



REPUBLIC OF KENYA



**In re Estate of Dickson Kihika Kimani (Deceased) (Succession Cause
158 of 2005) [2023] KEHC 507 (KLR) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 507 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 158 OF 2005
TM MATHEKA, J
JANUARY 31, 2023**

BETWEEN

ERISHIFA WANJIRU KIHKA APPLICANT

AND

ALICE MUKUHI KIHKA 1ST RESPONDENT

FLORENCE NDUATA 2ND RESPONDENT

MARY WANGARI KIHKA 3RD RESPONDENT

MIRIAMU WARAU KIHKA 4TH RESPONDENT

RULING

1. Vide an Application dated 19th April, 2021 brought under Rule 49,63 and 73 of the [Probate and Administration Rules](#), Section 47 of the [Law of Succession Act](#) and Section 7 of the [Appellate Jurisdiction Act](#), the Applicant seek for the orders: -

I. That Honourable Lady Justice Ng'etich be pleased to disqualify herself from trying this Cause further.

II. That if prayer 1 is allowed, this Honourable Court be pleased to order that the said file be placed before the Presiding Judge for Re-allocation to another Judge to hear and determine the said cause.

III. That this Honourable Court be pleased to extend the time within which the Applicant is to file a Notice of Appeal and to apply for leave to appeal to the Court of Appeal against the ruling of this Honourable Court delivered on 11th February, 2021.



IV. That if prayer 3 is granted, the Applicant be granted leave to file and serve a Notice of Appeal out of time and leave to appeal to the Court of Appeal against the ruling of this Honourable Court delivered on 11th February, 2021.

V. That this Honourable Court be pleased to grant a stay of execution and/or implementation of the ruling/order dated 11th February 2021 pending the hearing and determination of this Application.

VI. That this Honourable Court be pleased to grant a stay of execution and/or implementation of the ruling/order dated 11th February, 2021 pending the hearing and determination of the intended Appeal.

VII. That this Honorable court be pleased to order that all title documents pertaining to the said estate be released and held by the court during the pendency of the hearing and determination of the summons for confirmation of Grant.

VIII. That this Honourable Court partially confirms the grant issued to the remaining Administrators.

IX. That the costs of this Application be provided for.

2. The Application is premised on grounds on its face and supported by an affidavit of Erishifa Wanjiru Kihika sworn on 19th April 2021. She deponed that she is a resident in the state of Texas in the USA, owns properties in Kenya and visits the country about twice a year in connection with her business.
3. She averred that the 1st & 2nd respondents know that she indeed visits the country frequently and should need for face to face meetings arise she will be available.
4. She deposed that she was horrified by the slow pace at which the administration of the estate had moved over the years and in 2016, 2017 and 2018 she took two months leave from her job to understand the cause of delay in the distribution of the estate. She discovered that there is an entity called Alijah which is acronym for the 1st respondent and the third wife which had sold some assets of the deceased after he died in 2004.
5. She stated that she also discovered that the deceased's urban properties which were registered in the name of the deceased at the time of death were now registered to other parties yet other properties cannot be accounted for, and a multi housing property that is part of the estate continues to be registered to the third party sixteen years after the estate was established, and that upon this discovery her mother and 6 siblings, save for the 2nd respondent herein, agreed that she replaces her mother as the legal representatives in this cause.
6. She stated that she was aggrieved by the Ruling delivered herein on 11th February, 2021 and upon advice by her advocates on record then K. Macharia & Company Advocates, she filed an application for review on 17th February 2021 that is pending before this Honourable Court and in the 3rd week of March 2021, she got advise of the current advocate on record to lodge this Application.
7. She averred that 1st & 2nd respondent greatly opposed her application to be substituted with her mother on grounds that she resides in the US but she believes that their desire is to control the assets of the deceased and not to facilitate the distribution and enjoyment of the life interest & inheritance by their mothers and children respectively of the properties that come to each of the 8 houses.
8. She verily believes that in view of the technology which facilitates virtual meetings and hearings of cases, the 1st and 2nd respondents did not have genuine or real justification for opposing her application.



