he believes has high chances of success. The applicant is apprehensive that unless



the orders sought are granted, the respondents will proceed to execute and distribute the estate which will be to his detriment.

4. The applicant has annexed a memorandum of appeal where he has raised nine grounds to demonstrate that he has an arguable appeal. The applicant has also filed written submissions in which he reiterates that he has an arguable appeal and that unless the orders sought are granted, the respondents will proceed with the execution as per the mode of distribution proposed, and his appeal will be rendered nugatory.
5. The respondents have opposed the applicant's motion through a replying affidavit jointly signed by them, in which they contend that the applicant's motion is unmerited, an abuse of the court process, and intended to delay the beneficiaries from their rightful entitlement. The respondents have also filed written submissions in which they contend that the applicant is actually the custodian and the one in possession of titles to the deceased's property, and that he is the one who would actualize execution in favour of the beneficiaries and there was, therefore, no danger or threat to the estate of the deceased.
6. Relying on *Rhoda Wairimu Karanja & Anor vs Mary Wangui Karanja & Anor. [2014] eKLR*, the respondents pointed out that the applicant has not shown that he had been granted leave to bring his application or leave to appeal; that the applicant has not demonstrated that he will suffer irreparable loss which cannot be compensated by an award of damages, nor has the applicant demonstrated any cause of action, interference or risk upon the deceased's assets; that the applicant is merely abusing the court process as there is a similar application, Civil Application No 359 of 2018, that he had previously filed in the Court of Appeal that is still pending.
7. During the hearing of the motion, Ms Karanja holding brief for Mr Mburu Machua appeared for the applicant, while Mr Mwaura appeared for the 1st and 2nd respondents. Ms Karanja relied on the written submissions that had been filed and urged the Court to grant the orders sought. Mr Mwaura also relied on the written submissions and added that the applicant was guilty of delay as the initial judgment was delivered on August 29, 2017 and no application for stay was made until 2019 when the first application was dismissed by Aroni, J (as she then was). Mr Mwaura reiterated that the applicant's motion was an abuse of the court process as a similar application, Civil Application No 359 of 2018 which was filed by the applicant is still pending. In addition, the applicant has not obtained leave of the Court to appeal
8. We have considered the motion, the supporting affidavit, and the affidavit in reply, as well as the contending submissions filed by the parties. The principles upon which an application for stay of execution under Rule 5(2)(b) of the Court of Appeal Rules is determined, are now well laid out having been restated by this Court in several decisions.

'In order for an applicant in an application under Rule 5(2)(b) to succeed he must satisfy the twin principles by establishing that he has an arguable appeal and that unless the orders of stay are granted, the appeal will be rendered nugatory (*Ruben & 9 others versus Nderitu and Another [1989] KLR 455*; *Kenya Airways Limited vs Patrick Waweru Mwangi & Anor [2016] eKLR*; and *Stanley Kangethe Kinyanjui V Tony Ketter & 5 others [2013] eKLR*).'

9. In *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR*, the Court distilled the principles as follows:
 - i) In dealing with Rule 5(2)(b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 Others v Nderitu & Another (1989) KLR 459*.



- ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
- iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin (1963) Ltd (1990) KLR 365*.
- iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni, Civil Application No Nai 189 of 2001*.
- v. An applicant must satisfy the court on both of the twin principles.
- vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No Nai 345 of 2004*.
- vii. 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. *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd & 2 others, Civil Application No 124 of 2008.*
 - 1. Before we consider the twin principles of arguability and the nugatory aspect, the applicant must establish jurisdiction by demonstrating that he has brought himself within the jurisdiction of this Court by filing a notice of appeal. In this regard although the applicant has exhibited a draft memorandum of appeal, the applicant has not exhibited any notice of appeal nor is there any evidence that a notice of appeal has been filed, nor has the applicant availed a copy of the judgment intended to be appealed against.
 - 2. As was stated by this Court in *Halai & Another vs Thornton & Turpin (1963) Ltd [1990] KLR 365*, and *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others (supra)*, the jurisdiction of this Court under Rule 5(2)(b) of the Court of Appeal Rules is activated by the filing of an appeal, which is initiated through lodging of a notice of appeal. Without a notice of appeal being filed, there is no appeal before us upon which the orders sought can be anchored, nor can the issue of arguability of a non-existent appeal arise.
- 12. This means that the applicant's motion is incompetent, and we can do no more than strike it out and down our tools. Accordingly, the notice of motion dated August 25, 2021 is struck out. We award costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

J. MATIVO

.....



JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

