



**Ochilo v Owino & another (Civil Application 20 of 2018)
[2021] KECA 237 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 237 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 20 OF 2018
AK MURGOR, J MOHAMMED & S OLE KANTAI, JJA
NOVEMBER 5, 2021**

BETWEEN

MONICA OCHILO APPLICANT

AND

CYNTHIA ATIENO OWINO 1ST RESPONDENT

PAUL OCHIENG OCHILO 2ND RESPONDENT

(An application for stay of execution pending the lodging, hearing and determination of an intended appeal to be filed out of time from the judgment or decision of the High Court of Kenya at Nairobi (L. A. Achode, J.) delivered on 14th June 2017 in Nairobi HC Succession Cause No. 1008 of 2014)

RULING

1. Before us is a notice of motion dated 2nd February, 2018 in which Monica Ochilo (the applicant) urges this Court to exercise its discretion under Rule 5(2)(b) of the *Court of Appeal Rules* and grant her orders in the main:
 1. A stay of execution of the judgment of Achode, J. delivered on 14th June, 2017 at Nairobi, in High Court Succession Cause No. 1008 of 2014 pending the hearing and determination of this application and or the appeal to be lodged as shall be directed by this Court.
 2. Costs of this application be provided for.
2. Cynthia Atieno Owino and Paul Ochieng Ochilo are the respondents herein.
3. The application is premised on the grounds inter alia: that the respondents have threatened to evict the applicant from Plot No. 24 Buruburu Phase V (the suit property) where she has lived for many years; that the applicant intends to file an appeal against the judgment; that the draft memorandum of appeal



and notice of appeal are ready and awaiting filing; that the instant application has been necessitated by the threats of eviction by the respondent; that the 1st respondent has already confirmed the grant and rectified the same thereby increasing the chances of the applicant being evicted from the suit property; and that the respondents are harassing tenants in other properties which form part of the estate of Mildred Akinyi Ochilo (the deceased); that unless the application is allowed, the applicant's appeal will be rendered nugatory; that the intended appeal is arguable and has great prospects of success; and that this Court has the discretionary power to make any necessary, incidental or consequential orders in the interest of justice and fairness.

4. The applicant filed an affidavit in support, stating that the 1st and 2nd respondents obtained Grant of Letters of Administration Intestate and are using the same to harass her and other beneficiaries of the estate of the deceased; that the confirmation of grant has displaced some beneficiaries; that the respondents have started eviction proceedings against her, her family and other beneficiaries living in the suit property; and that strangers have been visiting her on the suit property demanding that she vacates the suit property. The applicant averred that she instructed her advocates to apply for certified copies of proceedings and judgment to enable her file an appeal.
5. Learned counsel for the 1st respondent, Mr. Dennis Kimakia, filed a replying affidavit in opposition to the application. Counsel contended that the delay between 4th October, 2017 when the applicant was issued with a Certificate of Delay and 2nd February, 2018 when the instant application was filed is inordinate, unreasonable and inexcusable. Counsel contended that the appeal is an afterthought and an abuse of the court process; that the respondent has the constitutional right to fair administrative action that is expeditious, efficient lawful, reasonable and procedurally fair; and that the 1st respondent should be accorded an opportunity to enjoy the fruits of her judgment. Counsel submitted that the applicant is guilty of laches and litigation must necessarily come to an end; that the intended appeal has no chances of success; and that the respondent will suffer prejudice if the orders sought are granted.

Determination

6. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction under Rule 5(2) (b) of this Court's Rules is discretionary and guided by the interests of justice.
7. 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. This Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR* 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...”

8. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant



ventilation before this Court. See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR* where 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.”

9. We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view it is arguable inter alia: whether the bona fide dependents and beneficiaries of the estate of the deceased were considered as stipulated in Section 29(B) of the *Law of Succession Act*. At this stage the issue is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.

10. 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”.

11. 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 determined on its merits. We find that in the circumstances of the instant application, the applicant faces the risk of being evicted from the suit property and thus face undue hardship.

12. In the circumstances of the instant application, we are persuaded that the applicant has demonstrated an arguable appeal which will be rendered nugatory if the orders sought are not granted.

13. From the circumstances of the application before us, we are satisfied that the applicant has satisfied the twin principles for the grant of an injunction pending the hearing and determination of the intended appeal in accordance with the jurisprudence underlying the consideration of the twin principles summarized by this Court in the case of *Stanley Kange'the Kinyanjui (supra)*.

14. The upshot is that the application dated 2nd February, 2018 is allowed. Costs shall abide the outcome of the intended appeal.

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

A. K. MURGOR

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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.

Signed

DEPUTY REGISTRAR

