



REPUBLIC OF KENYA



**In re Estate of Njoroge Mbote (Deceased) (Succession Cause
15 of 2001) [2004] KEHC 2439 (KLR) (Family) (7 May 2004) (Ruling)**

Samuel Mundia Njoroge & 5 others v John Njuguna Njoroge [2004] eKLR

Neutral citation: [2004] KEHC 2439 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
FAMILY
SUCCESSION CAUSE 15 OF 2001
MK KOOME, J
MAY 7, 2004
IN THE MATTER OF THE ESTATE OF NJOROGE MBOTE (DECEASED)
IN THE MATTER OF THE ESTATE OF NJOROGE MBOTE (DECEASED)**

BETWEEN

**SAMUEL MUNDIA NJOROGE 1ST APPLICANT
JAMES MURUGA NJOROGE 2ND APPLICANT
FRANCIS NGUGI NJOROGE 3RD APPLICANT
PETER KARIUKI NJOROGE 4TH APPLICANT
DAVID MBURU NJOROGE 5TH APPLICANT
LILIAN WAMBUI NJOROGE 6TH APPLICANT**

AND

JOHN NJUGUNA NJOROGE RESPONDENT

RULING

1. This is an application for stay of execution brought under order XXI Rules 22(1) and 91 of the *Civil Procedure Rules*. The stay of execution from my reading of the grounds upon which the application is based is sought pending a hearing of a Notice of Objection to the taxation made on 24th September 2003 whereby the applicants were ordered to pay a sum of Kshs.268,320/= being the taxed costs due to the respondent. Pursuant to the said order, a Notice to show Cause was issued and an order attaching the salary of the 1st applicant was issued on 3rd March 2004.



2. This is the order that has triggered this application for stay of execution which is premised on the following grounds as deposed in the applicants affidavits.
3. That the applicants were never served with the NTSC and according to the applicant the affidavit of service by Godfrey Gichuki sworn on 3rd March 2004 is not true as the applicant was not at Kijabe on the day the service is alleged to have been made.
4. The applicant claims that he was at Tulanga where he works as a Forest Officer and the distance between Tulanga and Kijabe is about 30 miles, and his residential home is in Magumo where the whole family resides and therefore there was no Notice to Show Cause that was properly served.
5. Secondly, the Notice to Show Cause was wrongly issued in the name of John Njoroge Mbote whereas the applicants Name is John Njuguna Njoroge which was meant to cause confusion.
6. Thirdly and perhaps more importantly the applicants intend to file a reference in regard to the order of taxation and in this regard, they have filed a Notice of Objection and they are awaiting the ruling of the learned Deputy Registrar to be typed.
7. This application was opposed by the decree holders on the following grounds:- That the application is fatally defective as it does not disclose what action is to be taken after the stay of execution.- The respondent filed an Affidavit of Service which is his evidence in chief and if the applicants intended to challenge the process server, they ought to have requested for his cross-examination to test the ferocity his evidence.- According to the respondent, this application is a merely meant to delay the process of execution as the applicants have not taken any steps since October 2001 to challenge the taxation. He therefore urged the court to bring this litigation to an end and disallow the application for stay.
8. I have carefully evaluated the submissions and the material presented for and against this application. This is an application for stay of execution of an order of costs arising out of a Succession proceedings. Although the issue of Jurisdiction was not addressed, I have to confirm whether this matter is properly before this court. It is clear from the provisions of Cap 160 especially rule 63, read together with rules 41 and indeed the entire Act, an application of this nature is not at all provided. The provisions of order XX1 of the *Civil Procedure Rules* and Section 3 of the *Civil Procedure Act* are not at all envisaged nor are they imported in the *Law of Succession Act*. Can this application therefore lie? As I pointed out the order that is sought to be stayed is not a substantive matter arising out of the decision of the court, under the *Law of Succession Acts* it is the ruling and order by the Deputy Registrar on costs.
9. Accordingly in view of the provisions of Section 47 of *Law of Succession Act* and rule 73 of the *P & A Rules* and bearing in mind the guiding principles in administration of justice that the court should decide all cases according to substantial justice without undue regard to technicalities of procedure and without undue delay, I am satisfied that this application brought under Rule 21 of the *Civil Procedure* is properly before me and I therefore proceed to determine it on merit.
10. The first issue for me to consider is whether the application is defective. My reading of prayer No. 2 of the Summons clearly shows that something was left out as it reads:

“That execution of the decree herein by attachment of the first applicant’s 1/3 salary issued on 3rd March 2004 be stayed.”
11. The question that begs for an answer is pending what? When one considers the grounds in support of the application especially ground No. (c) which provides:



- a) “That the other applicants and I have filed a Notice of Objection to the taxation herein and are awaiting a copy of the Ruling to file the necessary reference herein”
12. This ground clearly shows why the applicant is seeking for stay of execution. It is pending the determination of the Notice of Objection and the reference. I therefore turn to the other issue raised in support of the application that is the Notice to Show Cause which is alleged to have been never been served upon the applicants. First of all the Notice to Show Cause was served upon the respondent’s advocates on the day of the hearing that is on 3rd March 2004. Although it is not necessary to serve the Notice to Show Cause upon the advocate if the decree/holder intended to have the applicants’ represented by the advocate, then they should have served him earlier with the court papers. Besides this point it was incumbent upon the decree holder’s advocates to produce the process server for cross-examination since the applicant had sworn an affidavit denying that he was ever served with the Notice to Show Cause In view of the above, and on the balance of convinience I grant the stay of execution on the following conditions:
- 1) The applicants do deposit in court a sum of Kshs.70,000/= being security for costs within 30 days from the date hereof.
 - 2) The applicants do prosecute the reference challenging the order of taxation within 6 months from todays date failure to which the stay herein shall lapse.
13. For reasons stated above, each party to bear their own costs of this application.

RULING READ AND SIGNED ON 7TH MAY 2004.

MARTHA KOOME

JUDGE