9. She posited that distance has not hindered any of the work as she has assisted her mother on behalf of the estate and neither has it translated into expeditious resolution of issues and setting the estate on a path to distribution for those who are domestically-based.
10. She averred that the legal representatives have not furnished accounts or an inventory of assets and liabilities since this suit was filed in 2005 and failed to value the assets of the deceased to facilitate the distribution of the estate contrary to Justice Ndungu's Order pertaining to the sale of one asset.
11. She deponed that the institution of partial distribution of an estate is used to relieve suffering from beneficiaries from pressure created by want and that if the trial is delayed any longer; partial distribution is a necessity in this case.
12. She contended that the 3rd parties are claiming that the estate's properties belong to them yet the legal representatives have filed separate suits against 3rd parties.
13. She averred that this Honourable Court has the opportunity of formulating and applying fiduciary duties of legal representatives from polygamous households.
14. It is her averment that unless stay of the order made on 11th February, 2021 is granted, the Applicant and members of her house will suffer substantial loss while the 2nd Respondent will suffer no prejudice because she is the remainder person and no one is endangering the property which she will inherit.
15. The Application is opposed by the 1st Respondent Alice Mukuhi Kihika via her Replying Affidavit sworn on 3rd October 2022. She averred that the Applicant resides in the USA and visits the country only twice in a year and therefore she is most unsuited to be an administrator.
16. She deponed that no good reason has been given for failure to file the Notice of Appeal within the prescribed time and for grant of stay of execution of the impugned ruling.
17. She deponed that the appointment of the 2nd respondent as an administrator will not cause any prejudice to the applicant or the estate.
18. She averred that the prayer to have the title documents to be stored in court lacks merit as this court is not a storehouse for ownership documents for the deceased person in this country.
19. She stated that the 4 appointed administrators have an obligation to administer the estate including keeping in safe custody all crucial documents of the estate and accused the Applicant for failing to advance grounds on why this court should keep the said documents.
20. It was her further deposition that the Applicant's prayer on the same is vague as no documents have been specified.
21. She stated that there are no grounds to warrant partial Confirmation of Grant and urged this court to strike out the averments of the Applicant's affidavit as they are submissions other than facts.
22. She deponed that this Application will cause delay and urged this court to dismiss it with costs.
23. The 2nd Respondent also opposed the application through her Replying Affidavit sworn on 25th August 2022.
24. She averred that prayer one and two of the Application has been overtaken by events and ought to be struck out; that the applicant is undeserving of prayer 3 and 4 of the Application, as she has not demonstrated due diligence and observance of timelines set by law. She averred that the applicant had neither adduced evidence to show she was ill advised by her erstwhile advocate nor demonstrated any



legal cause as to why prayers 5 and 6 should be granted, and that should these orders issue, her and her siblings will stand disinherited.

25. It was her further deposition that the Applicant had not demonstrated any grounds for grant of stay of execution and more particularly the loss she will suffer if the stay orders are not granted.

Applicant's Submissions

26. The counsel for the applicant submitted that prayers 1 and 2 of the Application are spent. With respect to prayers 3 to 6, he submitted that there is no automatic right of appeal from a decision in a Succession Cause as was held in the case of *Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another* [2014]eKLR .
27. He argued that leave is also required because the Applicant did not lodge a notice of appeal within 14 days as required under Rule 77 of the *Court of Appeal Rules* 2022.
28. He submitted that the court in *Sango Bay Estates Ltd vs Dresdner Bank AG* [1971] EA 17 held that anyone seeking leave of Court of Appeal must demonstrate that he /she has grounds that merit judicial consideration. He stated that the Applicant has those grounds because: -
1. The court appointed Florence Nduta Kihika a representative of the 1st house despite the fact that she had not requested so and that the court lacked jurisdiction to grant relief not sought. He cited the case of *Provincial Insurance Company of East Africa v Mordekai Nandwa* [1995-1998] 2 EACA 288 where the court stated that “cases must be decided on the issues on the record and if is desired to raise other issues they must be placed on the record by amendment”.

