



**Kamatta & another v Kamatta & another (Civil Appeal (Application)
E733 of 2022) [2023] KECA 1419 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1419 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E733 OF 2022
DK MUSINGA, HA OMONDI & GWN MACHARIA, JJA
NOVEMBER 24, 2023**

BETWEEN

JOSEPH MUTHAA KAMATTA 1ST APPLICANT

SERAPHINE NYAMBURA KINGORI 2ND APPLICANT

AND

MALVEC KAMATTA 1ST RESPONDENT

MICHELLE KAMATTA 2ND RESPONDENT

*(An appeal from the judgment and decree of the High Court of Kenya at Kajiado
(Mutuku, J.) dated 22nd September 2022 in Succession Cause No. 42 of 2019)*

RULING

1. The Notice of Motion dated October 17, 2022, and supported by the affidavit of Joseph Muthaa Kamatta of even date, is made pursuant to rule 5(2) (b) of the *Court of Appeal Rules*, and seeks that pending the hearing and determination of the appeal, there be a stay of execution of the orders of September 22, 2022 in Succession Cause No. 42 of 2019.
2. The application is opposed through the replying affidavit sworn by Michelle Kamatta, the respondent, dated November 25, 2022.
3. The genesis of this matter was sparked by the death of Kamatta Muthaa, who died intestate on April 22, 2019, whereupon the respondents petitioned for, and obtained, grant of letters of administration, indicating that he was survived by the 1st respondent as the wife, and his sons Malvec Kamatta and Micah Kamatta, as administrators. When they sought confirmation of the grant, Joseph Muthaa Kamatta, the 1st applicant, and his mother Seraphine Nyambura Kingori, raised an objection through a summons for revocation of the grant, claiming that the grant had been fraudulently obtained through



- concealment that they had beneficial interest in the estate as first wife and son respectively; and concealment from the court of some of the deceased's properties.
4. The 1st respondent described herself as the sole legal wife of the deceased whom she got married to on August 17, 1982 at Dayton Ohio, in the United States of America, and were blessed with two children; and that all the assets in the deceased's name were jointly acquired during the subsistence of their marriage, and that although they hold American passports, they are not in a hurry to dispose of and or waste the estate of the deceased.
 5. The 2nd applicant insisted that she was the deceased's first wife, having married him under Kikuyu customary law in 1973, and had the 1st applicant as their 1st born son in 1978, before he went to the USA. Her contention was that the deceased was survived by two widows, and three sons.
 6. The High Court delivered judgment, dismissing the applicant's summons for revocation of the grant and affidavit of protest, and confirming the grant of letters of administration as per the respondents' summons for confirmation of grant; it held that what was touted as a marriage did not meet the Kikuyu customary threshold, and the birth certificate relied on, to demonstrate that the 1st applicant was a son to the deceased was obtained when the 1st applicant was over 18 years. The upshot of the judgment was that the applicants are not dependents of the deceased, thus they were not entitled to the estate.
 7. Being aggrieved by that judgment, the applicants preferred an appeal to this Court. They contend that the appeal is arguable, and unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. On the limb of arguability, it was submitted that the trial court's finding was made despite the applicants' concrete evidence vide birth certificate, passport, photographs and testimony by the 2nd applicant (who is the 1st applicant's mother), that she was married to the deceased under Kikuyu customary law in 1973 before the deceased went to the United States of America (USA) and married the 1st respondent.
 8. Further, that the trial court questioned the authenticity of the 1st applicant's birth certificate saying the same was a copy but in the same breath did not question the 1st respondent's marriage certificate which was a copy and not an original; that the 2nd respondent never produced his birth certificate to prove paternity; that, the trial court failed to appreciate the fact that customary marriages back then were conducted in various ways and were valid despite there being no document to prove the same; that the respondents, being American nationals, may alienate all the deceased properties to the applicants' detriment, yet they are rightful beneficiaries of the deceased.
 9. On nugatory limb, the applicants submitted that unless the orders sought are granted, the appeal will be rendered nugatory because the respondents have already filed an affidavit for the court to adopt the distribution schedule allocating all the deceased's assets to them, which will completely disinherit the applicants.
 10. In response, the respondents argued that the applicants have neither demonstrated that the intended appeal is arguable, nor have they shown that their appeal will be rendered nugatory if the orders sought are not granted; that the applicants did not sufficiently or on a balance of probabilities demonstrate to the trial court the existence of a matrimonial or dependency relationship between them and the deceased to enable to consider them as beneficiaries of the estate; that the grant has already been confirmed, and that it will not benefit the deceased's estate or beneficiaries to stay the distribution process; and that the applicants have not demonstrated that in the event the appeal succeeds they will not be capable of being compensated in damages.
 11. The basis for our intervention on behalf of the applicant has been invoked under rule 5(2) (b) of the [Court of Appeal Rules, 2022](#), which provides:



(2)

(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. In *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR, this Court, differently constituted, aptly articulated the principles that guide it in the discharge of its mandate under the above rule, that: an applicant must demonstrate that the appeal or the intended appeal is arguable and secondly, 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 whether the appeal is arguable, we bear in mind, that the jurisdiction exercised is discretionary. In *Stanley Kangethe Kinyanjui vs. Tony Keter & 5 Others* (*supra*), the Court stated as follows:
- “in dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the Judge’s discretion to this Court. The first issue for consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground is not one which must succeed but should be one that is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”
14. The Supreme Court in *Teachers Service Commission vs. Kenya National Union of Teachers*, Sup. Ct. Appl. No. 16 of 2015 considered the nature and scope of rule 5(2) (b) as follows:
- “it is clear to us that Rule 5(2) (b) is essentially a tool for preservation. It safeguards the substratum of the appeal, if invoked by an intending appellant, in consonance with principles developed by that court over years...Rule 5(2)(b) of is derived from section 163 of the *Constitution*. It illuminates the Court of Appeal’s inherent jurisdiction to preserve the substratum of an appeal or intended appeal.”
15. Having perused the proposed grounds of appeal, we entertain no doubt hat the appeal is arguable. Some of the arguable issues are whether the alleged relationship between the deceased and the 2nd applicant created a marriage; whether late procurement of a birth certificate would render the paternity unauthentic; and whether the conduct between the 1st applicant and the deceased, especially the cards and photographs would account for anything towards the applicants’ claim to be beneficiaries entitled to the deceased’s estate.
16. Will the appeal be rendered nugatory should the injunction not be granted? 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*, [53 of 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, there are instances when the Court is called upon to decide which party’s hardship is greater. With that in mind, we take note that the grant of letters of administration has been issued and confirmed, and the deceased’s estate shall be distributed to the respondents. That will definitely render the appeal nugatory, if it is successful.

19. We are satisfied that the applicant has demonstrated that it will be near impossible for her to be compensated in damages should the intended appeal be successful. This Court in Mukuma vs. Abuoga [1988] KLR 645 held:

“the discretion of the Court of Appeal under Rule 5(2) (b) is at large but the issue of substantial loss is the corner stone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render it nugatory.”

20. The applicants have satisfactorily demonstrated the existence of both limbs as required by rule 5 (2) (b). The upshot is that we grant the orders of stay of execution sought for in the application dated February 16, 2023 pending the hearing and determination of the appeal. Costs shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

G. W. NGENYE – MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

