



**In re Estate of Alfred Kipkorir Gimnyigei & Hanna Jebii Tum
(Deceased) (Succession Cause E065 of 2021 & E006 of 2022
(Consolidated)) [2024] KEHC 16433 (KLR) (23 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16433 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE E065 OF 2021 & E006 OF 2022 (CONSOLIDATED)
RN NYAKUNDI, J
DECEMBER 23, 2024**

BETWEEN

GRACE JEBET SAINA 1ST PETITIONER

DAVID KIMELI LETING 2ND PETITIONER

AND

JULIA GIMNYIGEI 1ST OBJECTOR

ESTHER GIMNYIGEI 2ND OBJECTOR

RULING

1. Before me for determination are chambers summons dated 23rd October, 2024 expressed to be brought under the provisions of Art. 28, 40 and 50 of *the Constitution* of Kenya, Section 1A, 1B and 3A of the *Civil Procedure Act*, Rules 49 and 73 of the Probate and Administration. The Objectors seek orders as follows:
 - a. Spent
 - b. That the Honourable court do grant the applicant leave to appeal against its judgment delivered on 11th October, 2024.
 - c. That pending the hearing and determination of this application inter partes, there be stay of execution of the judgment delivered on 11th October, 2024.
 - d. That pending the hearing and determination of this application inter partes, there be stay of any activity on the suit land and status quo be maintained.
 - e. That pending the hearing and determination of the intended appeal there be stay of execution of the judgment delivered on 11th October, 2024.



- f. That the Notice of Appeal filed be validated and the same be deemed duly properly filed.
 - g. That costs be provided for.
2. The application is supported by Julia Chepkoech Gimnyigei's sworn affidavit and rests on seven distinct grounds, which are outlined below. These grounds form the fundamental basis of the application and are detailed as follows:
- a. That the judgment delivered on 11th October, 2024 aggrieves the applicants and all the beneficiaries of the estate of the late Hanna Jebii Tum and thus intend to appeal the whole of the judgment.
 - b. That the Honourable court rendered itself against the applicants yet beneficiaries of the estate of the late Hanna Jebii Tum reside in the homestead within Eldoret Municipality Block 24 (kipkenyo) 88 measuring about 96 acres (the suit property) and depend on farming on the said farm for sustenance.
 - c. That the applicants and all the beneficiaries of the estate of the late Hanna Jebii Tum shall suffer substantial loss if the stay of execution of the judgment herein is not granted.
 - d. That the execution of the judgment delivered on 11th October, 2024 is on course as the 2nd Petitioner/Respondent has already threatened to evict the beneficiaries of the estate of the late Hanna Jebii Tum and some of the beneficiaries of the estate of the late Alfred Gimnyigei from the only place they call home.
 - e. That the applicants are willing to abide by any condition of due performance of decree.
 - f. That if stay of application is not granted the intended appeal will be rendered nugatory.
 - g. That this being a succession matter the Honourable court has to give leave to appeal to the Court of Appeal.
3. In response to the application, the Objectors filed a replying affidavit contesting all grounds raised therein. The affidavit is reproduced below in its entirety for completeness of context. The Objector deposed that:
- a. The application is unmerited and baseless in law.
 - b. The application is incompetent
 - c. There is no judgment delivered on 11th October, 2023
 - d. The ruling issued on 11th October, 2024 is a negative one and it is incapable of enforcement.
 - e. The orders made on 11th October, 2024 are incapable of being stayed.
 - f. The honourable court is unable to issue the orders sought.
 - g. The honourable court cannot validate a notice of appeal as the same is within the jurisdiction of the Court of Appeal.
 - h. That I am opposed to the application seeking leave to appeal as the same is unmerited.
 - i. The honourable court was right in pronouncing itself that the matters raised in the objection fell within the jurisdiction of the Environment and Land Court not the High Court.



- j. The certificate of confirmation of grant had already been enforced as per the green card already submitted by the land registrar
- k. The application has already been overtaken by events as the estate has already been distributed and new parcel numbers namely Eldoret Municipality Block 24 (Kipkenyo) 2251-2374 registered.
- l. The application lacks merit and it ought to be disallowed with costs to me and my co-petitioner.
- m. I have never met the applicants/objectors save for the brief stint during the court sessions.

