



REPUBLIC OF KENYA



**In re Estate of M'ikunyua M'murithi (Deceased) (Succession Cause
284 of 2008) [2023] KEHC 25782 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25782 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 284 OF 2008
EM MURIITHI, J
NOVEMBER 28, 2023
IN RE ESTATE OF M'IKUNYUA M'MURITHI (DECEASED)**

BETWEEN

PRISCILLA KARIMI APPLICANT

AND

JOEL MURIUKI RESPONDENT

RULING

1. By Summons under certificate of urgency dated 22/3/2023 brought under Rules 49 & 73 of the Probate and Administration Rules, the applicant seeks that:
 1. Spent
 2. This honourable court be pleased to issue an order directing the Deputy Registrar of this honourable court to execute all the relevant transfer documents on behalf of the respondent/administrator.
 3. This honourable court be pleased to grant an order directing the O.C.S Meru Police Station to provide security to the surveyor, his assistants and beneficiaries as they undertake the subdivision of land Reg.No. Nthimbiri/Igoki/11 into the courts judgment.
 4. The honourable court be pleased to direct that the land Registrar Imenti North District to dispense with the requirement of the production of the Original title deed of Land Reg. No. Nthimbiri/Igoki/11 before processing transmission documents.
 5. Costs of this application be borne by the respondents herein.



2. The application is premised on the grounds on the face of it and the supporting affidavit of the applicant sworn on even date. Since the delivery of the judgment on 21/2/2019 where the estate was shared among the beneficiaries as per the annexed decree, the respondent has declined to execute the requisite documents to effect subdivisions of the estate land to the beneficiaries, hence this application.
3. The applicant swore a supplementary affidavit on 20/5/2023 in support of her application.
4. The respondent opposed the application vide his replying affidavit sworn on 10/5/2023. He avers that he has since appealed against the judgment of 21/2/2019 to the Court of Appeal vide a Notice of Appeal filed on 4/3/2019, and this court is functus officio. He verily believes that this honourable court lacks jurisdiction to entertain this matter in line with the provisions of rules 5(2)(6) of the Court of Appeal Rules. He avers that the application is misconceived having been made in bad faith, and if the orders sought are issued, the appeal will be rendered nugatory. He faults the applicant for failing to demonstrate that his refusal to surrender the original title deed to her on demand and urges the court to dismiss her application with costs.

Submissions

5. The applicant urges that lodging a notice of appeal in the Court of Appeal does not automatically stop the execution of the judgment of this court. She urges that the court does not become functus officio merely because it has delivered a final decision in civil proceedings, and cites [*Telkom Kenya Ltd v John Ochanda \(suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Ltd \(2014\) eKLR, Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others \(2013\) eKLR and Leisure Lodge Ltd v Japhet Asige and another \(2018\) eKLR.*](#) She urges the court to allow the application with costs to ensure that she gets a fair share of her father's estate.
6. The respondent urges that the court has become functus officio since the notice of appeal has been issued and thus the application ought to be dismissed. He urges that the discretion to dispense with the production of the original title deed lies with the registrar, and cites [*Re Estate of Philip Kiogo Tunga \(dcd\) \(2020\) eKLR.*](#)

Analysis and Determination

7. For the issuance of the orders sought, the applicant must demonstrate that the respondent, who is the administrator of the estate of the deceased has blatantly failed to execute the transmission documents to effect the requisite transfers to the beneficiaries. Here, it is said that the respondent has not executed the transfer documents 4 years since estate was distributed by the court *vide* its judgment of 21/2/2019. The reason cited by the respondent for his alleged refusal to so execute the said documents is the pendency of an appeal in the Court of Appeal. While he has exhibited a notice of appeal dated 4/3/2019, it is trite under Order 42 Rule 6 of the [*Civil Procedure Rules*](#) that an appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order. The mere lodging of a Notice of Appeal is not in itself an automatic stay of execution of the judgment of this court. It is clear from the judgment sought to be appealed against that the court, the court rendered thus, "Accordingly, in terms of the aforesaid section 38 of the [*Act*](#), the estate is supposed to be distributed equally amongst the children of the deceased, whether male or female, married or unmarried. However, since the protestors, who are daughters of the deceased are agreeable that they get a smaller share in the estate, the court will adopt their mode of distribution..."



8. It is clear from the foregoing that the estate was distributed in accordance with the law and there is no real grievance to be escalated to the Court of Appeal.
9. The issue of the court being functus officio does not arise because the orders sought herein are not for the reopening of the decision of the court in the matter but purely facilitative of its earlier orders.

Orders

10. Accordingly, the Court finds merit in the applicant's Summons dated 22/3/2023 and it is allowed as prayed.
11. There shall be no order as to the costs of the appeal.

Orders accordingly.

DATED AND DELIVERED ON THIS 28TH DAY OF NOVEMBER, 2023.

EDWARD M. MURIITHI

JUDGE

