



In re the Estate of Mutava Kioko alias Mutava Kioko (Deceased) (Succession Appeal E004 of 2023) [2024] KEHC 9739 (KLR) (30 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9739 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION APPEAL E004 OF 2023**

FR OLEL, J

JULY 30, 2024

**IN THE MATTER OF THE ESTATE OF MUTABA
KIOKO ALIAS MUTAVA KIOKO (DECEASED)**

BETWEEN

JOSEPH MUSEE KASYUMA 1ST PETITIONER

JUSTUS MUTETI KASYUMA 2ND PETITIONER

MUTINDI KASYUMA 3RD PETITIONER

AND

PETER MUISYO MUTAVA 1ST RESPONDENT

STELLA NDUNGE MUTAVA 2ND RESPONDENT

BENARD WAMBUA MUTAVA 3RD RESPONDENT

RULING

Introduction

1. The application before this court is the Chamber summons dated March 18, 2024. The applicant seeks for orders that;
 - a. That this honourable court be pleased to review and/or vary the orders of 18th December 2023 requiring the deposit of Kshs.200,000/= in the court as security for the appeal within sixty (60) days and in place be pleased to substitute the same with a security of Ksh.100,000/=.
 - b. That upon grant of prayer 2 above, this Honourable court be pleased to extend the sixty days period to enable the appellant deposit the security so directed.
 - c. That costs be in the cause.



2. The application is supported by the grounds on the face of the said Application and the supporting Affidavit of the 1st Appellant, Joseph Musee Kasyumu, who deponed that vide a ruling of this court dated 18th December 2023, this court allowed their Application for stay pending Appeal and directed that they deposit a sum of Kshs.200,000/= in court as security for the Appeal within sixty (60) days. They were unemployed and retired and despite their best efforts they had only raised a sum of Kshs.100,000/=, which the 2nd Appellant had withdrawn from his retirement benefits held at NSSF and others sourced from well-wishers. Thus, their request to have the earlier orders issued to be varied and they be allowed to deposit the said Kshs.100,000/= as a condition for stay pending Appeal.
3. This application is opposed by the respondents, who filed a replying affidavit sworn by the 1st respondent Peter Muisyo Mutave. They averred that this Application was made without basis, was frivolous, vexatious, scandalous and constitutes an abuse of the process of the court. No good reason had been proffered as to why the applicants had failed to comply with the earlier orders issued and that this Application had been made in bad faith to delay the administration and distribution of the deceased Estate to the rightful beneficiaries of which the Applicants were not. The respondents therefore urged court to find that the application was not merited and to dismiss the same with costs.

Analysis & Determination

4. I have carefully considered the summons, Supporting Affidavit, and the Respondent's replying affidavit and find that the only issue for determination is whether the terms of condition of stay pending Appeal should be varied and time extended to allow the Applicant deposit the sum of Kshs.100,000/=.
5. Section 47 of the Succession Act, Cap 160, provides that;

“The high court shall have jurisdiction to entertain any Application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”
6. Further Rule 73 of the Probate and Administration Rules provides further cushion to the court to expeditiously deal with its proceedings and the said rules provides that;

“Nothing in these rules shall limit or otherwise affect the inherent powers 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.”
7. The reasons advanced by the Applicant for seeking that the terms of security be varied is that they are retired citizen and have no source of income. Even for them to raise the Kshs.100,000/= sought to be deposit, the 2nd Appellant had to withdraw his benefits from NSSF and they all sought help from well-wishers.
8. The Court, in exercising its discretion, when confronted with such circumstances should always opt for the lower rather than the higher risk of injustice and should make such orders as may be necessary for the ends of justice. The court will consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.
9. What is at stake herein is the right to be heard, while maintain status quo on the ground. If the stay orders are vacated, it stands to chance that the respondents will proceed to distribute the estate, without



involving the Appellants and that would render the Appeal filed to be nugatory. The reasons advanced the basis upon which the applicants seek for review are also genuine and valid.

Disposition

10. The Application dated 18th March 2024, therefore has merit and is allowed in terms of (2) and (3). The Appellants are granted 21 days from the date of this ruling to deposit Kshs.100,000/= into court as security for the Appeal.
11. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF JULY 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 30th day of July, 2024.

In the presence of:-

No appearance for Applicants

No appearance for Respondent

Susan/Sam Court Assistant

