



**Ontweka & 3 others v Onderi (Civil Application E332 of 2023)
[2023] KECA 1032 (KLR) (4 August 2023) (Ruling)**

Neutral citation: [2023] KECA 1032 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E332 OF 2023
HA OMONDI, JM MATIVO & PM GACHOKA, JJA
AUGUST 4, 2023**

BETWEEN

**JOSEPH ONTWEKA 1ST APPELLANT
ELISHA ONTWEKA 2ND APPELLANT
STANLEY ONTWEKA 3RD APPELLANT
DAVID ONTWEKA 4TH APPELLANT**

AND

ZIPPORAH MASESE ONDERI RESPONDENT

(An application for stay of execution under rule 5(2) (b) of the Court of Appeal Rules pending appeal from the Judgement and Decree of the High Court of Kenya at Nairobi (Ogola, J.) dated on 5th July 2023 in H.C.F.A. No. E048 of 2023)

RULING

1. Before us is a notice of motion dated July 19, 2023 brought under Rule 5(2) (b) of this Court’s Rule, 2022, in which the applicants pray for stay of execution of the judgment and decree of the High Court (Ogola, J) dated July 5, 2023 pending the hearing and determination of this application and the intended appeal.
2. The motion is supported by grounds on its body and the supporting affidavit of David Ontweka (the 4th applicant) sworn on July 19, 2023 together with the annexures thereto. It has been opposed by the respondent vide a replying affidavit dated July 24, 2023. It was canvassed through rival pleadings, written submissions and legal authorities relied upon by advocates for the respective parties in support of their opposing positions. At the hearing of the motion on August 1, 2023, both parties elected to both rely on their respective filed submissions and made oral highlights.



3. Briefly, on May 2, 2023, the respondent aggrieved by the applicants' decision to bury her husband (late Naftali Onderi Ontweka) in Kisii, Bomachoge Borabu Constituency instead of Kamulu, Machakos County where they had established their matrimonial home and lived till his demise moved the lower court in Civil Suit No E1878 of 2023 seeking permanent injunction to restrain them jointly and severally either by themselves, their agents, servants, employees and or any other person working under their instructions from interfering, removing, interring, burying, and transferring her husband's remains from Lee funeral home. The applicants who are the deceased's siblings opposed the suit and even filed a Counter-Claim dated May 5, 2023 seeking orders to have the body released to them for burial at Kiago, in Bomachoge Borabu which they claimed was the matrimonial home of the respondent and where the deceased had a permanent home.
4. The suit was expedited and on June 5, 2023, judgment was delivered dismissing the respondent's suit while allowing the applicants' Counter-Claim as prayed. Dissatisfied by the lower court's finding, the respondent filed HCFA/EO48 OF 2023 seeking to set-aside the impugned judgment and for orders that she proceeds to bury the deceased at the Kamulu land LR Mavoko Town Block 12/221. The appeal was canvassed by way of written submissions and vide judgment delivered on July 5, 2023, the High Court set-aside the decision of the lower court and held that the respondent had the right to bury her deceased husband.
5. The applicants herein aggrieved by the High Court decision desire to appeal to this Court. On July 5, 2023, the applicants' counsel requested for certified copies of proceedings and judgment and on July 6, 2023, a notice of appeal was filed against the whole judgment.
6. In demonstrating that their appeal is arguable, Mr Mogeni learned counsel for the applicants submitted that the dispute in this suit is whether the deceased should be buried in Kamulu or in Kiago. Counsel argued that the issue for determination is not who has the right to bury the deceased, since that is absolutely the respondent's right. However, the place of burial of the deceased who was a prominent member of the Gusii community and according to his wishes was in Kiago, as evidenced in his actions of building a permanent house in Kiago in accordance to the Gusii customs. Further, the deceased was the chairman of the Mogunde family and he was even crowned as a Gusii elder, and given blessings to contest for Bomachoge Borabu Constituency in 2022. Counsel also submitted that there is no evidence that the deceased's wishes were for him to be buried in Kamulu. Therefore, it is in public interest and in the interest of justice for the deceased to be buried in accordance to the Gusii community customs and not as per the wishes of his nuclear family as was held by the High Court.
7. As to whether the appeal will be rendered nugatory in the absence of stay, the applicants' counsel argued that their larger Mogunde family having prepared for the burial stand to suffer substantial pain, loss and anguish if the orders sought are not granted. Further, the respondent will proceed to bury their brother rendering their intended appeal an academic exercise.
8. In opposition to the application, Mr Manyara learned counsel for the respondent maintained that the applicant's appeal was frivolous since in the affidavit in support of their application they only state that their appeal is arguable with high chances of success and they have not demonstrated and or exhibited any ground that they intend to rely on. To buttress his submission counsel cited the dictum in *Pricilla Wambui Mathenge vs. Mary Wairimu Mathenge* [2020] eKLR where this Court held that it is not enough for the applicant to just state that she was dissatisfied with the impugned ruling without attaching a draft memorandum of appeal or setting out the grounds in the affidavit. It is also counsel's submission that the applicant's appeal being a second appeal, the applicants have not demonstrated what matter of law they intend to argue on appeal.



