



**Yockbag v Wettstein & 2 others (Civil Application E063 of 2023)
[2023] KECA 1189 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1189 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E063 OF 2023
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
OCTOBER 6, 2023**

BETWEEN

JEANNE NGO YOCKBAG APPLICANT

AND

URS WETTSTEIN 1ST RESPONDENT

SOPHIE SCHMITT 2ND RESPONDENT

ANDREAS WETTSTEIN 3RD RESPONDENT

(An application for Injunction under Rule 5 (2) (b) of the Court of Appeal Rules pending the filing, hearing and determining of an appeal from the entire Ruling and Order of the High Court at Mombasa (Gregory Mutai J.) delivered on 15th June 2023 in Mombasa Succession Cause No. E69 of 2022)

RULING

1. This notice of motion dated July 18, 2023 is expressed to be brought under rule 5(2)(b) of the [Court of Appeal Rules](#) and it seeks that pending the hearing and determination of the applicant's appeal, this court be pleased to restrain the respondents from interfering with the applicant's occupation and use of Kwale/Msambweni 'A'/1329, Kwale/Msambweni 'A'/1350, Kwale/Msambweni 'A'/3370, Kwale/Msambweni 'A'/3371, Kwale/Msambweni 'A'/3515, Kwale/Msambweni 'A'/3575, Kwale/Msambweni 'A'/1352, Kwale/Msambweni 'A'/3107, Kwale/Msambweni 'A'/3108, Kwale/Msambweni 'A'/2950, Kwale/Msambweni 'A'/3109, Kwale/Msambweni 'A'/3110 and Kwale/Msambweni 'A'/3353.
2. The application is supported by an affidavit sworn by Jeanne Ngo Yockbag, the applicant herein sworn on July 18, 2023. This dispute revolves around the Estate of Manfred Walter Schmitt (deceased), who died on December 27, 2017. Following his death, the 1st respondent petitioned for grant of letters of administration intestate while the applicant objected to the same on the ground that the deceased left



a will. The applicant also petitioned for grant of letters of administration ad litem. The applicant's petition for grant of letters of administration ad litem was however dismissed by the High Court by its ruling dated June 23, 2023 on the ground that the issues raised therein could be properly canvassed and ventilated in the main petition and in the objection.

3. According to the applicant, the deceased was both her life and business partner; that some of their joint ventures they had included companies known as Blackhornbill Ltd (BHB) and Moringa for Life EPZ (MFL); that in his Will, the deceased had named the 1st respondent as his executor while the applicant was named as one of the deceased's beneficiaries; that apart from intermeddling in the deceased's estate by the respondents, the 1st respondent, instead of securing the deceased's assets asserted that he is the sole beneficiary of the assets of the estate.
4. According to the applicant, though the ownership of the shareholding in BHB is contested and is pending determination, in the ruling dismissing the said applicant's petition, the High Court also discharged the status quo order that had been issued during the pendency of the proceedings. Aggrieved by this order, the applicant filed a notice of appeal dated June 29, 2023 and based thereon made the present application. The applicant's grievance stems from the fact that without determining what constituted the assets of the estate the learned judge proceeded to discharge the status quo orders that directed the firm of Aboo and Co Advocates, who was on record for the 1st respondent, not to release the title deeds in its possession.
5. By that ruling, it was contended that the said firm is at liberty to release the said titles to the 1st respondent; that should this happen, the applicant's intended appeal will be rendered nugatory as the respondents who neither reside nor have any interests in Kenya would then be at liberty to dispose of the said properties to third parties; that a change in the status quo, and particularly the release of the said title deeds would make it possible for the sale and dissipation of the assets of BHB; that the dissipation of the said assets would not only dilute the value of the shareholding in BHB, but would render both the intended appeal and the pending proceedings moot or academic; that applicant is in occupation and use of Kwale/ Msambweni 'A'/1329, 1350, 3370, 3371, 3515, 3575, 1352, 3107, 3108, 2950, 3109, 3110 and 3353; that together with the deceased, the applicant set up an EPZ license organic farm and moringa plantation and the delicate ecosystem of an organic farm is in danger of being interfered with; and that in the event the farm and the factory are interfered with, the company will lose its EPZ licencing status which will be irreparable given the hard work and resources that the deceased and the applicant invested in the property and business.
6. In response to the application the respondent relied on the replying affidavit sworn by Urrs Wettstein, the 1st respondent on August 2, 2023. According to him, the order sought to be stayed, to the extent that it directed that "the status quo orders currently subsisting directing Aboo & Co not to release the title deeds in its possession are hereby discharged', is incapable of being stayed; and that no substantive appeal has been filed as what the applicant has filed is only a notice of appeal; that any intended appeal would be frivolous and would serve known purpose for the reasons that the applicant is not a spouse as the same is contested and is not a beneficiary to the estate of the deceased nor was she the deceased's dependent at the time of his death; that the deceased did not leave a valid Kenyan will; and that the properties owned by Black Hornbill Limited were not owned by the deceased.
7. According to the respondents, there is no imminent danger of the intended appeal being rendered nugatory since the applicant has not demonstrated any peril arising from BHB running its own affairs as it deems appropriate under the law including by safeguarding its title deeds; and that presently there is no intention to sell any part of the said company's assets to third parties and that in the event of sale, the applicant as a minority shareholder has a remedy under part xi of the Companies Act [No 17 of 2015] to challenge such disposal.



8. The foregoing averments were reiterated by learned counsel for the applicant, Mr Philip Murgor, SC who appeared with Mr George Ouma and learned counsel for the respondents, Ms Wairimu Kinyanjui who appeared with Mr Zeus Mitto at the hearing which was conducted via this court’s virtual platform on August 10, 2023.

