



In re the Estate of Migwi Romba alias Migui Rumba (Deceased) (Probate & Administration Appeal E005 of 2024) [2024] KEHC 10114 (KLR) (14 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10114 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
PROBATE & ADMINISTRATION APPEAL E005 OF 2024**

MA ODERO, J

AUGUST 14, 2024

IN THE MATTER OF THE ESTATE OF MIGWI ROMBA ALIAS MIGUI RUMBA - DECEASED

BETWEEN

PETER MIGWI MUREITHI 1ST APPELLANT

CHARLES MACHARIA MIGWI 2ND APPELLANT

AND

MUNENE MIGWI 1ST RESPONDENT

SAMUEL MAINA MIGWI 2ND RESPONDENT

STEPHEN VICTOR MUCHANGI ESTHER 3RD RESPONDENT

LUCY NJERI WAHOME 4TH RESPONDENT

ALICE WAMBURA WAIKWA 5TH RESPONDENT

RULING

1. Before this Court is the Summons dated 15th April, 2024 by which the Applicants Peter Migwi Mureithi And Charles Macharia Migwi seek the following orders:-

- “(a) Spent
- (b) That the Honourable Court be pleased to stay the orders of the trial court in Karatina Succession Cause No. 62 of 2020 issued on 24th October 2023 and further ruling and orders of 5th March 2024 pending the hearing and determination of the Appeal.
- (c) That this Honourable Court be pleased to grant a stay of further proceedings in Karatina Succession Cause No. 62 of 2020 consequent to the orders made



in the rulings delivered on 24th October 2023 and 5th March 2024, including the execution of the orders granted, pending the hearing and determination of the present appeal preferred to the High Court against the said rulings.

(d) That the costs of this application be provided for.”

2. The application which was premised upon Articles 48 and 159 (2) of *the Constitution* of Kenya Section 47 of the *Law of Succession Act*, Rules 63 and 73 of the *Probate and Administration Rules*, Order 42 Rule 6 of the Civil Procedure Rules and all enabling provisions of the law, was supported by the Affidavit of even date sworn by the 1st Applicant.
3. The Respondents Munene Migwi and 4 others opposed the application through the Replying Affidavit dated 22nd April 2024.
4. The genesis of this application are the two (2) rulings delivered on 24th October 2023 and 5th March 2024 by Hon. E. Kanyari, Principal Magistrate, Karatina Law Courts.
5. In the Ruling of 24th October 2023 the trial Court made the following orders:-
 - “(a) That pending the hearing and determination of the summons for revocation of Grant dated 19th July 2022, a prohibitory order to issue over L. R. No. Magutu/Ragati/2049 and L. R. No. Magutu/Ragati 2050”
6. The Respondents being dissatisfied by the Grant of the above prohibitory orders filed an application dated 1st November 2023 seeking review of the said orders.
7. Vide the ruling delivered on 5th March 2024 the Learned trial magistrate made the following orders:-

“The applicants application dated 1st November 2023 is disallowed with costs to the respondents herein and the ruling made on the 24th of October 2023 stands. The parties herein are advised to have the matter set down for hearing.”
8. Being dissatisfied with the above rulings the Applicants herein filed a Memorandum of Appeal dated 12th March 2024. The Applicants then filed the present application seeking to stay the said rulings pending the hearing and determination of their appeal.
9. The application was canvassed by way of written submissions. The Applicants filed the written submission dated 3rd May 2024 whilst the Respondents relied upon their written submissions dated 30th April 2024.

Analysis And Determination

10. I have carefully considered this application for stay, the reply filed thereto as well as the written submissions filed by both parties.
11. It is not the duty of this court to determine the merits or otherwise of the Intended appeal. All the court is required to determine is whether the application for stay is merited.
12. Order 42 Rule 6 of the *Civil Procedure Rules* 2010 provides as follows:-
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appeal from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal



is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision to appeal is preferred may apply to the appellate court to have such order set aside, No order for stay of execution shall be made under sub rule.

- (1) Unless -
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;-
And
 - (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
 - (c)
13. Therefore in order to merit the orders being sought the applicants must satisfy the court.
 - a. That the application for stay was filed without unreasonable delay.
 - b. That they stand to suffer substantial loss unless the stay is granted.
 - c. That security for the performance of the decree or order has been given by the Applicants.
14. The impugned rulings were delivered on 24th October 2023 and 5th March 2024. This application for stay was filed on 15th April, 2024 barely one month or so after the last Ruling was delivered. The Applicants were obviously pursuing a remedy in the trial court before coming to the High Court. This in my view was quite in order. I find that a period of one (1) month cannot be said to amount to delay. Accordingly am satisfied that this application was filed in a timely manner.
15. The decision whether or not to grant an application for stay of execution lies squarely within the discretion of the court concerned. The court must consider each case on its own merits and the likely effect of granting or declining an application for stay. The court ought to act conscientiously not capriciously in determining an application for stay.
16. In the case of *Re Global Tours & Travel Ltd* HCWC No. 43 of 2000, Ringera, J (as he then was) held that:

“...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice.... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”
17. The Applicants submit that they are likely to suffer substantial loss if the stay sought is not granted. The question of what constitutes “substantial loss” is one which has engaged our courts over a long



period and there exist a plethora of decisions on the issue. In *RWW-vs-EKW* [2019] eKLR the Court stated as follows

“Demonstrating what substantial loss is likely to be suffered is the core to granting a stay order pending appeal”

18. The Applicants seek to stay the proceedings in the lower court pending the hearing and determination of their appeal.
19. The matter which is due to proceed in the lower court is the hearing of the summons for revocation of Grant. This will not in any way affect the prohibitory orders which were issued in order to preserve the status quo. Neither will the appeal be rendered nugatory.
20. I am not persuaded that any prejudice will be suffered by either party if the application is not granted. Nor will the Applicants suffer any loss.
21. Finally I find no merit in this application for stay. The same is hereby dismissed in its entirety. This being a family matter each side will bear their own costs.

DATED IN NYERI THIS 14TH DAY OF AUGUST 2024.

MAUREEN A. ODERO

JUDGE