Applicants' submissions

4. Learned Counsel Mr. Yego, appearing for the Petitioners, submitted that the Applicants were aggrieved by the judgment delivered on 11th October 2024, which affected all beneficiaries of the estate of the Late Hanna Jebii Tum. He argued that the beneficiaries reside in the homestead within Eldoret Municipality Block 24 (Kipkenyo) 88, measuring about 96 acres, and depend on the said farm for sustenance.
5. In buttressing his submission on the requirement for leave to appeal, Learned Counsel relied on the case of Rhoda Wairimu Karanja and John Kioi Karanja -vs- Mary Wangui Karanja Salome Njeri Karanja [Civil Application No. 69 of 2014] 2014 KECA 255 KLR, where the Court held that in cases where there is no automatic right of appeal, an aggrieved party wishing to appeal must seek leave to do so and the granting of leave is a discretionary power.
6. Learned Counsel further strengthened his argument by citing the case of Francis Gachoki Murage V. Juliana Wainoi & Another, Civil Appeal (Application) No. 139 of 2009, where the court established that where there is no automatic right of appeal, an aggrieved party wishing to appeal is enjoined to seek leave, with such leave being within the discretion of the Judge.
7. On the issue of substantial loss, Mr. Yego drew the court's attention to the case of *Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001*, where Musinga, J explained that substantial loss should be assessed by the totality of consequences which an applicant is likely to suffer if stay is not granted.
8. Learned Counsel contended that the Applicants and beneficiaries would suffer substantial loss if stay of execution was not granted. He emphasized that execution of the judgment was already in progress as the 2nd Petitioner/Respondent had threatened to evict the beneficiaries of the estate of the Late Hanna Jebii Tum and some beneficiaries of the estate of the Late Alfred Gimnyigei from the only place they call home.
9. Mr. Yego further submitted that if stay of application was not granted, the intended appeal would be rendered nugatory. He argued that the application was supported by the sworn affidavit of Julia Gimnyigei dated 23rd October 2024, who deposed that the 2nd Respondent had already threatened to evict the beneficiaries from their homestead and farm situated within Eldoret Municipality Block 24 (Kipkenyo) 88.
10. It was noted that the 2nd Respondent, in his response through an affidavit filed on 31st October 2024, opposed the application on grounds that the ruling issued on 11th October 2024 was a negative order incapable of enforcement, that the certificate of confirmation of grant had already been enforced per the green card submitted by the Land Registrar, and that the estate had already been distributed with new parcel numbers registered.



Objectors' submissions

11. Learned Counsel Mr. Momanyi, appearing for the Respondents, submitted that the matter originated when the petitioners filed a petition seeking appointment of administrators to their late grandmother's estate, which was granted. However, he pointed out that it later emerged that the deceased Anna Jebii had no estate in her name, and the property LR Eldoret Municipality Block 24 (Kipkenyo)88 claimed to be part of her estate was actually part of the estate of her grandson Alfred Kipkorir Gimnyigei.
12. Mr. Momanyi drew the court's attention to the fact that succession proceedings regarding Alfred Kipkorir Gimnyigei's estate had already been pursued and concluded in Eldoret High Court Succession Cause No.E006 of 2022. He explained that when the petitioners sought to have the grant of letters of administration in Alfred Kipkorir Gimnyigei's estate revoked, the court found that the issue raised was not a succession matter but rather a land matter that could only be adjudicated in an environment and land court.
13. In opposing the application for stay, Learned Counsel advanced three main grounds. First, he submitted that there was no judgment made on 11/10/2024, but rather what the court delivered was a ruling dismissing the application seeking revocation of grant. In buttressing this point, he argued that the application was therefore premised on a non-existent judgment.
14. Advancing his second ground, Mr. Momanyi relied on the case of Kenya Commercial Bank Limited vs 7 others (2016) eKLR where the Court of Appeal held that a negative order which did not require parties to do or refrain from doing anything was incapable of execution save in respect of costs. He further reinforced this position by citing the case of Raymond M Omboga v Austine Pyan Maranga (eKLR) where the court held that where there is no positive order made in favor of the respondent which is capable of execution, there can be no stay of execution.
15. On the third ground regarding whether the application had been overtaken by events, Learned Counsel submitted that the confirmed grant had already been acted upon and the land reference Block 24 (Kipkenyo) 88 had been subdivided into parcels number 2251-2374 as evidenced by the certified copy of the register. He emphasized that the application had therefore been overtaken by events as parcel number 88 was now non-existent.
16. Mr. Momanyi further strengthened his submissions by referring to the case of Cooperative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya) (2015) eKLR on the principle that a court cannot grant stay of a judgment that dismissed an entire suit as it constitutes a negative order incapable of execution.
17. In conclusion, Learned Counsel urged the court to dismiss the application with costs to the respondents, arguing that the application was incompetent as there was no prayer for stay of enforcement of the certificate of confirmation of grant.

