



**Kiragu & 2 others v Kiragu & 6 others (Civil Application
E273 of 2021) [2022] KECA 92 (KLR) (4 February 2022) (Ruling)**

Neutral citation: [2022] KECA 92 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E273 OF 2021
RN NAMBUYE, W KARANJA & J MOHAMMED, JJA
FEBRUARY 4, 2022**

BETWEEN

JANE ALICE WAMBUI KIRAGU 1ST APPLICANT
SILAS MACHARIA KARIUKI 2ND APPLICANT
MARGARET WANGARI NGINYO 3RD APPLICANT

AND

BRENDA NYAMBURA KIRAGU 1ST RESPONDENT
SARAH MUKUHI NGINYO KARIUKI 2ND RESPONDENT
JAMES ANTHONY KARIUKI 3RD RESPONDENT
ROSE WANJIRU KARIUKI 4TH RESPONDENT
SCHOLASTICA NJERI KARIUKI 5TH RESPONDENT
AUSTIN WACHIRA KARUNGO 6TH RESPONDENT
AUSTIN WACHIRA KARUNGO 7TH RESPONDENT

(An application for stay of proceedings order pending the hearing and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (S.Mutuku J.) dated 27th July, 2021 in H.C Succession Cause No. 336 of 2020)

RULING

1. **Background**

Before us is a Notice of Motion dated 2nd August, 2021 in which Jane Alice Wambui Kiragu, Silas Macharia Kariuki & Margaret Wangari Nginyo (the applicants) seek orders in the main:



- a. that pending the hearing and determination of the intended appeal, this Court be pleased to grant an order staying further proceedings in Nairobi HCSC No.336/2020 and all orders and consequential orders of S. Mutuku, J. dated 27th July,2021.
 - b. That the costs of this application be provided for.
2. Brenda Nyambura Kiragu, Sarah Mukuhi Nginyo Kariuki, James Anthony Kariuki, Rose Wanjiru Kariuki, Scholastica Njeri Kariuki, Alex Ndoria Karuri & Austin Wachira Karungo are the respondents herein.
 3. The brief background of the application is that vide an application dated 24th August, 2020, the 1st respondent filed an application alleging that the applicants were intermeddling with the estate of Lawrence Nginyo Kariuki (the Deceased). In the impugned ruling, the Judge made the following orders:
 - “i. That the respondents, their agents, servants and employees are hereby restrained from intermeddling and or interfering with the Deceased’s estate including his bank accounts domiciled at Consolidated Bank of Kenya and I&M Bank Limited until Grant of Probate or Letters of Administration in respect of the Deceased’s estate is issued and confirmed by this court;
 - ii. That the respondents are hereby ordered to account for all funds and or proceeds they have collected and/or received from the Deceased’s estate since his demise on 24th February 2020 and how they were utilized, spent and or preserved;
 - iii. That this Honourable Court hereby orders that a forensic audit of the Deceased’s estate since his demise to be conducted by an audit firm to be agreed upon by all the beneficiaries herein failing which the court to appoint one;
 - iv. That failure to account as ordered in order No. 5 above, the respondents shall refund to the estate all and any of the proceeds they have withdrawn from the Deceased’s accounts and or misappropriated from the entire estate;
 - iv. This being a family dispute, each party is ordered to bear own costs.”
 4. Aggrieved by this decision, the applicants filed a notice of appeal and the instant application. The application is brought under Rule 5(2) (b) of the *Court of Appeal Rules* (this Court’s Rules) and Section 3 of the *Appellate Jurisdiction Act* and is premised inter alia on the grounds: that the learned Judge had no jurisdiction to make the orders made before the objections to the Will were heard directing that a forensic audit be conducted on the estate of the Deceased; that the High Court had no basis to find that there was intermeddling of the estate by the executors of the Will; and that the learned Judge disregarded the documents placed before the court particularly the architect’s report and proof of payment of the sum of Kshs 1,158,000.00 to the contractor in discharge of the estate’s liability
 5. The applicants herein, together with the 3rd and 5th respondents are the executors of the Deceased’s estate pursuant to the Deceased’s Will and Testament dated 13th June,2014. It is the applicants’ case that Section 80(1) of the *Law of Succession Act* entitles an executor to act on behalf of the estate before issuance of the grant of probate and therefore, the payment of Kshs. 1,158,000.00 to a contractor on or about 10th March, 2020 from the estate of the Deceased was justified.



