



**Mbili & another v Suleiman El Busaidy & another (Civil Application
E54 of 2021) [2022] KECA 750 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KECA 750 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E54 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MAY 27, 2022**

BETWEEN

SAID KHAMISI MBILI 1ST APPELLANT

ESHA AHAMAD HAMISI 2ND APPELLANT

AND

WAKF KHADIJA BINTI SULEIMAN EL BUSAIDY 1ST RESPONDENT

FRANCIS KADIMA 2ND RESPONDENT

*((An application for stay of execution of the judgement of the High Court at Mombasa delivered
by Nyakundi, J on 14th April 2021, in High Court Succession Cause No. 141 OF 2016))*

RULING

1. The application before us is a notice of motion dated 18th August 2021 and brought under rule 5 (2) (b) and 47 of the *Court of Appeal Rules*, section 3A and 3B of the *Appellate Jurisdiction Act* and Article 159 (2) (d) of *the Constitution* of Kenya. The applicants seek stay of the judgement, decree and order of the High Court at Malindi in Succession Cause No. 141 of 2016 dated 30th July 2021, pending the hearing and determination of an intended appeal.
2. The application is premised on the grounds the High Court annulled the applicants confirmed grant of letters of administration on the basis the suit property was a Wakf. The applicants, the widow and son of the deceased claim that they are entitled to the suit property. They seek the orders sought in order to give them an opportunity to exercise their inalienable right of appeal as guaranteed under *the Constitution*. That there is a real danger that if stay of the execution of the judgment and decree of the High Court is not granted, the property may be alienated beyond their reach, and that it will render their intended appeal nugatory.



3. The brief background of the case are that the 1st respondent, Wakf Khadija Binti Suleiman El Busaidy, filed a chamber summons application in High Court Succession Cause No. 141 of 2016 at Malindi, seeking annulment of the grant of letters of administration intestate issued to the applicants on 15th February 2019 and confirmed on 14th March 2019. The 1st respondent contended that the suit property was a registered Wakf and therefore did not form part of the properties available for distribution as part of the estate of the deceased.
4. The applicants filed grounds of opposition challenging the respondent's legal capacity to apply to have the property declared a Wakf, that the deponent of the affidavit sworn in support of the application had no interest in the suit property and was therefore incapable of supporting the application, and that there was no Wakf created over the suit property.
5. In the judgment, the High Court found that the confirmation of the grant of letters of administration was based on non-disclosure and concealment of material facts to the effect that the suit property was Wakf and therefore not available for distribution to individual heirs to the estate. The court found further that the proceedings instituted by the applicants were defective because of misrepresentation of facts. The court annulled the confirmed grant; ordered that the grant be recalled and surrendered to the Deputy Registrar of the High Court; and declared that the suit property is a Wakf property that cannot be inherited.
6. The applicants being aggrieved by the decision of the High Court lodged a Notice of Appeal to this Court on 16th April 2021. They have also annexed to the supporting affidavit to this application a memorandum of appeal citing 20 grounds of appeal.
7. The application was heard before us on the 22nd February 2022. Mr. Ondabu learned counsel appeared for the applicants, while Ms. Mulwa learned counsel held brief for Mr. Kilonzo learned counsel for the 1st respondent. There was no appearance for the 2nd respondent despite service of the hearing notice upon him on the 20th January, 2022. Mr. Ondabu relied on his written submissions and in a brief highlight urged that Mr. Kadima advocate, who is the 2nd respondent in the application lacked legal capacity to apply to nullify an already confirmed grant; that he had been the advocate for the applicants when the Petition was filed, but that he later turned against them. Mr. Ondabu urged that the suit property was the only property of the deceased; that the High Court determined the suit at an interlocutory application, granting final orders that had not been sought; that the appeal is arguable, and that if orders sought are not granted the suit property will be wasted and lost as the 2nd respondent and another were in the process of sub-dividing and selling the property. He urged further that none of the Commissioners of Wakf supported the application.
8. Ms. Mulwa relied on the replying affidavit sworn by Ms. Sultana Fadhil and the filed written submissions. In brief highlight, counsel urged that under Section 50 of the *Law of Succession Act*, the applicants were required to apply for leave to file the appeal as the proceedings had been commenced at the High Court. Counsel urged that the applicants had not satisfied the conditions for grant of injunction sought as they had not demonstrated that the appeal will be rendered nugatory; that they did not prove that they were in occupation of the suit property; and that they gave no proof that the suit property was registered in the deceased name.
9. We have considered the application, the affidavits and the rival submissions. It is incumbent on the applicants to demonstrate that the intended appeal is arguable and that if the order sought is declined, the intended appeal, if successful, will be rendered negatory. See *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR.



10. On the arguability of the appeal, the applicant has contended that the High Court gave final orders determining the suit in an interlocutory application where only interim orders had been sought. 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. See *Joseph Gitabi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008. We are satisfied that the appeal is not frivolous. It is arguable.
11. On the nugatory aspect, the suit property is land, and the subject matter is distribution of the estate of a deceased person. We are satisfied that if no stay is ordered, and the appeal eventually succeeds, the suit premises may be out of reach of the estate before the intended appeal is heard and determined. We rely on the case of *Butt -v- Rent Restriction Tribunal* (1979) eKLR that held that even though the power of the court to grant or decline a stay of execution is discretionary such power should not be used to prevent an appeal. We are satisfied that there is a need to preserve the substratum of the appeal.
12. All in all we are satisfied that the applicants have satisfied both limbs for the grant of the orders sought. We allow the application dated 18th August 2021, and hereby order a stay of execution of the judgment and decree of the High Court at Malindi delivered on 14th April 2021 pending the hearing and determination of the applicant's intended appeal.
13. The costs of the application shall abide the outcome of the intended appeal.

Dated and delivered at Mombasa this 27th day of May 2022.

S. GATEMBU KAIRU (FCI Arb)

..... JUDGE OF APPEAL

NYAMWEYA

..... JUDGE OF APPEAL

J. LESIIT

..... JUDGE OF APPEAL

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

Signed DEPUTY REGISTRAR

