



**Manyara v Manyara & another (Civil Appeal (Application)  
E145 of 2021) [2023] KECA 1245 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1245 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL (APPLICATION) E145 OF 2021  
J MOHAMMED, F TUIYOTT & JM NGUGI, JJA  
OCTOBER 6, 2023**

**BETWEEN**

**DAVID KOMBO MANYARA ..... APPELLANT**

**AND**

**RAEL NYABOKE MANYARA ..... 1<sup>ST</sup> RESPONDENT**

**ANDREW BARONGO MANYARA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for stay of execution pending the hearing and  
determination of the appeal against the judgment of the High Court at Nyamira  
(Maina, J.) dated 4th March, 2021 in H.C. SUCC. CAUSE NO. 213 OF 2015)*

**RULING**

1. The Application before the court is dated October 3, 2022, and is predicated on Sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#) and Rules 5(2)(b), 43 and 44 of the [Court of Appeal Rules, 2022](#). It seeks the following orders:
  1. That this application be certified urgent and be heard ex-parte in the first instance.
  2. That pending the hearing and determination of this application inter-parties, this Honourable Court be pleased to grant a stay of execution.
  3. That pending the hearing and determination of the appeal herein, this Honourable Court be pleased to grant a stay of execution.
  4. That the costs of this application be provided for.
2. The Application is supported by grounds on its body and a supporting affidavit of David Kombo Manyara, the appellant, sworn on October 3, 2022, together with annexures thereto. They narrate that the appellant and the 2<sup>nd</sup> respondent herein and some of the co-administrators were dissatisfied



with the judgment of the High Court in which a certificate of confirmation of grant was issued that included the 1<sup>st</sup> respondent herein as one of the administrators of the deceased's estate. Additionally, they were dissatisfied with the mode of distribution ordered by the High Court, and the appellant and 2<sup>nd</sup> respondent filed respective appeals, that is the instant appeal and *Andrew Barongo Manyara v Rael Nyaboke Manyara & Another*, Kisumu Court of Appeal, Civil Appeal No E146 of 2021.

3. The appellant states that on November 10, 2021, the 1<sup>st</sup> respondent filed an application which is still pending at the High Court seeking the following orders:
  1. That the High Court do authorize the Deputy Registrar to sign all the application documents for transfer on behalf of all beneficiaries, to effect the execution of the grant of letters of administration intestate made to the administrators of the estate and confirmed on March 4, 2021.
  2. That the High Court do authorize the 1<sup>st</sup> respondent herein to appoint a surveyor to prepare a comprehensive report on the subdivision and distribution of the estate of the deceased to give effect to the judgment and certificate of confirmation of grant dated March 4, 2021.
4. Upon realization of the 1<sup>st</sup> respondent's application (for execution), the appellant and the 2<sup>nd</sup> respondent herein filed an application on January 21, 2022, at the High Court seeking a stay of execution of the judgment. The application was canvassed by way of written submissions and on September 19, 2022, the superior court delivered a ruling and directed that the application for stay of execution be pursued in this Court. The High Court also granted a limited stay of fourteen (14) days within which the appellant and the 2<sup>nd</sup> respondent ought to have filed a formal application to this Court. Thus, the High Court substantively declined to adjudicate on the merits of the stay application.
5. The applicant urges that if the 1<sup>st</sup> respondent's application for execution at the High Court proceeds and is allowed and instruments for the transmission signed and/or the property distributed, then the appeals before this court will be rendered nugatory.
6. The applicant argues that the 1<sup>st</sup> respondent will not suffer any prejudice if the stay orders are granted as she is living in a parcel of land forming part of the deceased's estate, which she is cultivating and she also has a shop built in another land forming part of the deceased's estate. He also argues that he and other beneficiaries were settled in the deceased's estate's properties long before the deceased passed on and have constructed permanent homes, to the extent that they will be devastatingly affected by the mode of distribution ordered by the High Court.
7. The applicant argues that this Application has been brought without unreasonable delay and unless the orders sought are granted expeditiously, he and other beneficiaries to the deceased's estate stand to suffer irreparable or substantial loss and damage. Lastly, the applicant argues that implementation of the High Court judgment will deny them the opportunity to exhaustively deal with the issue of intermeddling of the estate by the 1<sup>st</sup> respondent, which resulted in a stranger obtaining possession of a portion of the deceased's estate.
8. The Application is opposed through a Replying Affidavit of Rael Nyaboke Manyara, the 1<sup>st</sup> respondent, dated November 23, 2022. She states that the instant application is incompetent and bad in law as there are no sufficient grounds or justification to allow for the orders sought.
9. The 1<sup>st</sup> respondent urges that the appeal lodged is frivolous and does not raise any arguable points. She avers that during trial, the applicant did not offer any or a better mode of distribution and the grounds of appeal on the mode of distribution are an afterthought.



