



**Kinuthia v Mwangi & 2 others (Civil Application 380 of 2019)
[2021] KECA 18 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 18 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 380 OF 2019
MSA MAKHANDIA, DK MUSINGA & PO KIAGE, JJA
SEPTEMBER 23, 2021**

BETWEEN

SUSAN KABURA KINUTHIA APPLICANT

AND

WANGUI MWANGI 1ST RESPONDENT

NDUTA MWAI 2ND RESPONDENT

WANJIKU MWAI 3RD RESPONDENT

(An application for stay of execution of the Ruling of the High Court (Ongeri, J.) delivered on 8th November 2019 in Succession Cause No. 500 of 2014)

RULING

1. The applicant's application dated 5th December 2019 seeks stay of execution of the High Court's ruling delivered on 8th November 2019 revoking a grant of letters of administration that had been issued to one, Nduta Mwai on her behalf and that of Rosemary Nyambura Mugeche in Succession Cause No. 500 of 2014.
2. The High Court (Ongeri, J.) also appointed one of the respondents as joint administratrix of the estate of Kinuthia Mwai (deceased) and ordered that the estate of the deceased be shared by the applicant and the respondents.
3. Being aggrieved by that ruling, the applicant filed a notice of appeal, evincing her intent to challenge the decision.
4. In her application before this Court, the applicant states that the respondents have engaged surveyors to subdivide the estate of the deceased, basically parcel of land in Limuru/Bibirioni, as per the impugned ruling. She further alleged that the respondents also intend to sell some of the subdivisions of the land.



5. The applicant believes that the intended appeal is arguable, and that unless the Court grants the order sought, the intended appeal, if successful, will be rendered nugatory as the substratum of the appeal may have ceased to exist.
6. Despite service of the hearing notice upon the respondents' advocates, C.W. Kinuthia & Company on 1st March, 2021, and a reminder on 19th March, 2021, when the application came up for hearing on 22nd March 2021 the respondents had not filed any submissions as directed. That notwithstanding, we are duty bound to consider the application on its own merits.
7. The principles that guide this Court in its determination of rule 5(2)(b) applications are now well settled. The applicant must demonstrate that the appeal or intended appeal is arguable, and that unless the orders sought are granted the appeal, if successful, shall be rendered nugatory. See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR.
8. We have looked at the draft memorandum of appeal dated 5th December 2019. Some of the grounds of appeal that are intended to be raised by the applicant are that the learned judge erred in law in holding that the estate of the deceased, who died in 1958, was to be distributed as per the provisions of the Law of Succession Act, which came into existence in 1981; that the learned judge erred in law, in holding that the respondents were dependants of the deceased; and in failing to give effect to section 2(2) of the Law of *Succession Act*.
9. In our view, these are arguable grounds of appeal. We must reiterate that an arguable appeal is not one that must succeed, rather, it is an appeal that raises at least one ground that is worth full consideration by the Court.
10. Turning to the second limb of the application, the applicant has stated that the respondents are intending to subdivide and sell parts of the deceased's estate, a fact that has not been challenged. If that were to happen, we agree that if the appeal is successful it may be rendered nugatory because it may be difficult or impossible to recover the part of the deceased's estate that may have been sold.
11. We are therefore satisfied that the applicant's application is merited and hereby grant the orders sought. The respondents shall bear the costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

ASIKE-MAKHANDIA

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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

