



Waita (also known as) Linda Wanjiku Muthandi v Waita & another (Civil Appeal (Application) E032 of 2023) [2023] KECA 1319 (KLR) (10 November 2023) (Ruling)

Neutral citation: [2023] KECA 1319 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E032 OF 2023
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
NOVEMBER 10, 2023**

BETWEEN

**LINDA CHAO WAITA (ALSO KNOWN AS) LINDA WANJIKU
MUTHANDI APPLICANT**

AND

EDITH WANGARI WAITA 1ST RESPONDENT

AGNES WAMAITHA 2ND RESPONDENT

(Being an application for stay of the Ruling of Mombasa High Court (J. N. Onyiego, J.) delivered on 17th November 2022 in Succession Cause no 76 of 2012)

RULING

1. The Applicant, Linda Chao Waita aka Linda Wanjiku Muthandi, has brought this Notice of Motion application pursuant to Sections 3, 3A and 38 of the [Appellate Jurisdiction Act](#) Cap. 9 Laws, of Kenya. and Rules 5(2) (b), 44 and 106 of the [Court of Appeal Rules](#), (hereinafter Rules). She seeks the following orders:
 1. Moot.
 2. Moot.
 3. That pending hearing and determination of this Appeal an Order of stay of the Order/Ruling of Hon Justice L. N. Onyiego given at Mombasa on 17th November, 2022 be granted pending hearing of the Mombasa Court of Appeal Civil Appeal No. E032 of 2023 Linda Chao Waita Aka Linda Wanjiku Muthandi Versus (1) Edith Wangari Waita (2) Agnes Wamaitha.
 4. Moot.



5. That pending hearing and determination of the Appeal filed herein by the Applicant Mombasa Court of Appeal Civil Appeal No. E032 of 2023 Linda Chao Waita Aka Linda Wanjiku Muthandi Versus (1) Edith Wangari Waita (2) Agnes Wamaitha an Order of injunction do issue restraining Respondent Edith Wangari Waita and 2nd Respondent Agnes Wamaitha by themselves, their servants and/or agents from charging, leasing, selling or disposing or in any other manner howsoever dealing or interfering with Plots known as Plot No. 627/VMN, Mombasa and Plot No. 44 Sagana presenting or in any manner whatsoever using Grant of Letters of Administration Intestate issued to Edith Wangari Waita and Agnes Wamaitha on 15th August 2012, confirmed on 30th August 2013, rectified on 25th August 2014 and subsequently rectified on 9th October 2014 to National Land Commission, Kenya Breweries Limited, Chief Land Registrar or any person or institution in pursuance of or monetary benefits due to the Estate of the George Francis Waita (Deceased).
 6. Moot.
 7. That pending hearing and determination of Appeal filed by the Applicant Mombasa Court of Appeal Civil Appeal No. E030 of 2023 Linda Chao Waita Aka Linda Wanjiku Muthandi Versus (1) Edith Wangari Waita (2) Agnes Wamaitha the 1st Respondent Edith Wangari Waita and 2nd Respondent Agnes Wamaitha be restrained from withdrawing any money from their bank accounts to mitigate loss to the Estate of the Deceased for recovery of m pursuant to Grant of Letters of Administration Intestate issued to Edith Wangari Waita and Agnes Wamaitha on 15th August 2012 and confirmed on 30th August 2013, rectified on 25th August 2014 and subsequently rectified on 9th October 2014 obtained fraudulently.
 8. That the Appeal filed by the Applicant Mombasa Court of Appeal Civil Appeal No. E032 of 2023 Linda Chao Waita Aka Linda Wanjiku Muthandi Versus (1) Edith Wangari Waita (2) Agnes Wamaitha be consolidated with Mombasa Court of Appeal Civil Appeal No. E030 of 2023 Gertrude Chao Waita Versus 1. Edith Wangari Waita (2) Agnes Wamaitha filed herein by Gertrude Chao Waita as the summons for revocation by the Applicant and the said Gertrude Chao were consolidated and the ruling is in respect of both applications.
 9. That in the interests of justice and expediency that this application be consolidated with the Similar application seeking same prayers filed by Gertrude Chao Waita in Mombasa Court of Appeal Civil Appeal No. E030 of 2023 Gertrude Chao Waita Versus (1) Edith Wangari Waita (2) Agnes Wamaitha fixed for hearing on 24th May 2023 as the applications for revocation by the Applicant and the said Gertrude Chao were consolidated end the ruling is in respect of both applications.
 10. That the applicant be at liberty to apply for further order and/or directions as this Honourable Court may deem just and expedient to grant
 11. That the costs of and incidental to this Application abide by the result of the Appeal.
2. The basis for this application is the dismissal of the Applicant's application dated 4th March 2021 in a ruling delivered on 17th November 2022 by the High Court (L N. Onyiego, J.) in Mombasa Succession Cause No. 76 of 2012, *In the Matter of the Estate of George Francis Waita (Deceased)*. The application was a Summons for Revocation of the Grant of Letters of Administration Intestate issued to Edith Wangari Waita and Agnes Wamaitha on 15th August 2012 and confirmed on 30th August 2013 and rectified on 25th August 2014 and subsequently rectified on 9th October 2014. The