He stated that moreover the court did not discuss issues of institution of houses in customary Law of Succession or under *Law of Succession Act*.
2. She has filed notice of appeal to the Court of Appeal against the decision of this court.
 3. She has explained that the reason of delay in lodging an appeal was due to ill advice by her erstwhile advocate to file a review application instead of an Appeal and that by the time she got correct advice to lodge an appeal the period within which to do so had lapsed. He argued that a litigant must not be punished for the fault of his/her counsel as they do not possess the requisite knowledge to settle on the correct position. To support this position, he placed reliance on the Court of Appeal case of *Belinda Murai & 9 others v Amos Wainaina* [1978] eKLR where the court held that as to delay I am satisfied that the applicants and their former advocate have not been guilty of unreasonable delay at any rate after the original appeal was struck out any delay before that was due to advocate's bona fide but mistaken view that a formal order was not necessary. That this case is identical to that of the applicant in the court of appeal.
 4. The first house is entitled to elect an administrator; moreover the principle of requiring consent to the petition by close relatives indicates how important this principle is in jurisdictions.
 5. Under section 7 of the *Appellate Jurisdiction Act* this Honorable court has jurisdiction to grant prayer 3 to 5. He relied on the case of *In re Estate of Edward Ng'ang'a Kabue (Deceased)* [2019] eKLR where the court granted leave to the applicant to file appeal out of time.
29. Regarding prayer 7, the applicant argued this court under Section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration rules* has jurisdiction to order preservation of title documents and the properties. For this proposition he relied on *Floris Pierro vs Giancarlo Falasconi*, Civil appeal Number. 145 of 2012



30. He submitted that on record there is evidence of dealing with the estate's properties that led to placing of restrictions in 2015, of acquisition of estate's properties measuring 15.4 acres in 2007 and 4.08 hectares by the Catholic Church and Salome Njeri Gichuru respectively before confirmation of grant.
31. He further submitted that during the pendency of this matter the 2nd respondent had purported to sell the properties of the estate and as such the applicant is worried that there will be no more property for distribution after completion of this Cause hence the need to have all estate documents deposited in court to prevent further illegal transfers and sales.
32. Regarding prayer no.8, the applicant's counsel argued that Rule 41 Sub Rule 3 of the Probate and Administration Rules provides for partial distribution where it is not possible for any sufficient reason to distribute the entire estate. He submitted that the rules specifically cover where there is a dispute over ownership of the property. He referred to the ruling of 11.2.2021 where the court observed that there is need for timely access to inheritance in the interests of the children and spouses respectively.
33. On costs, he submitted that it is the discretion of court under section 27 of the *Civil Procedure Act* and that discretion must be exercised judiciously as was established in *Jasbir Singh Rai And 3 Others vs Tarlochan Singh Rai And 4 Others* [2014]eKLR where the Supreme Court held that the awarding of costs is not to penalize the losing party but it is a means for the successful litigant to be recouped for the expenses to which he has been put in fighting an action.
34. He argued that other principles to be considered in the awarding of costs were stated in by Justice Odunga in *Republic v Communication Authority of Kenya and Another ex-parte Legal Advice Centere AKA Kituo Cha Sheria* [2015] eKLR in which he held that: - "In determining the issue of costs, the Court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. In other words, the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287 and *Mulla* (12th Edn) P. 150. "
35. He urged the court to allow the application as prayed.

1st Respondent's Submissions

36. The 1st respondent argued that after the ruling was delivered on 11th February, 2021 the applicant filed an application for review which has not been withdrawn and as such both review and appeal cannot proceed simultaneously.
37. She submitted that the court will normally grant leave to appeal when there is a prima facie case that warrants judicial consideration. That the Applicant has not attached a draft Memorandum of Appeal to help the court determine whether there are meritorious grounds. She cited the case of *Rhoda Wairimu Karanja & Another v Mary Wangari Karanja & Another* [2014] eKLR, the Court of Appeal held that leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration.
38. On whether a stay of execution should issue, the 1st respondent argued that the Ruling/Order of 11th February, 2021 substituted the 1st Administrator, Margaret Wambui Kihika, with the 2nd Respondent. The reason for her removal was that she is advanced in age and has health challenges. An order for stay of execution would mean that Margaret Wambui Kihika remains as the 1st Administrator notwithstanding the health challenges that she is facing and which will impact negatively on her role as an administrator. She argued that the court needs to consider that the 4 administrators have to work



in a collegial manner and the non-participation of the 1st Administrator due to her health challenges will not affect the administration of the estate of the deceased.