9. It is also counsel's submission that the intended appeal would not be rendered nugatory since the applicants have not proved their allegations. However, the respondent maintained that the delay in burying her husband has caused her psychological and mental anguish. Counsel maintained that the respondent stands to suffer prejudice since the morgue charges continue to accumulate, yet the applicants are free to participate in burial of the deceased at Kamulu, and they will suffer no prejudice at all because if their intended appeal succeeds, the body of the deceased can be exhumed, and thereafter interred at *Kiigo. Counsel relied on Norah Adongo Onyango & another vs. Jane Awino Onyango* [2018] eKLR.
10. In rejoinder, Mr. Mogeni argued that exhumation is a taboo in Kisii customary law and consequently preserving the status quo is the way to go.
11. Our invitation to intervene on behalf of the applicants has been invoked under rule 5(2) (b) of the Court of Appeal Rules which provides:
 - (2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may-
 - (b) In any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.
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 settled. (See *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR). These require an applicant seeking relief premised on the above Rule to demonstrate that the appeal or the intended appeal is arguable and second, that the appeal will be rendered nugatory should it ultimately succeed after the substratum of the appeal is no more or out of reach of the successful appellant.
13. 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 applicants to warrant ventilation before this Court on appeal. In *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others* (*supra*) this Court described an arguable appeal in the following terms:
 - “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.
 - viii). 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.”
14. It is the applicants' case that the dispute is whether the deceased should be buried in Kisii or in Kamulu. It is evident that no draft Memorandum of Appeal was annexed by the applicants and according to the respondent the applicants have failed to demonstrate an arguable appeal with chances of success by demonstrating the same in their supporting affidavit and by annexing a memorandum of appeal. In the case of *Somak Travels Limited vs. Gladys Aganyo* (2016) eKLR this Court held as follows; -
 - “While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on



the face of the application. That is the case in this application. The applicant set out what it considers to be arguable points that it intends to raise during the appeal and addressed at length on the same. This is sufficient to demonstrate its grievances against the orders that it seeks to be reversed.”

15. We note that other than stating the dispute to be considered in their intended appeal in their affidavit, the applicants have at length in their submission elucidated why they believe the deceased should be buried in Kisii and not in Kamulu. Consequently, our take on the same is that in law an arguable appeal is not one which must necessarily succeed, but one which is not frivolous but raises a bona fide issue that can be argued fully before the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
16. Turning to the second prerequisite, whether the appeal, if successful, would be rendered nugatory in the event we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang’ethe Kinyanjui vs. Tony Ketter & 5 Others (supra)* this Court stated that:
 - “ ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - x). Whether or not an appeal will be rendered nugatory 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.”
17. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits. It is uncontroverted evidence that the body of the deceased has been lying at the Lee Funeral Home since April 20, 2023. The mortuary charges for preserving the body continue to accrue daily at the rate of Kshs 4,000/= . As at June 12, 2023 the mortuary charges were Kshs 391,000 as per the invoice produced by the respondent vide replying affidavit sworn on June 12, 2023.
18. We appreciate the concern raised by the respondent on the escalating mortuary fees. We also appreciate the fact that the applicants have not been precluded from participating in the burial ceremony to be conducted at Kamulu. We also note that should the appeal succeed, nothing prevents the Court from giving an order to exhume the body and inter it at Kiago in Bomachoge Borabu Constituency. However, the Court should also consider the peculiar circumstances of each case. While this option of exhuming the deceased’s remains is available, in our considered view, it would be more prudent to await the outcome of the appeal rather than subject the family to the process of exhuming and reburying the body.
19. For the above reasons, we are satisfied that the applicants have satisfied the two prerequisites for granting an order of stay of execution. However, owing to the nature of the case, it is our view that the interests of justice will best be served by expediting the intended appeal. Accordingly, we hereby issue the following orders:
 - a. That an order be and is hereby issued staying the execution of the judgment, decree and all the consequential orders issued in in HCFA/E048 of 2023 pending the filing, hearing and determination of the applicants’ intended appeal against the said judgment.
 - b. The applicant is hereby directed to file and serve their intended appeal together with their written submissions and a list of authorities within 30 days from today in default, the stay herein above granted shall lapse and execution of the said decree shall proceed.



- c. Upon being served with the record of appeal and the appellant's submissions, the respondent shall be required to file their submissions within 15 days from the date of service.
- d. The appeal shall be listed for hearing on priority basis in new term.
- e. The costs of this application shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST, 2023.

H. A. OMONDI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA – CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