Respondents, Edith Wangari Waita and Agnes Wamaitha, had successfully petitioned for grant of letters of administration in their capacity as widows.

3. The Applicant's case was that she was a beneficiary of the deceased estate on the basis of being his daughter, but that she had been left out through non-disclosure, and that the Grant of Letters were obtained through fraud.
4. The learned Judge dismissed the application for revocation of the Grant finding that the Applicant had not established that she was a daughter or a dependant of the deceased. The Judge found that even if there was forgery in the supporting forms for the Grant, the same did not affect the Grant.
5. The Applicant was aggrieved by the ruling of the learned Judge and she filed a Notice of appeal dated 23rd November 2022. She also filed this application seeking the various orders as contained hereinabove.
6. The application was virtually heard before us on the 27th June 2023. Present for the hearing was learned Counsels Mr. Anyona for the Applicant and Ms. Azei for the Respondents.
7. The principles applicable in the exercise of the Court's unfettered discretion under Rule 5(2) (b) to grant an order of stay are well settled. Firstly, an Applicant has to satisfy that he or she has an arguable appeal. Secondly, an Applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR. We are mindful that the Applicant need not prove a multiplicity of arguable grounds of appeal, it is sufficient if a single bona fide arguable ground of appeal is raised. See *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004. Further that 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 Gitabi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others*, Civil Application No. 124 of 2008.
8. The application is supported by an affidavit sworn by one Charles Kuria Muthandi dated 15th May 2023 pursuant to a Power of Attorney dated 8th February 2021 that was duly registered and annexed to the affidavit. The affidavit annexes a Notice of Appeal and the Ruling of the learned High Court Judge dated 17th November 2023, the subject of this application. It was deposed that the Applicant was aggrieved by the Court's ruling dismissing her application to be recognized as a daughter of the deceased that had been excluded from the list of beneficiaries of the deceased estate, and one that was entitled to a share of the estate of the deceased alongside the other children of the deceased. It was deposed that the Grant of Letters was obtained through fraud as Forms P&A 8, 5 and 12 contained forged signatures.
9. The application is opposed through an affidavit sworn by the 2nd Respondent on her behalf and on behalf of the 1st Respondent, and dated 13th June 2023. It challenges the competence of the application for reason it was filed without requisite leave of Court there being no automatic right of appeal and on account of being filed late; further that the Applicant addressed new issues that were not before the High Court, and finally that the order sought cannot be granted as it was sought against a negative order which cannot be stayed.
10. Mr. Anyona relied on his submissions dated 18th May 2023. He urged that there was fraud in obtaining the Grant of Letters as shown in the letter from an expert and the court erred in dismissing the application; that the court introduced another property that was not subject to the application before the court. On the nugatory test, Counsel urged that the Applicant's Appeal will be rendered nugatory if the Orders sought herein are not granted and ultimately the Applicant being a beneficiary of the Estate of George Francis Waita will suffer irreparable injury that cannot be compensated by damages.