39. With respect to prayer No.8 of the Application, the 1st applicant submitted that there is no good reason given for storage of the documents of the estate of the deceased in court. The administrators should be left to perform their duties as provided for under Section 83 of the [Law of Succession Act](#) and call to give an inventory or account if need arises. She submitted that besides the prayer is general and it does not specify the documents to be produced and who should produce.
40. On partial confirmation, the 1st respondent submitted that the prayer is unmerited. That summons herein is part heard it is only fair and just that its finalization be prioritized so that the estate of the deceased is fully distributed and that under Rule 41 sub rule 4 of the [Probate and Administration Rules](#), the Applicant has no locus to apply for production of documents as she is not a personal representative.
41. She argued that the present application does not specify the question that has arisen, the identity, share or estate that it relates to or the persons claiming to be beneficially interested in such share or estate as required under Rule 41 (3) of the [Probate and Administration Rules](#).
42. She urged the court to disallow the application and order that the hearing of the Summons for Confirmation of the Grant proceed to conclusion.

2nd Respondent's Submissions

43. The second respondent filed two sets of submissions. One is dated 25th August 2022 filed on 4th October 2022 while the other one is dated 20th October 2022 and filed on 21st October, 2022.
44. She framed the following four issues for determination:-
 1. Whether the applicant should be granted leave to file and serve the appeal out of time
 2. Whether stay of execution of the ruling dated 11th February 2022 should be granted
 3. Whether the title documents should be deposited and held by the court
 4. Who should bear the costs of this application?
45. On the first and second issue, the 2nd respondent submitted that in [Visbram Ravji Halai v Thornton & Turpin](#) Civil Application Number 15 of 1990[1990]KLR 365 the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 Rule 6 of the [Civil Procedure Rules](#) is fettered by three conditions namely; establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.
46. As to whether the Applicant has established that she has a prima facie/arguable case, the 2nd respondent argued that the Applicants has not met the requisite threshold. That a prima facie case was defined in [Stek Cosmetics Limited vs Famil Bank Limited & another](#) [2020] eKLR where the court referred to [Mrao Ltd v First American Bank of Kenya Ltd & 2 others](#) as the one that on the material submitted to it portends a possibility of success.
47. The 2nd respondent submitted that there is no link that has been demonstrated by the Applicant to show that there is indeed a case that has a possibility of success against her or any Respondent at all. She stated that the contention that the properties are at risk of being sold is misleading and that there is no house that is unrepresented as an administrator in this cause. She submitted that the court rightly



- appointed her as an administrator in place of Margaret Wambui Kihika as the Applicant resides abroad and appointing her as an administrator will further derail this matter.
48. As to whether the Application has been filed timeously, the 2nd respondent argued that the conditions for stay of execution are well spelt out under order 42 Rule 6 of the *Civil Procedure Rules*. She submitted that the notice of appeal was not filed and served within time and without explanation.
49. On whether the Applicant had established sufficient cause to the satisfaction of the court, she argued that the applicant has not demonstrated her willingness to place security. She however argued that security issue is discretionary and it is upon court to determine it.
50. She cited the case of *James Wangalwa & Another v Agnes Naliaka Cheetos* Bungoma High Court Misc App No.42 of 2011 where the court held that:
- “The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.”
51. She argued that Rule 5(2) (b) of the *Court of Appeal Rules*, respectively, emphasize the centrality of substantial loss.
52. She submitted that there is no substantial loss that has been demonstrated by the Applicant and that there is no prejudice at all that she will suffer if the stay for execution of the ruling is disallowed.
53. On the third issue, the 2nd Respondent submitted that it is well known to the Applicant that being an administrator does not grant anyone ownership of the estate and that the present administrators are capable of administering the estate with consent of all beneficiaries.
54. There are three (3) other administrators for the estate and any action regarding any property would call for every beneficiary to put their consent and instruct the administrators to act with their permission. She stated that the court is not obliged to store documents and the applicant has not sufficiently demonstrated why they should be deposited in the court.
55. Regarding the fourth issue, the 2nd respondent submitted that this application should be dismissed with costs to her. She urged this court to be guided by *Bandari Investments & Co. Ltd v Martin Chi Chiponda & 139 others* [2022] eKLR where the Hon. Judge stated that under Section 27 (1) of the *Civil Procedure Act*, Cap. 21 costs follow events.