6. The application was further supported by the 1st applicant's affidavit in which she reiterated the grounds on the face of the application. She further deponed that, unless stay is granted as prayed, the accounts sought by the 1st, 6th and 7th respondents would be furnished and that they were incapable of recall.
7. In a replying affidavit sworn by the 1st respondent it was deponed inter alia that, the application was not merited and was solely intended to delay the just conclusion and determination of Succession Cause No. 336/2020; and that the applicants were challenging the orders requiring them to account to the court despite having stated under oath, in the High Court that they were willing to provide an account of the estate should they be called upon to do so.
8. In a replying affidavit sworn by the 3rd respondent, it was deponed that he was not involved or consulted when the 1st applicant solely transferred Kshs. 1,158,000.00 from the Deceased's Will; he is not opposed to rendering a true and accurate account; that the 1st applicant stated in the High Court that she is ready and willing to render a true account in accordance with the law; that he is engaged in discussions with all the advocates on record to ensure that a forensic audit is conducted; and that he is opposed to the grant of the orders sought, specifically, the order for stay of the proceedings before the High Court as it will delay the just conclusion of the matters pending before the High Court. The 3rd respondent urged the court to dismiss the application.
9. The 7th respondent also filed a replying affidavit opposing the instant application and deponed that an order of stay of proceedings will not serve justice in this matter; that the applicants have not shown or proved to the required standard that an order for stay will do justice to the parties herein; that to grant the orders sought will grossly infringe on the right to access to justice, right to be heard without delay, and right to a fair trial; that the applicants have failed to show what prejudice they will suffer if the orders sought are not granted; that an order of stay of proceedings would fly in the face of Section 83(h) of the *Law of Succession Act*; that the general principles of intermeddling have already been settled and there is nothing novel to warrant the same being classified as a matter of general public importance; that the appeal will not be rendered nugatory, absent stay; and that no substantial loss will be suffered if the orders sought are not granted as the impugned orders are for the benefit of the Estate.**

Submissions by Counsel

10. The application was heard by way of written submissions with oral highlighting. Messrs Oraro & Company Advocates for the applicants submitted that they have an arguable appeal with a high probability of success as the decision by the learned Judge was unsupported by law and that the applicants' actions were sanctioned by the provisions of Section 80(1) of the *Law of Succession Act*. On the nugatory aspect, it was the applicants' contention that if the orders sought herein are not granted, the forensic audit will be undertaken prematurely; and that the effects of an audit are neither reversible nor capable of being compensated by an award of damages. Counsel further submitted that it is in the public interest that the impugned order be stayed on the ground that the impugned ruling renders Section 80(1) of the *Law of Succession Act* otiose as it adds on to the statute that which has not been legislated by stating that executions must where objection proceedings are filed wait until a grant is issued in order to exercise their powers under the Will.
11. Messrs Murage Juma & Company Advocates for the 1st respondent opposed the application and contended that the applicants have not demonstrated that they have an arguable appeal since Section 80(2) of the *Law of Succession Act* provides that a grant of probate takes effect only as from the date of the grant; that the applicants have failed to tender any evidence that the appeal will be rendered nugatory since the applicants had conceded to providing an account of the estate in their pleadings before the High Court. Counsel further submitted that the impugned ruling does not affect the public



