



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Zacharia Ichaura Kariuki (Deceased) (Succession Cause
488 of 2003) [2023] KEHC 267 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 267 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 488 OF 2003
JM NGUGI, J
JANUARY 26, 2023
IN THE ESTATE OF ZACHARIA ICHAURA KARIUKI (DECEASED)**

BETWEEN

PHILISTER NJOKI KARANJA APPLICANT

AND

SUSAN SALOME WAMBUI RESPONDENT

RULING

1. The Deceased in this Cause died intestate on 24/01/1999. The Applicant/Petitioner herein, Philister Njoki Karanja (hereinafter, “Applicant”), is the wife to the Deceased while the Respondent, Susan Salome Wambui (hereinafter, “Respondent”), is the Deceased’s former wife. In a Judgment dated 19/11/2020, this Court -Ngetich J. set out the mode of distribution of the Deceased’s estate. The said mode of distribution is contained in a Certificate of Confirmation of Grant dated 05/03/2021 as follows:
 - I. LR Nakuru Municipality Block 2/290 to be inherited by the objector Salome Wambui.
 - II. LR Chinga Gikie/1800 to be inherited by the Petitioner and her children.
 - III. West Pokot/ Sioi/57 (West Pokot Farm) to be valued and shared equally between the protestor on one part and the petitioner Philister and her children on the other part.
2. There are two applications before me. The first is Summons for Rectification of the Grant by the Applicant dated 22/07/2021. It seeks the following orders:
 - a. Spent
 - b. That this Honourable Court be pleased to rectify LR Chinga/gikie/1800 in the certificate of Confirmed Grant dated 5th March 2021 to read LR No. Chinga/Gikie/1200.



- c. That this Honourable Court be pleased to summon Susan Salome Wambui to produce the Original Title Deeds of the Deceased's property namely LR No. Chinga/Gikie/1200 and West Pokot/Sioi/57(West Pokot)
 - d. That further, this Honourable Court be pleased to order Susan Salome Wambui to surrender the Title Deeds for the parcels of land hereinabove mentioned to the counsel for the Petitioner to facilitate transmission to the intended beneficiaries.
 - e. That on failure to comply with (c) and (d) above, the Objector be cited for contempt of court orders and the court be pleased to commit her to civil jail and/ or punish her for contempt as it deems fit.
 - f. That the costs of this Application be borne by the Respondent.
3. The Application is supported by the grounds on the face of it and the affidavit of Philister Njoki Karanja, the Applicant. She depones that after the confirmation of grant, she conducted due diligence on 13/07/2021 on LR No. Chinga /Gikie/1800 and realised that the same belonged to a 3rd Party known as Thuita Karuiru. She later conducted due diligence on LR No. Chinga /Gikie/1200 and confirmed that the latter belongs to the Deceased.
 4. She depones that the Respondent has been in physical possession of all title deeds hence her (the Applicant's) lack of knowledge of the correct number. She swears that she is desirous of finalising the transmission process to their legitimate beneficiaries but that despite her concerted efforts, the Respondent in a bid to frustrate the process failed/ refused and/ or ignored to surrender the title deeds of the properties.
 5. The Applicant contends that due to the Respondent's unlawful conduct, she is unable to exercise her legal mandate of ensuring transmission of the estate to the beneficiaries and that it is therefore in the interest of justice that the orders be granted.
 6. In response, the Respondent filed an Affidavit dated 25/05/2022 in which she depones that after the delivery of Judgment on 20/11/2020, she was aggrieved and immediately instructed her then advocates to lodge an appeal, vide a Notice of Appeal dated 08/12/2020 and subsequently served upon the Applicant's advocates. The Respondent depones that she only learnt that this Court had issued a Certificate of Confirmation of Grant dated 05/03/2021 when she was served with the Summons dated 09/11/2021 on 23/11/2021.
 7. While the Respondent admits that LR No. Chinga /Gikie/1200 and West Pokot/Sioi/157 (West Pokot) form part of the Deceased's estate, she denies that she has possession of all the Title Deeds of the Deceased. She however admits that she has always had titles to West Pokot/Sioi/157 (West Pokot) and Nakuru Municipality Block 1/456 (Plot 290).
 8. The Respondent also denies that she was aware of the Applicant's desire to transmit the properties since, she says, the Applicant was aware that the Respondent was aggrieved by the Court's decision and of her intention to appeal. The Respondent further denies being served with a Demand Letter or having committed any wrongful acts. She reiterates that the Applicant is aware of an ongoing appeal and contends that the Applicant cannot therefore purport to proceed with what she terms as an illegal and/ or irregular distribution.
 9. The Respondent believes that the prayers sought by the Applicant should not be granted until the Court of Appeal pronounces itself on the same and that she will suffer irreparable loss if the prayers are granted.



