



**Ng'ang'a v Mburu & 2 others (Civil Application E408 of 2021)
[2022] KECA 1225 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1225 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E408 OF 2021
HM OKWENGU, F SICHALE & S OLE KANTAI, JJA
NOVEMBER 4, 2022**

BETWEEN

CATHERINE NJERI NG'ANG'A APPLICANT

AND

LOUISA WANJIRA MBURU 1ST RESPONDENT

LEWI WANYOIKE KANGETHE 2ND RESPONDENT

JOSEPH KANG'ETHE WANYOIKE 3RD RESPONDENT

(An application for stay of Order for revocation of grant issued by the High Court of Kenya at Nairobi (Muchelule, J) delivered on 25th October, 2021 in Succession Cause No. 1130 of 2018)

RULING

- [1] On 15th January 2019, the applicant Catherine Njeri Nganga (Catherine), was appointed a legal representative of the estate of the late Carmelina Ngami Mburu (herein referred to as Carmelina), through a Limited Grant Ad Litem in High Court Succession Cause No. 1130 of 2018. The Limited Grant was for the purposes of enabling Catherine to take over ELC Case No. 1180 of 2014 (the ELC suit) in which Carmelina and Catherine were parties.
- [2] On 25th October 2021 the High Court (Muchelule, J), issued an order revoking the Limited Grant that had been issued to Catherine on 15th January 2019. Catherine is aggrieved that the effect of the order made on 25th October 2021 is that the proceedings in the ELC suit, cannot proceed. She has therefore, moved this Court under Rule 5(2)(b) of the [Court of Appeal Rules](#), for orders of stay of the orders issued by the High Court on 25th October 2021. Catherine also seeks an order of stay of proceedings of the ELC suit, pending the determination of the application and the appeal.
- [3] The application is supported by grounds stated on the face of the motion, as well as a supporting affidavit sworn by Catherine. In brief, Catherine explains that prior to her death, Carmelina who



was the widow of the late John Godhard Mburu (Mburu), instituted the ELC suit. She appointed Catherine through a power of attorney to defend her (Carmelina) interest in L.R. No. 3586/2/3 which was the subject matter of the ELC suit. Following Carmelina's death, Catherine was granted a limited grant in the estate of Carmelina for purposes of continuing with the ELC suit.

- [4] The revocation of the grant was precipitated by an application dated 12th October 2020, filed by the 1st respondent Louisa Wanjira Mburu (Louisa), who sought to have the grant issued to Catherine revoked. On 9th March, 2021, the 2nd and 3rd respondents, Lewis Wanyoike and Joseph Kang'ethe Wanyoike filed summons claiming that Carmelina had executed a written will naming them as executors and, that Catherine had obtained the Limited Grant fraudulently by withholding material information. They contended that Catherine had no legal basis to participate in the ELC suit and prayed for revocation of the Grant.
- [5] Catherine maintains that she has an arguable appeal and has identified 10 grounds that she intends to argue in the appeal. For instance, she points out that the threshold for revocation of the grant had not been met; that the Limited Grant was lawfully issued to her as she had been representing Carmelina's interest in the ELC suit prior to her death; that Carmelina had no children of her own, and the respondents and their siblings neither accepted nor supported Carmelina during her lifetime; and that Carmelina deliberately chose to donate the power of attorney to Catherine and not her own siblings.
- [6] Catherine adds that a revocation of grant should only be issued in cases of fraud or defect in the proceedings, and that is not the case herein; that the estate of Carmelina would not suffer any prejudice as the limited grant does not donate power to distribute an estate; and finally, that the appeal is arguable, and unless the revocation and the proceedings in the ELC suit are stayed, the appeal shall be rendered nugatory, with irreparable consequences.
- [7] Louisa filed a replying affidavit stating that she is a beneficiary of the Estate of Mburu, and is representing the interest of 6 other beneficiaries who are children of the late Mburu. She further contends that she is not a party to the ELC suit and as such cannot respond to issues relating to it; that the grant of letters of administration ad litem issued to Catherine was revoked on 25th October, 2021; that the grant was obtained through defective proceedings and material non- disclosure; that the power of attorney did not allow Catherine to continue acting in the ELC suit after the demise of Carmelina; that Catherine has no interest in L.R. No. 3586/2/3; that the interests of Carmelina in L.R. No. 3586/2/3, by virtue of being the spouse of the late Mburu, if any dissipated upon her death; that the intended appeal does not raise any arguable points of law for reasons that Catherine lacks locus standi as she is neither a relative nor a beneficiary of the estates of Carmelina or Mburu, nor is she a creditor or debtor of the estate of the two; that what was before Muchelule, J. was an application for revocation of the Limited Grant and not the ELC suit; and that Catherine shall not therefore suffer any harm if her application is denied.
- [8] The 3rd respondent, Joseph Kang'ethe Wanyoike (Joseph) who claims to be a nephew to Carmelina, also filed a replying affidavit in which he reiterated what Louisa had averred. He urged that the validity of the written Will of Carmelina is not an issue before this Court, and the Court has no jurisdiction to deal with the issue.
- [9] Catherine has filed written submissions maintaining that the appeal is arguable and not frivolous, and that if the orders sought are not granted, she shall suffer irreparable harm. Louisa and Joseph have also filed written submissions, maintaining that the appeal filed by Catherine is not arguable, and that the nugatory aspect has not been proven.