Analysis And Determination

9. We have considered the application, the affidavits both in support of and in opposition to the application, the submissions made and the authorities cited.
10. There are two requirements that need to be met by the applicant herein, so as to obtain the relief sought in this application. The first requirement is that the applicants need to demonstrate that she has an arguable appeal, and second that the said appeal will be rendered nugatory if the order sought is not granted. See [Stanley Kangethe Kinyanjui v Tony Ketter & 5 others](#) [2013] eKLR.
11. In urging us to dismiss the application the respondents submitted that since no appeal has been filed, this court has no jurisdiction to grant the orders sought herein, notwithstanding the fact that the notice of appeal has been filed. With due respect to the respondents, this court’s jurisdiction is invoked by either the filing of an appeal or notice of appeal. This comes out clearly from rule 5(2)(b) of the rules of this court which provides that:
- (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—
 - (a)
 - (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.
- See also [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another](#) [2006] eKLR.
12. It was further contended that since the learned judge in dismissing the applicant’s petition did not make a positive order capable of being stayed. In this case, however, the learned judge did not stop at dismissing the applicant’s petition for limited grant *ad litem*, but proceeded to discharge the order of status quo that had been granted during the pendency of the proceedings. In any case, what is being sought before us are orders of injunction pending an intended appeal and not stay of execution pending an intended appeal. The distinction between the two was made in [Joyce Mutethya Kimantbi v Timothy Kimanzi Kiiva and others](#), Nai civil application No E321 of 2021 in which this court delivered itself thus:

“Applying the above principles to the rival positions herein, it is our position that considering the nature of the circumstances surrounding the litigation giving rise to the intended appeal, it is not only fair and just that the applicant be accorded an opportunity to be heard on her intended appeal but also that the suit properties be preserved pending hearing of the intended appeal.

The above conclusion now leads us to determine which of the two substantive prayers that is stay and injunction is the appropriate relief for us to grant herein. As correctly contended by the respondents, what the High Court issued as the final order is a negative order. It is now trite that a negative order is incapable of being stayed. See [Nairobi Metropolitan PSV Saccos Union Limited and Twenty Five others v County of Nairobi Government and three](#)



others [2014] eKLR for the proposition that there is no jurisdiction to grant a relief under rule 5(2)(b) of this Courts Rules where the High Court's order either resulted in a dismissal or a striking out order; or alternatively where the court did not order either party to do or refrain from doing something capable of being restrained.

The above being the correct position in law, it is our position that it is only the injunction relief that can issue herein as an appropriate relief.”

13. We have considered the intended grounds of appeal particularly the allegation that the learned judge failed to take into account relevant matters including the relevant statutory provisions and instead took into account irrelevant ones. We find that the said grounds are arguable. We are in this regard mindful that an arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the court. This court in this regard held as follows in *Somak Travels Ltd v Gladys Aganyo* [2016] eKLR.

“It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this court. 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.”

See *Stanley Kang'ethe v Tony Keter & 5 others* [2013]eKLR.

14. The respondents have raised matters which, in yheir view, I Wasike & another [2006] eKLR;

“It is to be rememberd taht in an application such as this out to the court the ground or grounds which he believes are arguable and leave it to the court to decide on the issue of whether or not the matters raised are arguable.”

15. On the second limb of whether the applicant's appeal will be rendered nugatory if the orders sought are not granted and the appeal succeeds, we are guided by the decision in *Stanley Kangethe Kinyanjui v Tonny Keter & others*, supra where the court summarized what should guide the court as follows:

- i. “The term ‘nugatory’ has to be given its full meaning. It does only mean worthless, futile or invalid. It also means trifling.
- ii. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

16. The applicant's contention that the 1st respondent has taken the position that he is the sole beneficiary of the deceased's estate as well as the allegation that the respondents are wasting the estate persuades us that unless conservatory orders are made, the likelihood of the properties the subject of this application being disposed of cannot be ruled out particularly as it is alleged that the respondents do not reside in Kenya and have no other interests in Kenya.

17. Since the respondents' position is that they do not intends to dispose of the subject properties, this court, in exercising its discretion under rule 5(2)(b) of the rules of this court, ought to take into account the overriding objective in sections 3A and 3B of the *Appellate Jurisdiction Act* and in so doing consider the principle of proportionality. To our mind, it would be prudent to maintain the status quo as the hearing and determination of the intended appeal is awaited.



18. In the premises, we find merit in the notice of motion dated July 18, 2023. We direct that the status quo in respect of land parcel Nos Kwale/Msambweni 'Á'/1329, Kwale/Msambweni 'Á'/1350, Kwale/Msambweni 'Á'/3370, Kwale/Msambweni 'Á'/3371, Kwale/Msambweni 'Á'/3515, Kwale/Msambweni 'Á'/3575, Kwale/Msambweni 'Á'/1352, Kwale/Msambweni 'Á'/3107, Kwale/Msambweni 'Á'/3108, Kwale/Msambweni 'Á'/2950, Kwale/Msambweni 'Á'/3109, Kwale/Msambweni 'Á'/3110 and Kwale/Msambweni 'Á'/3353 be maintained and that the title documents in respect thereof do remain in possession of the firm of Aboo and Co Advocates pending the hearing and determination of the intended appeal against the ruling delivered on June 23, 2023 in Mombasa succession cause No E69 of 2022.

19. The costs of this application will be in the intended appeal.

20. Orders accordingly.

DATED AND DELIVERD AT MOMBASA THIS 6TH DAY OF OCTOBER, 2023.

S.GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

P. NYAWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUGE OF APPEAL

I certify that this is the true copy of the original

DEPUTY REGISTRAR

