



**Kiricho v Kiricho & 6 others (Miscellaneous Application
5 of 2022) [2022] KEHC 12405 (KLR) (17 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12405 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS APPLICATION 5 OF 2022
FN MUCHEMI, J
AUGUST 17, 2022**

**(BEING A HIGH COURT REFERENCE AFTER REFUSAL OF APPLICANTS
APPLICATION BY SUMMONS GENERAL DATED 3RD MARCH, 2022 BY HON. E.W
ANGIMA ON 28TH FEBRUARY, 2022 IN CM SUCCESSION CAUSE NO. 99 OF 2018)**

BETWEEN

GERALD GACHUNIA KIRICHO APPLICANT

AND

JAMES WANJOHI KIRICHO 1ST RESPONDENT
ALICE WANGECHI KIRICHO 2ND RESPONDENT
MARY WAIRIMU GATIMU 3RD RESPONDENT
JOHN MATHENGE KIRICHO 4TH RESPONDENT
ESTHER MUTHONI NYORO 5TH RESPONDENT
MOSES KURIA KIRICHO 6TH RESPONDENT
JAMES MWANGI IRICHO 7TH RESPONDENT

RULING

1. This application dated 4th March 2022 seeks for orders of stay of execution of judgement in Nyeri CM Succession Cause No. 99 of 2018 delivered on 28/02/2022. He also prays for orders restraining the respondents from evicting him from the deceased's land where he says he lives. Orders against intermeddling with the deceased's estate pending the intended appeal are also sought.
2. An amended application was filed on 4th April 2022 dated 1st April 2022. The applicant depones that he is the son of the deceased and brother to the seven (7) respondents. The applicant claims that he was left out in the distribution of the deceased's estate without good cause. He states that he applied for



proceedings in order to appeal against the judgement of the Resident Magistrate but he is still waiting to be supplied. He further states that he has a home on the deceased's land since 20 years ago and the respondents have started felling down trees and are in the process of evicting him.

3. In his further affidavit, the appellant annexed a draft memorandum of appeal and is positive that his appeal has high chances of success.
4. The respondents oppose this application filed a joint replying affidavit sworn by James Mwangi Kerichu who deposes that he has the authority to swear on behalf of himself and the other 6 respondents. It is deposed that the application dated 4/03/2022 was not filed on a working day as shown by the court stamp on the face of the summons. It is further stated that the respondents response was first rejected by the registry for it had pointed out about the filing of the application on a weekend.
5. The respondents deny that they have attempted to evict the applicant and that the Amended application was filed without leave of the court.
6. It is deposed that the judgement of the magistrate was well reasoned and the appeal has no chances of success.
7. It is noted that the contents of the rest of the replying affidavit is evidence that was adduced in the lower court which is not relevant in this application.
8. In addressing the complaint of the respondents that the initial application dated 4th March 2022 was filed during the weekend as per the court stamp, I wish to state that this matter ought to have been brought to the attention of the Senior Court Administrator to deal with it administratively. As for the Amended application, it was filed on 4th April 2022 which was on a Monday. As for now, I direct that the Senior Court Administrator take up the issue on allegation of filing the initial application during the weekend for internal investigation and deal accordingly.
9. The respondents allege that the Amended Application was filed without leave of the court. The respondents have not cited the law relied on in this regard. However, I take judicial notice that the parties in this application are not represented by advocates and as such some procedural flaws in the course of the application would be expected to occur from time to time. Article 159 of [the Constitution](#) calls upon courts to handle matters without undue regard to technicalities. As such any technicality such as the one pointed out does not render the application defective. Furthermore this is a succession matter where the complex Civil Procedure rules do not apply.
10. The applicant filed this application on 5/03/2022 the judgement having been delivered on 28/02/2022. The application was therefore filed without any delay.
11. The applicant says that he was dissatisfied with the judgement of the magistrate in that he was excluded from the distribution of the estate. He says the magistrate erred in finding that he was not a child of the deceased despite the evidence he tendered. The grant has already been confirmed and the applicant fears that his appeal will be rendered nugatory if the orders are not granted. The applicant further depones that he has applied for proceedings and he is in the process of preparing to file an appeal. The respond has pointed out that the 30 days for filing an appeal have already expired since judgment was delivered. The applicant states that he can file an application for extension of time but this will still cause further delay. The applicant argues that he has a right of appeal which cannot be denied unless it is found not to be deserved.
12. I have perused the judgement and the draft memorandum of appeal and I am of the view that the appeal is arguable and that the applicant ought to be given a chance to file his appeal. If the grant is executed, the appeal may be rendered nugatory. The parties may have to incur unnecessary expenses in



an exercise that may have to be repeated in the event that the appeal is successful. The applicant is likely to suffer substantial loss in the execution of the grant at this stage. The applicant depones that he lives on the land and has been there for many years. In the event that he is forcefully evicted, the applicant is likely to suffer further loss which may not be necessary if it can be prevented at this state.

13. This court appreciates the fact that the respondents are entitled to fruits of their judgment and that there is need for the applicant to file and fast-track the intended appeal. Time is therefore of essence and provision of a reasonable security is appropriate in this application. The applicant has demonstrated that there is need to preserve the estate of the deceased pending the hearing and determination of the intended appeal.
14. Having considered all the foregoing, I find that this application has merit. It is hereby allowed in the following terms:-
 - a. That stay pending the intended appeal is hereby granted against the judgement delivered on 28th February 2022 in CM Succession Cause No. 99 of 2018.
 - b. That the applicant is hereby ordered to deposit Kshs.100,000/= in court as security within 30 days in default of which these orders will stand vacated.
 - c. That the appellant is granted 21 days to file the intended appeal.
 - d. That the parties shall maintain status quo pending determination of the intended appeal.
 - e. That each party to meet their own costs.
15. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 17TH DAY OF AUGUST, 2022.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 17TH DAY OF AUGUST, 2022.

