



**Masiga v Masiga (Succession Appeal E009 of 2022)
[2023] KEHC 26700 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26700 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION APPEAL E009 OF 2022
WM MUSYOKA, J
DECEMBER 20, 2023**

BETWEEN

CICILIA ACHIENO MASIGA APPELLANT

AND

MARGARET AKONGO MASIGA RESPONDENT

(an appeal arising from orders made in the ruling of Hon. Mrs. Lucy Ambasi, Chief Magistrate, CM, in Busia CMCS No. E507 of 2021, of 28th November 2022)

RULING

1. The application, dated 29th September 2023, is up for determination. It seeks review of orders made on 28th September 2023, dismissing the appeal herein.
2. I have gone through the record herein, and it is apparent that the court fell into error, upon the filing of the record of appeal, on 19th April 2023, by misapprehending the directions of 17th April 2023, for canvassing of the application dated 5th December 2022, to be directions for disposal of the appeal itself.
3. I agree with the appellants, that no directions had been taken on canvassing the appeal, rather the directions on record were for canvassing the application on record, dated 5th December 2022. It is an error on the face of the record, which is rectifiable under order 45 of the Civil Procedure Rules, as imported into probate practice by rule 63 of the Probate and Administration Rules.
4. The consequence is that the judgment, delivered on 28th September 2023, was in error, and it should be set aside, the appeal reinstated, with all the orders that were in force as at the 28th September 2023, and I hereby so order.
5. The application, dated 5th December 2022, sought stay of execution of the confirmation orders of 14th July 2022, pending hearing and determination of the appeal herein. I see that the prerequisites for an appeal have been met. The record of appeal has been filed, and the original trial court records availed.



The appeal is, therefore, ripe for hearing and determination. Consequently, to avoid, the same being nugatory, the orders sought in that application ought to be, and are hereby, granted, to preserve the status quo, pending hearing and determination of the appeal.

6. Whether the appeal was filed within time, is an issue that should be canvassed at the hearing of the appeal, for the appellants are still mixed up on whether their appeal is founded on the memorandum of appeal filed on 1st December 2022, against orders made on 28th November 2022; or the amended memorandum of appeal filed on 19th April 2023, which challenges orders made on 7th July 2022. If we go by the memorandum of appeal of 1st December 2022, then the appeal was filed within time, but if we go by that filed on 19th April 2023, then there would be something fundamentally wrong.
7. The application, dated 29th September 2023, is disposed of in terms of paragraphs 4 and 5 hereabove. The appeal herein is admitted. The same shall be mentioned on 16th January 2024, for directions on disposal. It is so ordered..

RULING IS DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 20TH OF DECEMBER 2023.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Margaret Akongo Masiga, the respondent, in person.

Advocates

Mr. Masiga, instructed by Masiga Wainaina & Associates, Advocates for the appellants.

