



**Kariuki v Kariuki (Civil Application 96 of 2019)
[2021] KECA 205 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 205 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 96 OF 2019
RN NAMBUYE, J MOHAMMED & S OLE KANTAI, JJA
NOVEMBER 5, 2021**

BETWEEN

BIBIANA WAMBUI KARIUKI APPLICANT

AND

JOSEPH KAMAU KARIUKI RESPONDENT

(Being an application for stay of execution from the ruling of the High Court of Kenya at Nairobi (Ali-Aroni, J.) delivered on 14th March, 2019 in Succession Cause No. 2461 of 2010)

RULING

1. Before us is a notice of motion dated 27th March, 2019 erroneously expressed to be brought under Order 42 Rules 4 and 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, which in our view do not govern the exercise of our mandate in an application of this nature. The proper provision of law for accessing the relief sought is Rule 5 (2)(b) of the *Court of Appeal Rules*. It is however, our view that failure to cite the correct provision of law for accessing the relief sought will not disentitle the applicant determination of the application on its merits and send her away empty handed from the seat of justice.
2. We invoke the inherent power of the Court under Rule 1(2) of the Court of Appeal Rules to cure that defect. It provides:

“1(2) Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

The principles that guide the Court on invocation and application of the above inherent power of the court are as crystallized by case law. See *Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR*; and *Board of Governors, Moi High School, Kabarak & Another vs. Malcolm Bell [2013] eKLR* wherein this Court and the Supreme Court of Kenya variously stated inter alia that: inherent power



is the authority possessed by a Court implicitly without its being derived from the Constitution or statute; and second, that inherent power is an endowment to the Court such to enable it regulate its internal conduct, and ensure that its mode or discharge of duty is conscionable, fair and just.

3. In light of the above, we substitute Rule 5(2)(b) of the Court's Rules in the place of the above erroneously cited provisions as access provisions for the relief sought and proceed to determine the application on its merits.
4. Bibiana Wambui Kariuki (the applicant) seeks orders in the main: that pending the hearing and determination of the appeal, this Court be pleased to issue an order staying the execution of the order in the ruling delivered on 14th March, 2019 before the High Court (Ali-Aroni, J.); and that costs be in the cause. Joseph Kamau Kariuki is the respondent herein.
5. The application is premised inter alia on the grounds: that the application seeks to stay the order in the ruling dated 14th March, 2019; that the intended appeal raises triable issues and unless the order is stayed, the object of the intended appeal will be rendered nugatory as the suit properties do not form part of the estate of the deceased; that unless the orders sought are granted, the intended appeal will be rendered nugatory and the applicant will be exposed to the risk of her only source of income being held in abeyance awaiting the full hearing and outcome of the Succession Cause in the High Court; and that this Court has the powers and discretion to grant the orders sought in the interest of justice.
6. The application was supported by the applicant's affidavit where she reiterated the grounds in the face of the application and averred that she is the registered owner of land reference number Chania/Ngorongo/2417, Thika Municipality/Block1/900 and Plot No 105 in Mathare Quick Service Limited (the suit properties); that she acquired the suit properties long before the demise of her late husband, Joel Kariuki Waititu (the deceased) who passed on in 2010; that the respondent filed an application in the High Court seeking to preserve the estate and the suit properties which the respondent claimed were irregularly transferred to the applicant; that the High Court ruled in favour of the respondent and directed that all monies collected from the suit properties be paid into a joint account to be opened by counsel on record; that the intended appeal is arguable with high chances of success; that unless the orders sought are granted, the applicant will suffer great prejudice as she solely depends on the income from the suit properties; and that the respondent will not suffer prejudice if the orders sought are granted.
7. The respondent opposed the application and filed a replying affidavit and deposed that he was the son of the deceased; that the deceased had three wives; that he was the son of the deceased and the first wife; that the applicant was the 3rd wife of the deceased; that the applicant and the deceased were married in 1992; that the deceased lived with the applicant who did not allow other family members to visit the deceased when he fell sick; that the deceased is purported to have made a will in which all his properties were bequeathed to the applicant; that the said will has been challenged; that the applicant received a monthly rental income exceeding Kshs 250,000.00 from the suit properties; that the other two houses were left with no property; that the cause in the High Court has been pending for more than 9 years; that the application is incurably defective having been brought under the wrong provisions of the law and failed to include a copy of the order appealed against; that the application is not urgent and the applicant would not suffer loss or her appeal rendered nugatory if successful since the order from which the appeal is filed is to deposit the rental receivables into a joint account held by advocates for both parties; and that if the appeal succeeds, the applicant will receive the deposited money from the joint account. The respondent urged the Court to dismiss the motion with costs.

Determination



8. We have considered the application, the grounds in support thereof, the submissions, the authorities cited, and the law. The jurisdiction of this Court under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice.
9. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled as was observed by this Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 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...”
10. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR* this Court described an arguable appeal in the following terms:
 - vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
 - viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”
11. We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view, the intended appeal is arguable inter alia whether the suit properties were part of the estate of the deceased. The position in law is that an arguable appeal is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court and a response from the opposite party. We refrain from saying more on the arguability or otherwise of the intended appeal lest we embarrass the bench that will be seized of the main appeal. It is sufficient for us to state that, we are satisfied as already intimated above that the intended appeal is arguable.
12. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought in *Stanley Kang'ethe Kinyanjui v 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.”
13. 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 considered on its merits. We find that in the circumstances of the instant application, the monies collected from the suit properties will be deposited in a joint account in the name of the parties' advocates. In the circumstances, the intended appeal will



not be rendered nugatory if the orders sought are not granted as the money deposited will be available to the applicant in the event that her intended appeal succeeds.

14. The position in law is that for a party to succeed under Rule 5(2)(b) of this Court's Rules both prerequisites for granting relief under the said provision must be satisfied. Herein the applicant has succeeded only on one as she has failed to establish the nugatory aspect. She has therefore failed to establish the twin limbs necessary for granting relief in an application under Rule 5(2)(b) of the Court of Appeal Rules.
15. The upshot is that the application dated 27th March, 2019 is without merit and the same is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