The balance of convenience is therefore in favour of the Applicant. He requested for status quo orders to be issued before the application is determined.

11. Ms. Azei relied on her submissions dated 19th June 2023 together with a list of authorities. On the issue of jurisdiction, it was urged that the application arises from a decision of a Probate Court in its original jurisdiction; that there is no automatic right of appeal and leave ought to have been sought before approaching the appellate court. In the absence of such leave, the appeal and the application are incompetently before the court and should be struck out for want of jurisdiction.
12. Counsel urged that the orders in the trial Court dismissed the application; that the court did not direct or refrain any party from doing anything; that the negative orders issued meant that no orders for stay or an injunctive relief could be granted. For that proposition she cited the case of was *Julius Mugo Muchiri vs. Njiru K. Njagi & Another* [2021] eKLR. In response to the issue of seeking leave before filing the appeal, Mr. Anyona stated that his oral application for leave was granted by the Superior Court, hence he did not see the need to make a formal application. As Ms. Azei did not raise any opposition to Mr. Anyona's submission, that leave was granted by the High Court allowing him to file this appeal, we consider that issue moot.
13. On the issue of jurisdiction to grant injunction, Mr. Anyona cited Rule 5(2) (b) for the proposition that this Court has jurisdiction to grant injunctive relief.
14. We have considered the application, the rival arguments by Counsel and the affidavits for or against the application. On the arguability of the appeal, we note that the Applicant annexed the Memorandum of Appeal. Among the grounds of appeal pleaded was failure by the learned Judge to consider that the deceased was survived by 8 children who were entitled to apply for administration under Section 66 of the *Law of Succession Act* and that the applicant was excluded from the list of beneficiaries due to non-disclosure. The other ground pleaded is that the grant was obtained fraudulently because forms P&A 8, 5 and 12 contained forged signatures and that the court sanitized the fraud by finding that the forgeries were irrelevant. We think that the Applicant has demonstrated that she has an arguable appeal, and that the appeal is not frivolous but one deserving of consideration by this Court.
15. On the nugatory aspect, this matter involves a Succession Cause and distribution of an estate of a deceased. It is important that there is preservation of the properties in the estate to prevent depletion. If that were to happen, and the property is sold, damages may not atone the injury caused to the Applicant. We are satisfied that no award of damages will adequately compensate the Applicant. In the premises, we are satisfied that if there is no order for the preservation of the estate pending the appeal, the appeal is likely to be rendered nugatory.
16. Before we conclude, we observe that other than the Applicant, the learned Judge of the High Court heard several Applicants with different applications and that he wrote one composite ruling in answer to those varied applications. We noted that most of the orders sought in this application concerned those other parties. As the parties concerned were not before us, we could not consider the said orders.
17. We have come to the conclusion that the application is for allowing. We allow the application in terms of order 5 as follows:
 1. That pending hearing and determination of the Appeal filed herein by the Applicant, Mombasa Court of Appeal Civil Appeal No. E032 of 2023 Linda Chao Waita Aka Linda Wanjiku Muthandi Versus (I) Edith Wangari Waita (2) Agnes Wamaitha an Order of injunction do issue restraining Respondent Edith Wangari Waita and 2nd Respondent Agnes Wamaitha by themselves, their servants and/or agents from charging, leasing, selling or disposing or in any other manner howsoever dealing or interfering with Plots known as Plot No. 627/VMN,



Mombasa and Plot No. 44 Sagana presenting or in any manner whatsoever using Grant of Letters of Administration Intestate issued to Edith Wangari Waita and Agnes Wamaitha on 15th August 2012, confirmed on 30th August 2013, rectified on 25th August 2014 and subsequently rectified on 9th October 2014 to National Land Commission, Kenya Breweries Limited, Chief Land Registrar or any person or institution in pursuance of or monetary benefits due to the Estate of the George Francis Waita (Deceased).

2. Costs of the application shall abide the outcome of the appeal.

18. Those are our orders.

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF NOVEMBER, 2023.

S. GATEMBU KAIRU, FCIArb.,

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