10. The 1<sup>st</sup> respondent also argues that that appellant and all dependents of the deceased estate were fully involved from the citation of objections, hearing and execution through being served with relevant papers, notices and documents, contrary to the allegations contained in the appellant’s supporting affidavit.
11. During the virtual hearing of the Application, Learned Counsel, Ms. Njoki, appeared for the applicant and Learned Counsel, Mr Ombachi, appeared for the 1<sup>st</sup> respondent. Both parties had filed written submissions.
12. During the plenary hearing, the Court noted that the instant Application and the Application in *Andrew Barongo Manyara v Rael Nyaboke Manyara & Another*, Kisumu Court of Appeal, Civil Appeal No E146 of 2021 arose from the same judgment and sought exactly the same orders. The opposing party, the 1<sup>st</sup> respondent, is the same in both applications. Therefore, the Court directed that both Applications be heard contemporaneously. The bench engaged the Counsel present, given the nature of the dispute, if they would consent to an order for defined status quo to preserve the subject matter for appeal. However, Mr Ombachi, Learned Counsel for the 1<sup>st</sup> Respondent in both Applications, dropped off from the virtual session. Later attempts by both Ms. Njoki and the Court registry staff to get him to rejoin the session were not fruitful. Since the 1<sup>st</sup> respondent had filed a replying affidavit and submissions in each of the two applications, the Court resolved to consider the applications and written submissions and write a ruling.
13. The Application is essentially brought under Rule 5(2)(b) of the *Court of Appeal Rules*. The rule provides as follows:
  - 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 75, order a stay of execution, an injunction or stay of any further proceedings on such terms as the Court may think just.
14. Our jurisprudence has stably shown that this rule donates to the Court original and discretionary jurisdiction to preserve the substratum of an appeal or intended appeal before the Court. In *Stanley Kang’ethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR, this Court distilled a comprehensive list of principles which it termed the “common vein” that govern the exercise of the Court’s discretion in Rule 5(2)(b) 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 bona fide 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.
  - 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. *Damji Pragji (supra)*.
    - ii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
    - iii. 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.
    - iv Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”
15. In this majestic restatement, the Court retained the crucible for the exercise of the Court’s discretion as satisfying the twin principles: demonstration that the appeal is arguable; and a demonstration that the appeal would be rendered nugatory but for the prayed-for relief of stay or injunction.
16. On the first principle, whether the appeal is arguable, we have to consider whether the appeal, as filed, raises at least a single bona fide arguable point noting, as the Court defined it in the *Stanley Kang’ethe Kinyanjui Case* (supra), that an arguable appeal is not one with a high probability of succeeding; it is, instead, one which ought to be argued fully before the Court. Differently put, an arguable appeal is one which is not frivolous.
17. Is the appeal preferred before the Court frivolous? We simply do not think so. The applicant has listed sixteen (16) grounds of appeal. Most of the sixteen grounds pivot from the argument that the Learned Trial Judge was biased and exhibited open hostility towards the Applicant; and that her decisions are demonstrably biased. Further grounds argue that the Learned Judge was simply wrong in applying the *Law of Succession Act* to the facts of the case – including in her determination of who the appropriate administrators to the estate were – and in the substantive distribution of the estate. This being a first appeal, these legal and factual questions cannot be said, by any stretch of interpretation, to be frivolous.



18. Turning to the second limb, has the Applicant succeeded in demonstrating that the appeal will be rendered nugatory if stay is not granted. As this Court held in Stanley Kang'ethe Kinyanjui Case (supra), the term “nugatory” has to be given its full meaning.

It does not only mean worthless, futile or invalid. It also means trifling.”

19. The subject matter of the appeal is a succession matter. The High Court gave a judgment in which it appointed administrators; and made far reaching decisions on the distribution of the estate of the Deceased. Most of the assets of the estate are landed properties. Execution of the judgment would mean, as the Application by the 1<sup>st</sup> Respondent to the High Court makes clear, the appointment of a surveyor; preparation of survey maps; and ultimate subdivision of the land belonging to the estate in accordance with the judgment of the High Court.

20. Aside from the sunk costs of such an undertaking before the outcome of an appeal, there is the possibility that once subdivision has occurred some beneficiaries may have to relocate. Yet it is on record that some beneficiaries were settled on their parcels long before the Deceased passed on and have constructed permanent homes. Additionally, once new titles are issued, the land might find its way into the hands of third parties. Indeed, it requires no belaboured analysis to see that the preferred appeal would be eminently rendered nugatory if status quo is not maintained until it is heard and determined.

21. In the result, we find that the appellant has easily satisfied the twin requirements of Rule 5(2)(b) of the Court of Appeal Rules. The upshot is that the application is merited and it is hereby allowed as prayed with the effect that the judgment and certificate of confirmation of grant both dated March 4, 2021 are stayed until the appeal is heard and determined.

22. The orders in this matter shall apply mutatis mutandis in Civil Application No E146 of 2021.

**DATED AND DELIVERED AT KISUMU THIS 6TH DAY OF OCTOBER, 2023**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

