



REPUBLIC OF KENYA



In re Estate of Peter Wambua Mutunga alias Wambua Mutunga (Deceased) (Succession Appeal E010 of 2024) [2025] KEHC 3208 (KLR) (21 January 2025) (Ruling)

Neutral citation: [2025] KEHC 3208 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION APPEAL E010 OF 2024**

FR OLEL, J

JANUARY 21, 2025

**IN THE MATTER OF THE ESTATE OF PETER WAMBUA
MUTUNGA ALIAS WAMBUA MUTUNGA (DECEASED)**

BETWEEN

ONESMUS MUTISYA WAMBUA 1ST APPELLANT

MUTUA WABUA 2ND APPELLANT

AND

PETER MUTOONI MUANGE RESPONDENT

RULING

Introduction

1. The application before this court for determination is the Chamber summons dated 1st October 2024. The applicant seeks for orders that;
 - a. Spent.
 - b. Spent.
 - c. The court be pleased to issue stay of execution and implementation of the ruling/judgment and order issued on the 27th of August 2024 by Hon Daffine Nyaboke Sure vide Kangundo Succession cause No E091 of 2022, pending the hearing and determination of this Appeal.
 - d. That costs be in the cause.
2. The application is supported by the grounds on the face of the said Application and the supporting Affidavit of the 1st Appellant, Onesmus Mutisya Wambua, who deponed that they had filed before the trial court, summons to revoke and annul the grant dated 21st October 2022 on grounds that the said had been obtained by making a false statement of written will and means of untrue allegations. The



said was heard and determined by the trial court, who dismissed their Application vide the court ruling dated 27th August 2024.

3. Being aggrieved by the said determination, they had filed this Appeal and unless orders of stay of execution were granted, the respondents would implement and execute distribution of the estate which would cause them irreparable harm and render this Appeal to be nugatory. The Appeal as filed raised weighty triable issues, which ought to be heard and determined on merit. They thus urged this court to find that this Application has merit and be pleased to grant the same.
4. This Application was opposed by the respondent through his replying Affidavit dated 4th November 2024, where he deponed that in succession matters, stay of execution should only be granted in exceptional circumstances, while mindful of the interests of other beneficiaries and also to avoid delay in implementation of distribution of the estate. The Appellants had failed to prove that they would suffer substantial loss if stay orders were not granted and thus urged the court not to grant the orders sought.
5. In the alternative, if the court was inclined to grant the stay of execution orders as sought, the respondent urged the court to order the Appellants to provide security of Kshs 200,000/= as a condition for stay of the decree issued by the trial court.

Analysis & Determination

6. I have carefully considered the summons, Supporting Affidavit, and the Respondent's replying affidavit and find that the only issue for determination is whether the court should grant the applicant orders staying implementation of the Ruling/order of the trial Magistrate dated 27th August 2024 and if so, under what terms.
7. Rule 63 of the *probate and administration Rules*, provides circumstances under which certain rules of the *Civil Procedure Act*, may apply to Succession matters, but excludes Order 42 of the *civil procedure rules*. In determining this application, the court then has to fall back on Section 47 of the *Succession Act*, Cap 160 as read together with Rule 73 of the *probate and administration Rules*, which gives this court unfettered jurisdiction to issue appropriate orders.
8. Section 47 of the *Succession Act*, Cap 160, provides that;

“The high court shall have jurisdiction to entertain any Application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”
9. Further Rule 73 of the *probate and Administration Rules* provides further cushion to the court to expeditiously deal with its proceedings and the said rules provides that;

“Nothing in these rules shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
10. The Court, in exercising its discretion, when confronted with such circumstances should therefore always opt for the lower rather than the higher risk of injustice and should make such orders as may be necessary for the ends of justice. The court will consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court,



so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. See *Suleiman v. Amboseli Resort Limited* [2004] 2 KLR 589.

11. What is at stake herein is the Appellant's right to be heard, while maintaining the status quo on the ground and balancing the interest of both parties to have this Appeal dispensed with in the shortest time possible so as not to prejudice the respondents.
12. If the stay orders are not granted, it stands to chance that the respondents will proceed to distribute the estate, without involving the Appellants and that would render the Appeal filed to be nugatory. Such distribution cannot be undone, without further litigation, which will be contra to the "oxygen principals", which provides for the efficient disposal of the business of the Court, efficient use of the available judicial and administrative resources, the timely disposal of the proceedings at a cost affordable by the respective parties.

Disposition

13. For the reasons advanced I do find that the Summons Application dated 1st October 2024 has merit and do allow the same in terms of prayer (3) on the condition that;
 - a. The Appellants will deposit a sum of Kshs 100,000/= in court as security for this Appeal and the said sum is to be deposited within 60 days from the date of delivery of this ruling.
 - b. The Executive officer -Kangundo Law Court to ensure that the proceedings of Kangundo Cmcc Succession cause No E91 of 2022 are typed within the next 60 days and the said file is forwarded to the High Court, to facilitate expeditious disposal of this Appeal.
 - c. The Appellants will have 90 days from the date of this order to file and serve their record of Appeal and submissions and upon service of the said pleadings upon the Respondents, they too will have 30 days to file their submissions.
 - d. The Appellants will extract and serve this order upon the executive officer-Kangundo Law Courts to ensure compliance.
 - e. If the Applicants fail to comply with prayer (a) and the timelines granted to have the record of Appeal and submissions filed, the order of stay issued herein will automatically lapse.
14. It is so ordered.

READ, SIGNED, AND DELIVERED VIRTUALLY AT MARSABIT ON THIS 21ST DAY OF JANUARY, 2025.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 21ST DAY OF JANUARY, 2025.

In the presence of:-

No appearance for Appellant

No appearance for Respondent

I.Jabo Court Assistant

