



**WG & 5 others v RNW & 4 others (Civil Application
E011 of 2022) [2022] KECA 960 (KLR) (26 August 2022) (Ruling)**

Neutral citation: [2022] KECA 960 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E011 OF 2022
MSA MAKHANDIA, S OLE KANTAI & KI LAIBUTA, JJA
AUGUST 26, 2022**

BETWEEN

WG 1ST APPLICANT
JMW 2ND APPLICANT
GWW 3RD APPLICANT
SMW 4TH APPLICANT
NMW 5TH APPLICANT
MWW 6TH APPLICANT

AND

RNW 1ST RESPONDENT
SWW 2ND RESPONDENT
MKW 3RD RESPONDENT
SMW 4TH RESPONDENT
FNW 5TH RESPONDENT

(An application for stay of execution of the ruling and order of the High Court of Kenya at Nyahururu (Kariuki, J.) dated 17th February, 2022 in Misc. Appln. No. E001 of 2021)

RULING

1. The application before us is dated February 25, 2022 and is brought under the provisions of Sections 3, 3A and 3B of the *Appellate Jurisdiction Act*, Rules 5(2) (b), 41 and 47 of this Courts Rules, Rules 3 and 11 of this *Court's practice directions for Civil Appeals and Applications*, 2015 and Articles 159(2) (d) and 164(3) (a) of the *Constitution* of Kenya. The main prayer for our consideration is the one for stay



- of execution of the ruling and order. The other prayers in the motion, for instance, the nullification of recognition of the 1st respondent as the second wife of SWM “the patient” and granting the 3rd applicant, full management of the patient’s estate would have to await the hearing and determination of the substantive appeal.
2. The application is premised on the grounds on the face of the motion, the supporting affidavit of the 1st applicant and the written submissions. It is the applicants’ case that the High Court at Nyahururu, on February 17, 2022, upon hearing an application brought under the *Mental Health Act* by the 1st respondent, appointed the 3rd applicant as the guardian of the patient, having established that he was mentally incapacitated. The court further appointed the 3rd applicant and the 1st respondent as joint managers of the estate of the patient and ordered them to furnish it with the inventory of all the assets and liabilities of the patient’s estate within 30 days.
 3. Dissatisfied with the ruling and order, the applicants lodged a notice of appeal dated February 23, 2022 and followed it up with the instant application. The applicants allege that some portions of the ruling and order are not enforceable and or, if enforced, they will be a recipe for chaos for the reason that the 1st respondent is not a legal wife to the patient. This is because the patient had contracted a monogamous marriage under the *Marriage Act* with the 3rd applicant, hence the recognition of the 1st respondent, and her inclusion in the care and management of the patient’s estate by the trial court, was an error apparent, which this Court should intervene and rectify. That if the orders sought are not granted, the patient’s estate will be put in a state of confusion as it will be co-managed by a stranger who will cause unnecessary disputes and equally waste it away. This will be exacerbated by the fact that she does not even know the extent of the assets and liabilities of the estate.
 4. The applicants filed a further affidavit dated March 23, 2022 in which they deposed that, on the strength of the ruling and order by the High Court, the 1st respondent had proceeded to write letters to various tenants of the patient asking them to bank their monthly rent directly in her personal account.
 5. The applicants take the position that, given the foregoing, their intended appeal is arguable and will be rendered nugatory if the orders sought are not granted. Reliance was placed on the case of *Regnoil Kenya Limited Vs. Winfred Njeri Karanja* [2019] eKLR in support of the above propositions.
 6. The motion is however opposed by the respondents. The 1st respondent, on behalf of the other respondents, deposes that the application is a waste of time and that after the High Court delivered its ruling and order, in a bid to execute the said ruling and order, she proceeded to obtain joint account opening forms to be signed by the applicants, but they refused; that the orders sought to be stayed are not yet executable as the applicants have refused to comply with the same and, further, that they have not even filed the substantive appeal to warrant them to obtain the said orders; that the application is a mere way of evading the filing of the inventory of the assets and liabilities of the patient as ordered by the High Court; that they had not demonstrated how they were going to suffer prejudice if the orders sought are not granted; and that they are only apprehensive of a future event in the succession proceedings, which is purely speculative. Lastly, the 1st respondent states that the applicants may have an arguable appeal, but that they have yet to file it. They may thus be required to file an application to extend time which application may or may not succeed, thence a waste of time. In the premises, the application should be dismissed with costs. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. This Court’s jurisdiction under Rule 5(2) (b) of this Court’s *rules* is discretionary, and is guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles, which are: that the appeal is arguable; and that, if the orders sought are not granted and the appeal succeeds, it will be rendered nugatory. See



the case of *Trust Bank Limited & Another Vs. Investech Bank Limited & 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...”

7. On the arguability of the intended appeal, we reiterate that an arguable appeal is not one that must succeed, it is one that raises a ground that ought to be fully argued. See *Stanley Kang’ethe Kinyanjui Vs. Tony Ketter & 5 Others* [2013] eKLR. Having perused the record before us, and the response by the 1st respondent and, in particular, the concession by the respondents that indeed the applicants may have an arguable appeal, particularly on the grounds that, the learned judge erred by failing to take judicial notice that a Christian marriage under Section 6(2) of the *Marriage Act* is a monogamous marriage and therefore declaring the 1st respondent a second wife of the patient was an error; and that such declaration was in any event premature, having been made at an interlocutory stage, we are satisfied that the limb on arguability has been proved.

8. On the nugatory aspect, in *Stanley Kang’ethe Kinyanjui Vs. 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.”

9. 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 determined on its own set of facts. In the instant application, the applicants are apprehensive that should the orders of the High Court not be stayed and, in particular, having the 1st respondent as a co-manager of the estate of the patient, there will be confusion and several disputes and legal battles. The 1st respondent may even waste away the estate as evidenced by the fact that she had already issued a notice to the patient’s tenants to pay into her personal account their monthly rent. It is noteworthy that the 1st respondent did not rebut or respond to the assertion. The assertion therefore that the 1st respondent may waste the estate is not idle. Accordingly, her actions and decisions may not be undone. This in our view, will render the intended appeal nugatory. In the circumstances, we are persuaded that the applicants have demonstrated an arguable appeal which will be rendered nugatory, absent stay.

10. The upshot is that the notice of motion dated February 25, 2022 is allowed to the extent that there shall be stay of execution of the ruling and order of the High Court dated February 17, 2022 pending the hearing and determination of the intended appeal. Costs shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