10. The second application is by the Respondent and is dated 26/11/2021. It seeks the following orders:
 1. Spent
 2. Spent
 3. Spent
 4. That this Honourable Court be pleased to stay this proceedings and any other subsequent orders obtained herein pending hearing and determination of the Objectors' appeal.
 5. That costs of this application be in the cause.
11. The Application is supported by grounds set out therein and the affidavit of Susan Salome Wambui dated 26/11/2021. She depones that since she had instructed her former counsel who is now deceased to lodge an appeal against the Judgment of this Court, it is only just that the proceedings herein be stayed pending the hearing and determination of her appeal.
12. She deposes that on 23/11/2021, while in Kapenguria, she was served with summons to appear in Court and produce Original Title Deeds of the Deceased's properties LR No. Chinga /Gikie/1200 and West Pokot/Sioi/157 (West Pokot) despite the pending appeal against the Judgment of this Court. She depones that she was also served with the application dated 22/07/2021 slated for hearing on 25/10/2021, which was a month after the application was heard and determined. The Respondent thus contends that she was not given an opportunity to participate in the proceedings, yet ex-parte orders were issued against her. She prays that the said proceedings and orders therefrom be set aside.
13. In response, the Applicant filed the Affidavit dated 21/03/2022. She contends that the Application dated 26/11/2021 is premised on an appeal that had not been filed at the time of filing the Application since the Application was filed on 29/11/2021 while the Appeal was filed on 02/02/2022. In the Applicant's view, the application is therefore fatally defective, bad in law and an abuse of the Court process. She contends that there being no appeal against the Court's decision as at the filing of the application, this Court cannot be invited to issue orders of stay pending appeal.
14. It is also the Applicant's contention that the Appeal filed on 02/02/2022 was filed out of time which ought to be struck out and it cannot therefore be a foundation for the Respondent's application. Nonetheless, the Applicant says that the mere fact of filing an appeal does not operate as an automatic stay of the Court's decision.
15. The Applicant believes that the Respondent has not satisfied the requirements for stay pending appeal which are that she stands to suffer irreparable loss and the application being made without unreasonable delay and is therefore undeserving of the orders sought.
16. The Applicant maintains that the Respondent has frustrated the execution process by refusing to surrender the original titles to the two properties for transmission purposes. She contends that the Respondent's appeal only relates to West Pokot/Sioi/157 (West Pokot) since the tea bushes and motor vehicles were not apportioned to any of the parties and that therefore, a blanket order for stay would prejudice the rights of the Applicant's children.
17. The Applicant further contends that save for claiming compensation for the tea bushes in the appeal, the Respondent is not claiming ownership of LR No. Chinga/Gikie/1200 hence nothing stops the Court from enforcing the Judgment as the Respondent pursues her appeal.