- [10] The motion before us being one anchored on Rule 5(2)(b) of the *Court of Appeal Rules*, we are governed by the principles in that Rule, as elaborated in the decisions of this Court. (See [/akn/ke/judgment/keca/2014/850 Multimedia University & Another vs. Professor Gitile N. Naituli \[2014\] eKLR](#); *Republic v Kenya Anti-Corruption Commission & 2 Others*, [2009] KLR 31; *Reliance Bank Limited v Norlake Investments Ltd*; and *Stanley Kangethe Kinyanjui v Tony Keter & 5 Others* 2013 eKLR).
- [11] Under Rule 5(2)(b) the discretion of the Court is unfettered but must be exercised judicially. The twin limb principles for consideration as laid out by this Court, are first, that an applicant for an order of stay of execution/proceedings has to satisfy the Court that he/she has an arguable appeal. This is not to say that it must be an appeal that will necessarily succeed. It suffices that it is an appeal that is not frivolous or idle, but attracts views that would require conclusive determination by the Court. The second limb that an applicant has to demonstrate, is that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. That is to say that whatever is required to be stopped if done cannot be reversed and the appeal even if successful would be no more than an academic exercise, as damages would not be an adequate remedy
- [12] We have carefully considered the application, the contending affidavits, the written submissions filed by the respective parties, and the authorities cited. We discern two issues for our determination. That is, whether Catherine’s intended appeal as reflected in the memorandum of appeal is arguable, and whether absent orders sought by Catherine, the appeal shall be rendered nugatory in the event it succeeds.
- [13] As already stated, an arguable appeal is one that is not frivolous but raises a bona fide issue deserving determination by a Court and a single bona fide issue would suffice. Catherine has listed 10 grounds that she intends to take up on appeal. We are persuaded that the question as to whether or not the learned Judge exercised his discretion and properly applied the law in revoking the Limited Grant issued to Catherine on 15th January, 2019, is sufficient to engage the Court’s mind on appeal. We accordingly find that the appeal is arguable.
- [14] On the second issue of the nugatory aspect, the impugned ruling revoked the limited grant that had been issued to Catherine, for purposes of her participating in the ELC suit. It is common ground that Catherine is not a beneficiary of the Estate of Carmelina. In any event, the reasons given for her continued participation in the ELC suit, is that the same is done in protection of the interest of the estate of Carmelina. As a party not interested in the estate, Catherine does not stand to lose anything by not participating in the ELC suit, and neither shall she suffer if the orders sought are not granted and the intended appeal concludes in her favour. She has not alleged or demonstrated any beneficial right that would be jeopardized by the denial of the orders sought herein.
15. We find that the nugatory aspect, being the second limb of the twin principle, has not been satisfied. As elucidated in *Republic v Kenya Anti-Corruption Commission & 2 Others* (supra):
- “... In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb”.

[16] Consequently, the applicant’s motion fails and is dismissed with no orders to costs.

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

HANNAH OKWENGU



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JUDGE OF APPEAL

F. SICHALE

.....
JUDGE OF APPEAL

S ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

