



Hano v Abuodha (Civil Appeal 7 of 2021) [2023] KEHC 1422 (KLR) (28 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1422 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 7 OF 2021
FA OCHIENG, J
FEBRUARY 28, 2023**

BETWEEN

RICHARD NYAGAYA HANO APPELLANT

AND

CHRISTINE ATIENO ABUODHA RESPONDENT

RULING

- 1 The application dated September 14, 2021 is for stay proceedings in Criminal Case No. 389 of 2019 and also the Succession Cause No. 48 of 2018, both of which are before the Principal Magistrate’s Court, Maseno.
- 2 The applicant, Richard Nyagaya Hano, has sought the orders of stay, asking that the proceedings be put on hold until his appeal herein is determined.
- 3 In a ruling dated April 21, 2021, the learned trial Magistrate held as follows, in the Succession Cause; Given that the petitioner/respondent Richard Nyagaya H. Hano, acted fraudulently, including falsely declaring himself as being the only surviving son of the deceased, while knowing too well that he is not, I order that the petitioner/respondent shall pay costs of this application and proceedings to the applicant/objector.”
- 4 The applicant felt aggrieved with the ruling and he has lodged an appeal to this court. in his said appeal he is asking this court to set aside the ruling in issue, and to reinstate the grant which had been granted to him.
- 5 In the appeal, the applicant will be seeking the termination of the criminal proceedings which had been instituted against him.
- 6 Pending the hearing and determination of the appeal, he asks that the proceedings in both the criminal case and the succession cause be put on hold.



- 7 One must therefore ask what the criminal proceedings are about.
- 8 The applicant has made available a copy of the charge sheet in the criminal case. It shows that he was charged with the offence of Obtaining Registration of a Parcel of Land by False Pretence, contrary to section 320 of the *Penal Code*.
- 9 The particulars in the charge sheet are that;
On diverse dates between 17/3/2018 and 10/01/2019 at Kawino – Urudi Village in Otwenya Location Seme Sub-County in Kisumu County, (the accused) willfully procured for yourself a parcel of land Registration Kisumu/Ratta/2750, property of the late Nashon Hano Aruwa by falsely pretending to be the sole surviving son of the late Nashon Hano Aruwa.”
- 10 The charge sheet also contains 2 other counts, relating to the alleged false swearing of an affidavit, and secondly, of giving false information to a person employed in the public service.
- 11 In respect to count 2 and count 3, the particulars cite the fact that the appellant herein had indicated that he was the only son of Nashon Hano Aruwa.
- 12 This court has been told that both the criminal case and the succession cause were being heard by the same Magistrate.
- 13 In the circumstances, the applicant submitted that he was unlikely to get a fair trial because the learned trial Magistrate had already made an express finding regarding the alleged fraudulent manner through which he declared himself as the only surviving son of Nashon Hano Aruwa.
- 14 When canvassing the application, the applicant appreciated that the court has a discretion on whether or not to grant stay of proceedings.
- 15 As he pointed out;
... The sole question is whether it is in the interest of justice to order 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 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 ... in the sense not of whether or not it will probably succeed, but whether it is an arguable one.” See Ringera J. in *Global Tours & Travels Ltd*, Winding Up Cause No. 43 of 2000.
- 16 I therefore have to answer the question about whether or not the interest of justice will be served by an order for stay of the proceedings.
- 17 In my understanding, the next step in the proceedings in the succession cause would be the appointment of an administrator to the estate of the late Nashon Hano Aruwa. The administrator would ultimately seek the confirmation of the grant.
- 18 At that stage, the applicant and any other person who believes that he or she has a beneficial interest in the estate, would have an opportunity to make his or her case. I so hold because a person who is a beneficiary does not have to be the administrator, in order to safeguard his or her interests.
- 19 The fact that the applicant may have obtained the original grant in a manner deemed to be fraudulent, (even if it were finally upheld by the appellate court), would not disentitle him from a claim to a share in the estate, provided the said claim is legitimate.
- 20 In the circumstances, I find that the applicant will not be prejudiced if the proceedings in the succession cause are not stayed.



- 21 As relates to the criminal case, I hold the view that this court cannot determine whether or not it ought to be stayed. I so hold because those proceedings are separate and distinct from the proceedings in this succession cause.
- 22 If the applicant was minded to seek stay of the criminal proceedings, he would need to consider making an appropriate application before the trial court.
- 23 Secondly, the Director of Public Prosecution is not a party to these succession proceedings. He has not been accorded an opportunity to participate in the hearing of the application to stay proceedings which were initiated by him.
- 24 By dint of the provisions of article 157(6) of the *Constitution* of the Republic of Kenya the office of the Director of Public Prosecutions is an independent office, which shall not be under the directions or control of any person or authority.
- 25 It would therefore be wrong for this court to issue an order which would curtail the exercise of the powers and functions of the Director of Public Prosecutions without giving him an opportunity to be heard.
- 26 In any event, provided that the applicant was still canvassing his appeal herein, the ruling which is the subject of the appeal cannot be conclusive evidence against him, either in the criminal case or in any other case.
- 27 In the result, justice does not demand that the proceedings in the criminal case be stayed. I therefore reject the application.
- 28 The applicant shall pay to the respondent, the costs of the application dated September 14, 2021.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF FEBRUARY, 2023.

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FRED A. OCHIENG

JUDGE

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR

