



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MUSINGA & KIAGE, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 202 OF 2019

BETWEEN

NAOMI NJERI GACHUKI..... 1ST APPLICANT

SALOME NYAMBURA KIMANI.....2ND APPLICANT

AND

JAMES KIHUMBA NJENGA1ST RESPONDENT

WILLIAM P. NGUGI MWANGI.....2ND RESPONDENT

JOSEPH KIMWAKI NGANGA..... 3RD RESPONDENT

ZEPHANIA NGUGI.....4TH RESPONDENT

(An application for injunction pending the hearing and determination of the appeal against the judgment and decree of the

High Court of Kenya at Nairobi (Ougo, J.) dated 30th May 2019

in

Succession Cause No. 88 of 2009)

RULING OF THE COURT

By the motion dated 8th July, 2019 and brought under **Rule 5(2)(b)** of the Rules of this Court, the applicants seek an injunction to restrain the respondents from interfering with their possession of the estate property now subdivided into LR Nos. Githunguri/Gathangari/3733, 3734, 3735, 3736, 3737, 3738 and 3739, pending hearing and determination of an appeal.

The motion is founded on grounds appearing on its face including that; the High Court distributed family land held in trust by the deceased as if it was free property; the deceased was of unsound mind and lacked capacity to make the will; the will was made under suspicious circumstances; the applicants have an arguable appeal with good chances of success; and, if orders of injunction are not granted the respondents may evict the 2nd applicant and her family rendering the intended appeal nugatory.

In a lengthy supporting affidavit sworn by the 1st applicant on 8th July 2019, the history of the matter is given. Specifically, She deposes that in **Nairobi Succession Cause No. 88 of 2009**, the court dismissed their application for revocation of the grant, thereby validating the will of the deceased **Ngundu Mugo**, whose estate was the subject of those proceedings. The applicants also filed written submissions through the firm of **Njoroge Baiya & Co. Advocates** reiterating their account in the supporting affidavit. Notably, there was no response on record from the respondents.

The principles upon which this Court grants relief under **Rule 5(2)(b)** of its Rules are well settled and they are that to succeed, an applicant must show, first; that he has an arguable appeal and, second; that if the orders sought, be they of stay of execution, or stay of further proceedings or injunction are not granted, the said appeal would be rendered nugatory or useless, illusory, academic and of no effect. By an

arguable appeal is meant, not one that must necessarily succeed but one that is not trifling, and raises at least one *bona fide* point that calls for a response from the respondent and is worthy of decision by the Court on hearing the appeal. See,

STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 5 OTHERS [2013]eKLR.

Regarding arguability of the appeal, it is averred by the applicants that the learned judge failed to evaluate whether the estate property was trust or free property which the deceased could lawfully dispose through a will. This seems to be a matter arguable before this Court, whether or not it will succeed. Concerning the nugatory aspect, it is common ground that the estate property was already subdivided among the beneficiaries following confirmation of the grant. We therefore find this application to be inconsequential should it be granted, that which it seeks to stop having already occurred. The Court cannot consciously act in vain. Since the requirement is for an applicant to satisfy the Court on *both* the arguable and the nugatory aspect, once the applicant fails on the one, the application fails entire.

In the result, the application is devoid of merit and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY, 2021.

W. OUKO, P

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR