



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Mbai (Civil Application E033 of 2021)
[2021] KECA 185 (KLR) (19 November 2021) (Ruling)**

Neutral citation: [2021] KECA 185 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E033 OF 2021
DK MUSINGA, PO KIAGE & SG KAIRU, JJA
NOVEMBER 19, 2021**

BETWEEN

MONICA WAIRIMU KAMAU APPLICANT

AND

LOISE WANJIKU MBAI RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an intended appeal from the Ruling of the High Court of Kenya at Nairobi (Muchelule, J.) dated 17th July 2019 in H.C. Succ. Cause No. 107 of 1991)

RULING

1. The applicant's notice of motion brought under sections 3(a) and 7 of the [Appellate Jurisdiction Act](#) and rules 4, 5(2)(b) and 42 of this Court's Rules seeks stay of execution of the ruling of Muchelule, J. issued on 17th July 2019 in Nairobi High Court Succession Cause No. 107 of 2019 pending hearing and determination of an appeal.
2. In her affidavit sworn in support of the application, the applicant deposed, *inter alia*, that on 17th July 2019 the learned judge delivered a ruling allowing the respondent's Judicial Review application dated 13th August 2018 in which he held that reference to Dagoretti/Uthiru/88 and Dagoretti/Uthiru/83 in paragraphs 17 (a) and (b) of the judgment was done inadvertently; that the court ordered that the certificate of confirmation of grant that was issued on 31st May 2018 be cancelled and recalled.
3. The applicant further stated that the learned judge failed to take into consideration the fact that her matrimonial home will be commingled among the estate subject matter in Succession Cause No. 107 of 1991; that on 25th January 2021 the beneficiaries of the estate commenced the sub-division of the property by conducting a survey with intention of sharing out the sub-divisions, leasing and or sale of the property without regard to the earlier developments as had been confirmed in the certificate of grant dated 31st May 2018.



4. Being aggrieved by the aforesaid decision, the applicant filed a notice of appeal. She contends that the intended appeal is arguable; that the orders granted by the learned judge have in fact disinherited her of her matrimonial home where she has resided over the last 30 years with her deceased husband and their children; and that unless the orders sought are granted the intended appeal will be rendered nugatory.
5. The respondent opposed the application. In her written submissions, the respondent stated that vide a ruling dated 31st May 2018, the learned judge made an erroneous finding in which he stated that land title No. Dagoretti/Uthiru/83, the smaller of the two parcels of land, be divided among seven beneficiaries, while Dagoretti/Uthiru/88, (the bigger one) be divided between two (2) beneficiaries; that the respondent on behalf of the other beneficiaries successfully applied for review of the ruling; that consequently, the learned judge corrected the aforesaid error, which resulted in the cancellation of the confirmed grant.
6. The respondent further stated that the applicant's application is aimed at delaying equal distribution of the properties amongst the beneficiaries and that the sub-division and the re-distribution does not in any way touch the applicant's matrimonial home, and the allegations of being rendered homeless or being evicted are baseless. She added that the applicant had not shown how the cancellation of the confirmed grant disinherits her of her matrimonial home.
7. We have considered the application, the affidavits and submissions filed by both parties. The principles that guide this Court in an application of this nature are well settled. An applicant requires to 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 unless the orders sought are granted. See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR*.
8. An arguable appeal is one that raises at least one bona fide issue that is deserving of full consideration by the Court. *See Nairobi Women Hospital v Purity Kemunto [2018] eKLR*. Having perused the draft memorandum of appeal that is annexed to the applicant's affidavit, we think that the intended appeal is arguable. However, on the nugatory aspect, we are not satisfied that the applicant is likely to be disinherited of her matrimonial home or evicted from the place where she has all along lived with her family members. The effect of the impugned orders is to re-distribute the two properties equitably among all the beneficiaries and as stated by the respondent, the re-distribution will not in any way touch the applicant's matrimonial home. The respondent's application for review which showed that the applicant's homestead will remain intact was supported by a sub-division report done by Earthscope Survey Services and approvals granted by Survey of Kenya, Nairobi City Council and the Ministry of Lands.
9. In the circumstances, the applicant has not satisfied the second limb of the twin principles we have alluded to. Consequently, we find this application unmeritorious and dismiss it with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL



S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