Analysis and determination

18. The application before me raises two primary issues for determination: first, whether leave to appeal should be granted, and second, whether stay of execution orders should be issued pending appeal.
19. On the question of leave to appeal, it is well established that there is no automatic right of appeal from decisions of the High Court to the Court of Appeal in succession matters. The Court of Appeal in



Rhoda Wairimu Karanja & Another -vs- Mary Wangui Karanja & Another [2014] eKLR definitively settled this position when it held that:

“We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right to appeal to the Court of Appeal, that an appeal will lie to the Court of Appeal from the decision of the High Court exercising original jurisdiction with leave of the High Court or where the application for leave is refused, with leave of this court”

20. The rationale behind requiring leave in succession matters was aptly explained in the same decision, where the court noted that this practice "ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes." This principle recognizes the unique nature of succession matters and the need for their expeditious resolution.
21. The critical question then becomes: what constitutes sufficient grounds for granting leave? The Court of Appeal has consistently held that leave will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. This threshold requires more than mere dissatisfaction with the court's decision; it demands the presence of substantive grounds that warrant further judicial scrutiny.
22. In examining the present application, several crucial factors emerge that militate against granting leave:
23. First, the applicants' grievance stems from a ruling that essentially determined that the matters raised fall within the jurisdiction of the Environment and Land Court rather than the High Court's succession jurisdiction. This is a jurisdictional finding that does not extinguish the applicants' right to pursue their claim in the proper forum. The applicants retain the right to ventilate their grievances before the Environment and Land Court, making an appeal unnecessary and potentially an abuse of the court process.
24. Second, the applicants have a clear alternative remedy. The ruling does not extinguish their right to challenge the validity of the title deed, it merely directs them to the proper forum, being the Environment and Land Court. This is not a case where denial of leave would shut out the applicants from pursuing their claims. Rather, they retain the full right to ventilate their grievances before the specialized court established by the Constitution to handle such matters.
25. Third, and perhaps most significantly, an appeal at this stage would be premature and potentially prejudicial to the orderly administration of justice. The core issue, the validity of competing title deeds, must first be determined by the Environment and Land Court before any meaningful succession proceedings can proceed. Allowing an appeal would effectively bypass this necessary first step and risk creating conflicting decisions between courts.
26. Fourth, the applicants have not demonstrated any substantial prejudice that would result from being required to pursue their claims in the Environment and Land Court. Their primary contention revolves around the validity of the 1996 transfer from Hanna Jebii Tum to Alfred Kipkorir Gimnyigei. This is precisely the type of dispute that the Environment and Land Court was established to resolve.
27. Regarding the question of stay of execution, having found that leave to appeal should not be granted, the prayer for stay becomes moot. However, even if I were to consider it independently, the application would still fail because there is nothing to stay, the ruling being a negative order determining forum rather than granting any executable orders.
28. The Court of Appeal in John Mwita Murimi & 2 others v Mwikabe Chacha Mwita & another [2019] eKLR emphasized that in succession matters, the court must balance the need for finality in litigation against the right of appeal. In this case, the scales tip decisively in favor of requiring the parties to



follow the proper procedural sequence: first obtaining a determination on the validity of the title from the Environment and Land Court, and only then proceeding with succession matters based on that determination.

29. We now come to the central issue in this case as to whether this court ought to grant special leave to appeal in the circumstances of this case. As I have pointed out, the provisions of the law no doubt are quite deliberate by leaving it entirely to this court to formulate the principles by which it will be guided in determining whether to grant or to review special leave. I do not propose at this stage to attempt to make any comprehensive formulation of those principles but rather propose to deal with the matter on a case by case basis whether the facts of this subject matter is of a nature to grant leave to appeal. The arguments have been properly advanced by the applicant and as controverted by learned counsel for the respondents, the question whose importance is to be assessed must be the question involved in the appeal and the question involved in the appeal which the appellant seeks leave to pursue has nothing to do with the law of distribution. The question involved in the proposed appeal is whether this court's exercise of discretion in making a finding as to the sanctity of the gift *intervivos* set aside by the deceased, one Hanna Jebii Tum to Alfred Kipkorir Gimnyigei. The form of title passed to Alfred is tenured in which as a land owner, he has maximum rights to land without restrictions in terms of the period of ownership. There has been no evidence during the trial of this case that the transfer carried out by the original owner in 1996 created a trust for the benefit of the estate.
30. In conclusion, I find that this application lacks merit and must fail. The grounds advanced do not meet the threshold for granting leave to appeal, the circumstances of the case make stay orders both inappropriate and impracticable, and the interests of justice are best served by allowing the dispute to be properly ventilated before the Environment and Land Court.
31. It is in this background that the desirability of providing leave to appeal as pointed out by the applicant be and is hereby denied with no orders as to costs.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 23RD DAY OF DECEMBER 2024

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R. NYAKUNDI

JUDGE

In the Presence of:

Mr. Wainaina for the Petitioners