- nor does it raise issues of public interest in any way; and that on the contrary, it is in public interest that any person handling the property of the Deceased is held accountable to the court and the beneficiaries.
12. Counsel for the 1st respondent submitted that the applicant's appeal is not arguable and has no chances of success for the reason that the impugned orders directed the applicants to render a full account of their dealings with the Estate of the Deceased to the beneficiaries which is a statutory requirement under Section 83(h) of the *Law of Succession Act*; that an order to account which is only opposed by two beneficiaries who have been found to have intermeddled with an estate should not be stayed especially when the Will is contested; that the alleged executors need to be reigned in and put under control of the court in line with the *Law of Succession Act*.
 13. Counsel submitted that the intended appeal will not be rendered nugatory, absent stay as the applicants who conceded to provide an account if called upon to do so, have not established what substantial loss they will suffer if they render an account of the funds of the Estate to the court and the beneficiaries. Counsel further submitted that there is no evidence of the prejudice the applicants stand to suffer if the Succession Cause before the High Court continues and the orders sought are not granted.
 14. On the question whether the intended appeal is in public interest, counsel submitted that the impugned ruling does not affect the public nor does it raise issues of public interest. Counsel urged us to dismiss the application.
 15. Counsel for the 3rd respondent, Messrs Victor Lee Advocates submitted that the 3rd respondent relies on his replying affidavit and is not opposed to an audit being conducted and or accounts being taken. Counsel submitted that the applicants conceded to provide accounts and the appeal is therefore not arguable.
 16. Counsel further submitted that the appeal will not be rendered nugatory, absent stay as the applicants' argument that they will suffer criminal sanctions under Section 45 of the *Law of Succession Act* is unfounded as the applicants have not provided any evidence of criminal prosecution or that they will not enjoy the constitutional safeguards provided by the Constitution. Counsel further submitted that the applicants have not provided grounds and or stated what prejudice they stand to suffer if the proceedings are not stayed.
 17. It was counsel's further submission that this application does not raise any issue of public interest; that the impugned orders were directed at the applicants as individuals and not the public; and that if the orders sought are granted, the applicants will continue to control and waste the estate of the Deceased without the consent of other named executors and in exclusion of the beneficiaries; and that the balance of commerce tilts in favour of safeguarding the estate and holding the applicants accountable to court and the beneficiaries as ordered in the impugned ruling.
 18. Counsel for the 6th & 7th respondents, Messrs Magee Law LLP submitted that the instant application has no merit. Counsel submitted that the applicants' intended appeal is not arguable; that the impugned executors had no role to continue with investments during the pendency of the suit; that this act alone amounts to intermeddling; that actions of intermeddling cannot be reversed; that this Court cannot be seen to propagate an illegality; and that the grant of the orders sought will be prejudicial to the parties herein.
 19. Counsel submitted that the appeal will not rendered nugatory, absent stay as the impugned ruling was hinged on Section 83(h) of the *Law of Succession Act* which gives the court and parties powers to request for accounts at any time; that the High Court was within the law when it made an order for the accounts. Counsel urged that without prejudice to the foregoing, if this Court is inclined to grant



the orders sought, the applicants be directed to deposit a security for Kshs 1,158,000.00 and the appeal be canvassed within 60 days.

Determination

20. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction of this Court under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice.

21. The principles for granting a stay of execution, injunction or stay proceedings under Rule 5(2)(b) of this Court's Rules are well settled as was observed by this Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR where the Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

22. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR 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.”

23. We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view it is arguable *inter alia* whether the learned Judge had jurisdiction to make the impugned orders before the objections to the Will were heard. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by 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.

24. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang'ethe Kinyanjui v 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.



- 25. 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 considered on its merits. We find that in the circumstances of the instant application, the intended appeal will not be rendered nugatory as Section 80(h) of the Law of Succession Act allows for the Court to order for an account of the estate of the deceased person. The High Court should be allowed to expeditiously hear and determine the suit so that if any party is aggrieved with the decision or any part thereof, they can file an appeal to this Court against the substantive decision. The intended appeal will therefore not be rendered nugatory.
- 26. In the circumstances of the instant application, we are persuaded that the applicants have demonstrated an arguable appeal but have failed to establish that the intended appeal will be rendered nugatory, absent stay. As the applicants are required to satisfy both the limbs of arguability and the nugatory aspect in regard to the requirements under Rule 5(2)(b) of this Court’s Rules, this application fails.
- 27. The upshot is that the application dated 2nd August, 2021 is hereby dismissed. This being a family matter, each party to bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