18. The Applicant denies that any adverse orders were issued against the Respondent and contends that the Court only issued summons for the Respondent to appear when the application dated 22/07/2021 was placed before the Judge for hearing on 25/10/2021. She denies that the Respondent was denied the opportunity to be heard but rather failed to appear in Court on 29/11/2021 despite having received summons.
19. In further response, the Respondent filed the Affidavit dated 28/03/2022. She contends that the Applicant's affidavit should be expunged from the record for being filed out of time. She denies the assertion that her appeal was filed late and maintains that her Notice of Appeal was filed on 08/12/2020 and served upon the Applicant on 20/01/2021.
20. She depones that after the filing of her Notice of Appeal, she requested for typed proceedings vide a letter to the Court, but there was a delay in typing proceedings, which resulted in a Certificate of Delay being issued and later proceedings issued, and a Record of Appeal prepared.
21. The Respondent contends that she stands to suffer irreparable losses since the Applicant may proceed to execute the decree thus rendering her appeal nugatory. She reiterates that the Court ought to stay the present proceedings to allow the Court of Appeal make its decision and that the Applicant should not be allowed to prosecute the appeal through an affidavit. She denies the Applicant's assertions that she failed to attend court when summoned and prays that her application be allowed.
22. Both Applications were canvassed by way of written submissions. The Applicant's submissions are dated 20/05/2022. The Applicant cites Section 79 of the Law of Succession Act on the role of the administrator as the personal representative of the Deceased. She relies on In re Estate of Barasa Kanenje Manyi (Deceased) (Succession Cause 263 of 2002) [2020] KEHC 1 (KLR) (30 July 2020) for the proposition that Section 79 of the Law of Succession Act should be read together with Section 82 and 83 of the same Act. She then cites Section 83(f) and (i) of the Act on the duty of the Administrator to distribute and complete administration of the estate. She thus contends that the Respondent's conduct of retaining the titles is intended to frustrate the Applicant's aforementioned duties and puts the grant at the risk of being revoked under Section 76(d) (ii) of the Act. She submits that it is in the best interest of the estate that the Respondent be ordered to surrender the title deeds for transmission purposes.
23. The Applicant also cites Rule 73 of the Probate and Administration Rules which empowers the Court to make necessary orders for the ends of Justice. The Applicant urges the Court to be persuaded by Terethina Nchenge M' Ikiara v Peter Kimotho [2016] eKLR, where the Court ordered the Objector to release a title to the Administrator.
24. On whether the Respondent should be cited for contempt should she fail to surrender the titles, the Applicant cites Section 5 of the Judicature Act and relies on Sheila Cassatt Issenberg & Another v Antony Machatha Kinyanjui [2021] eKLR for the proposition that the purpose of the Courts punishing for contempt is to ensure compliance with directions of the Court. The Applicant further relies on Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 Others [2017] eKLR. She contends that the Respondent was found in contempt of Court when she failed to honour the Summons of the Court and warrants of arrest issued but stayed pending the hearing of the Applicant's Application.
25. The Applicant submits that the Respondent is not entitled to audience before this Court. She again relies on Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and 3 Other [2017] eKLR and Fred Matiang'I the Cabinet Secretary Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 Others [2018] eKLR and contends that the Respondent, being in contempt of Court Orders has no audience before the Court until she purges that contempt.