Issues For Determination

56. The issues which arise for determination are:
1. Whether a party can appeal and file an application for review concurrently.
 2. Whether failure to attach draft memorandum of appeal is fatal to the Applicant's case.
 3. Whether the Applicant should be granted leave to appeal out of time.
 4. Whether stay of execution to a ruling delivered on 11th February 2021 should issue.
 5. Whether the estate's documents should be deposited in court for safe keeping.
 6. Whether the prayer to have the grant partially confirmed is merited.



Analysis

57. Prayer one and two of the Application have been overtaken by events. The Judge who previously heard this matter and in which the Applicant seeks to have her disqualified from further hearing this matter has since been transferred out of station.

Issue No.1 - Whether a party can file an appeal and an application for review concurrently

58. It is not in doubt that the Applicant filed an Application for review dated 17th February, 2022 before seeking filing this application. The Application for review has neither been abandoned nor determined.

59. Section 80 of the Civil Procedure Act provides for Review as follows;

“ Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

60. It appears that a party may file an application for review and appeal simultaneously. In African Airlines International Limited v Eastern & Southern Africa Trade Bank Limited [2003] eKLR, where the Court of Appeal had the following to say on the issue of review and appeal-

“It was succinctly stated in Sarkar’s Law of Civil Procedure Eighth Edition Volume 2 at page 1592 as follows ...-

“Review application should be filed before the appeal is lodged. If it is presented before the appeal is preferred, the court has jurisdiction to hear it although the appeal is pending. Jurisdiction of a court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard the review cannot be proceeded with.”

Issue No.2- Whether failure to attach draft memorandum of appeal is fatal to the Applicant’s case.

61. It is similarly not in doubt that the Applicant in this case has not annexed a draft Notice of Appeal. The 1st respondent has argued that without it this court cannot ascertain whether the Appeal is arguable or not.

62. Failure to attach a draft memorandum of appeal is not fatal to an application so long as there is demonstration through supportive evidence that the intended appeal is arguable. (See – Vishva Stones Suppliers Company Limited v RSR Stone [2006] Limited [2020] eKLR) and Attorney General v Charles Otok Oliech [2021] eKLR.) In Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR in which Odek, JA held that failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other proceedings relied upon by such an applicant that the intended appeal is safe.

63. In this case the Applicant has expressed her dissatisfaction with the impugned ruling. She averred that the court granted orders which were not sought and it had no jurisdiction to do so. She has also indicated before one is appointed as an administrator there must be concurrence from all requisite beneficiaries. From her pleading it is decipherable that she is apprehensive the 2nd respondent who was



appointed as an administrator may not facilitate and expedite the conclusion of this cause. These are her grounds for the intended appeal..

64. This court under Section 47 of the *Law of Succession Act* has jurisdiction to pronounce such decrees and make such orders therein as may be expedient and under Rule 73 of the *Probate and Administration Rules* to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
65. The applicant's apprehension is not backed by any concrete evidence. Further she has not demonstrated the likely prejudice she will suffer if the 2nd respondent remains an Administrator.

Issue No.3 - Whether the Applicant should be granted leave to appeal out of time.

66. The parties herein do not appear to question the fact that an appeal to the Court of Appeal in succession matters can only be obtained with the leave of the High Court.
67. Leave to appeal is, however, not automatic since an applicant is required to demonstrate a prima facie case. The Court of Appeal in the case of *Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another* [2014] eKLR made the following observations with regards to appeals in succession matters against the decisions of the High Court exercising its original jurisdiction:

“We think we have said enough to demonstrate that under the *Law of Succession Act*, there is no express automatic right of 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. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.”

68. The intended appeal arises from the decision of this court as to the appointment of the 2nd respondent as an administrator in place of her mother Margaret Wambui Kihika who is advanced in age and has health challenges.
69. Section 66 of the *Law of Succession Act* does give the Probate Court some discretion in the determination of who becomes an administrator. It states inter alia;

“Preference to be given to certain persons to administer where deceased died intestate.

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference.”

70. The Applicant core ground of appeal is that this court lacked jurisdiction to issue orders not sought. Clearly the court is granted that jurisdiction by the *Law of Succession Act*.
71. The court appointed the 2nd respondent in the interest of justice as an administrator to represent the interest of her family because her mother is advanced in age and has health challenges, and also for reasons that resides in Kenya thus easily accessible unlike the applicant who indisputably resides abroad. The court further considered the age of the matter before it and proceeded to issue orders that it deemed just and expeditious in the circumstances.