26. However, the Applicant submits, that if the Court is persuaded otherwise, then the Respondent is not entitled to orders of stay of proceedings pending appeal. The Applicant cites the threshold for stay of proceedings in *Halsbury's Law of England, 4th Edition* Vol. 37 at pages 330 and 332, *Kenya Wildlife Service v James Mutembei* [2019] eKLR and *Global Tours & Travels Limited: Nairobi HC Winding Up Cause* No. 43 of 2000 for the proposition that stay of proceedings is a matter of judicial discretion, which ought to be exercised in the interest of justice.
27. The Applicant further relies on *Lugz Enterprises & Another v Robert Lang'at* [2021] eKLR where the Court reasoned that in the absence of a Memorandum of Appeal the Court may be acting in vacuo by considering an application for stay of execution pending appeal. She reiterates that the Respondent's Application was filed on 29/11/2021 while her Memorandum of Appeal was filed on 02/02/2022, 3 months later. She thus contends that there was no appeal at the time the Respondent filed her application.
28. The Applicant submits that the change of advocates provided for under Order 9 Rule 9 of the *Civil Procedure Rules* does not provide for the stay of proceedings and as such the Respondent's application is fatally defective. She further relies on *OGM (Suing as the Father of KGW) v FG and Another* [2020] eKLR and *Ezekiel Mule Musembi v H. Young and Company (E.A) Limited* [2019] eKLR and the conditions set out therein for stay pending appeal. These are substantial loss; the application being made without unreasonable delay and the security given by the Applicant.
29. On substantial loss, the Applicant relies on *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR and submits that the Respondent has not demonstrated that she stands to suffer substantial loss, having herself been in occupation of LR NO. Chinga /Gikie/1200, which is not subject to the Respondent's appeal.
30. On whether the application has been made without unreasonable delay, the Applicant again relies on James Wangalwa & Another. She submits that the Judgment having been delivered on 19/11/2020 and the Respondent's application filed on 29/11/2021, there is inordinate delay by the Respondent.
31. On the issue of security, the Applicant relies on *Rose Sang Tarus v Barclays Bank of Kenya Limited* [2021] eKLR and *Machira T/A Machira & Co. Advocates v East African Standard* [2002] eKLR and contends that the security in this case would be the said title deeds which she argues, the Respondent has failed to provide.
32. The Respondent's submissions are dated 18/07/2022. She contends that the orders sought by the Applicant have been overtaken by events since the subject matter herein is subject to an appeal already lodged by the Respondent in Nakuru C. A No E08 of 2021. The Respondent thus contends that this Court lacks jurisdiction and relies on *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR and *Samuel Macharia Kamau v KCB & Others* [2012] eKLR.
33. On whether this Court should stay its proceedings, the Respondent cites Section 47 of the *Law of Succession Act* and submits that this Court ought to stay its proceedings given that there is already an appeal lodged at the Court of Appeal. She contends that her appeal has high chances of success and the same is likely to be rendered nugatory if proceedings are not stayed. The Respondent submits that the grant of stay of proceedings is discretionary and relies on *HMI v KBH* [2021] eKLR. She reiterates that her appeal has high chances of success and prays for costs.
34. From the foregoing, the following issues arise for determination:
 - I. Whether the proceedings herein ought to be stayed pending appeal.



- II. Whether the Certificate of Confirmation of Grant dated 05/03/2021 should be rectified.
- III. Whether the Applicant is entitled to the orders sought in the application dated 22/07/2022
35. Often, an order for stay of proceedings is sought and made in the course of a trial, so as to prevent the Trial Court from proceeding in a manner that would prejudice the Applicant. It is meant to ensure that an appeal before the Appellate Court is not rendered nugatory and to prevent the Court appealed from, from making orders that would interfere with the matter before the Appellate Court.
36. As the Court of Appeal noted in *Ayub Muthee M'igweta & 2 others v Orinda*. (Civil Application 56 of 2014) [2022] KECA 739 (KLR) that once a Court has given its Judgment, it becomes functus officio and whatever happens post-judgment cannot be stayed. Any proceedings after the delivery of Judgment can only be proceedings relating to execution of the Judgment such as an application for stay of execution or an application such as the Applicant's in the instant case. Indeed, the only proceedings pending before this Court are the two applications now before me. There are no proceedings to be stayed and as such an order for stay of proceedings would serve no useful purpose. As I reason below, however, the question of stay of proceedings is a mis-framing by the Respondent: the real issue is whether the judgment herein should be stayed until her appeal is heard and determined.
37. On the prayer for rectification of the title for one of the Deceased's properties as indicated in the Certificate of Confirmation of Grant, Section 74 of the *Law of Succession Act* allows the rectification of grants to correct errors in names and descriptions, or in setting out of the time and place of the deceased's death. The correct title number is not contested by the Respondent and as such it would only be prudent to rectify the Grant to indicate the correct parcel of land.
38. On the prayer for production of titles, the same are sought on the grounds that the Applicant wishes to proceed with execution. The Applicant alleges that the Respondent's failure to surrender the title deeds to the two properties is frustrating the process. Conversely, the Respondent argues that the issue is now before the Court of Appeal and as such this Court has no jurisdiction to entertain the same. The Applicant's response is that first, the appeal was filed out of time and that the orders sought would not interfere with the appeal.
39. The Respondent's appeal is contained in her Memorandum of Appeal dated 27/01/2022. The grounds of appeal therein can be collapsed into three: First, that the Learned Judge erred by not finding that the Respondent contributed to the purchase of West Pokot/ Sioi/57 (West Pokot Farm). Her suggestion in the appeal is that half of that property ought to have been given to her and the other half to the Deceased's estate, thus entitling her to three quarters of the said property.
40. Second, the Respondent is persuaded that the Learned Judge erred by not finding that the Respondent was entitled to her share of 5000 bushes of tea planted on LR NO. Chinga /Gikie/ 1,200 and/ or is entitled to their value thereof. Third, that the Learned Judge erred in failing to determine that Motor Vehicles KAA 402 and KAA 697A were available for distribution and that the Respondent contributed to their purchase.
41. In Succession Causes, execution occurs by way of effecting the mode of distribution as ordered in the Grant and transmission of the Deceased's assets to the beneficiaries. From the above grounds of appeal, I agree with the Applicant's analysis of the appeal that the Respondent is challenging the mode of distribution of West Pokot/Sioi/157 (West Pokot) which is one of the Title Deeds the Applicant wants produced and the distribution of tea bushes on LR No. Chinga /Gikie/1800 (1,200).
42. While the Applicant's frustration is well-founded, the Respondent's fear that execution of the Judgment herein may prejudice her ground of appeal relating to Pokot/Sioi/157 (West Pokot) is



equally well-founded. This is more so because the Applicant has expressed her intention to distribute the said property as per the Judgment of this Court. What the Respondent is truly seeking is a stay of execution of the judgment – although her application wrongly seeks of stay of proceedings.

43. It is readily obvious that should execution proceed as the Applicant intends and transmission occurs, the Appeal filed by the Respondent at the Court of Appeal will be rendered nugatory. It is, therefore, important that as much as possible the estate and the issues be preserved until the Respondent has had her day on appeal. Be that as it may, I am of the view that the parties should be put on a level playing field as they await the outcome of the appeal. This is also considering that the Respondent denies being in possession of the title to LR No. Chinga/ Gikie/1200 but has admitted to being in possession of West Pokot/Sioi/157 (West Pokot) and Nakuru Municipality Block 1/456 (Plot 290).

44. In view of the above, I make the following orders:

- I. The property identified as LR Chinga/gikie/1800 in the Certificate of Confirmation of Grant dated 05/03/2022 is hereby rectified to read LR No. Chinga/gikie/1200.
- II. The Respondent to deposit the Title to West Pokot/Sioi/157 (West Pokot) in this Court within 7 days of the date of this Ruling.
- III. The Respondent to cooperate with any necessary steps taken by the Applicant in in acquiring and/ or replacing the Title Deed to LR No. Chinga /Gikie/1200.
- IV. Status quo to be maintained respecting the estate of the Deceased until the hearing and determination of the Appeal filed by the Respondent.
- V. Any subsequent applications to be filed before the Court of Appeal.
- VI. Each party to bear its own costs.

45. Orders accordingly.

DATED DELIVERED AT NAKURU THIS 16TH DAY OF JANUARY, 2023

.....
JOEL NGUGI

JUDGE

DELIVERED AT NAKURU THIS 26TH, DAY OF JANUARY, 2023

.....
HILLARY CHEMITEI

JUDGE