72. It is therefore not demonstrated that there are satisfactory grounds for grant of leave to appeal.

Issue No.4 - Whether stay of execution of the Ruling delivered on 11th February 2021 should issue

73. The principles upon which the court may grant stay of execution pending appeal are well-settled. These are captured in Order 42 Rule 6 of the [Civil Procedure Rules](#) which requires an applicant seeking a stay of execution pending appeal to demonstrate that -

- (a) Substantial loss may result to the applicant unless the order was made;
- (b) The application was made without unreasonable delay; and
- (c) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant.

74. A stay of execution should only be granted where sufficient cause is shown. In [Antoine Ndiaye v African Virtual University](#) [2015] eKLR Gikonyo J opined that -

“... stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the [Civil Procedure Rules](#)...

75. Grant of stay of execution pending appeal is a discretion of the court. In [Butt vs Rent Restriction Tribunal](#) (1982) KLR the court gave guidance on how such discretion should be exercised and held that –

1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the [Civil Procedure Rules](#), can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”



76. The purpose of stay of execution is to preserve the status quo pending the hearing of the appeal. In [RWW v EKW](#) [2019] eKLR, it was observed that:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

77. While the application was filed timeously, there is no evidence of substantial loss that the applicant will suffer if the orders sought are not granted. The court is yet to make final orders in respect to confirmation of grant. There is then no immediate risk of execution.

78. The other consideration is security. In the case of [Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates](#) [2014] eKLR the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant....”

79. The applicant has not offered any security in the event the appeal fails. The upshot is that there are no grounds for grant of this prayer.

Issue No.5- Whether the estate’s documents should be deposited in court for safe keeping

80. Notably, the duties of personal representatives are fiduciary in nature and they have been laid out in Section 83 of the [Law of Succession Act](#). Section 83(g), provides for administrators’ duty to render the accounts.

81. [In re Estate of Julius Mimano \(Deceased\)](#) [2019] eKLR analysed the unique position in law held by the personal representative of a deceased person by stating as follows:

“...personal representatives administer estates on the strength of legal instruments made to them by the probate court. The vesting of the estate of the deceased on the personal representatives by virtue of section 79 of the Act, flows from the instrumentality of the grant of representation. Upon representation being made, the grant holder then becomes entitled to exercise the statutory powers conferred upon personal representatives by section 82 of the Act and incurs the duties imposed on them by section 83 of the Act. Additional powers flow from and duties are imposed by other statutes, such as the [Trustee Act](#). Under section 82 of the Act, there are powers to enforce and defend causes of action on behalf of the estate, to sell or convert estate assets, to assent to vesting of bequests and legacies on the beneficiaries, among others. Acts done or actions taken on behalf of the estate or for the benefit of the estate would have to be accounted for. In other words, the personal representatives are bound to account for every action they take on behalf of the estate, for they exercise the powers of delegation.”

82. By dint of Section 79 of the [Act](#), which states

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any



limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

All the estate’s assets vest in the administrators.

83. The duly appointed administrators herein should have all the documents of title relating to the said assets.
84. There is no evidence on record that the Administrators are dealing with the estate’s properties in a manner prejudicial to the beneficiaries. In any event, the Applicant has an option to apply for removal of administrators if they are in breach of their tasks.

Issue No.6- Whether the prayer to have the grant partially confirmed is merited.

85. The applicant submitted that Rule 41 Sub Rule 3 of the *Probate and Administration Rules* provides for partial distribution where it is not possible for any sufficient reason, to distribute the entire estate. She did not advance any evidence to show that it is not possible to distribute the estate herein. This matter is part heard and there is a need to expedite its determination. Distributing the estate piece-meal will only serve to further derail this cause.
86. This prayer is declined.
87. The upshot is that this Application is devoid of merit and it and is dismissed.
88. This being a family matter each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 31ST JANUARY, 2023.

MUMBUA T MATHEKA

JUDGE

C/A Jennifer

Kamau Kuria & Company Advocates

Mutonyi, Mbiyu & Co. Advocates

Charles Kimathi & Company Advocates

