



In re Estate of Walter Odhach Arudhi alias Odhach Arudhi (Civil Appeal E019 of 2023) [2025] KEHC 202 (KLR) (17 January 2025) (Ruling)

Neutral citation: [2025] KEHC 202 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E019 OF 2023
DK KEMEL, J
JANUARY 17, 2025**

BETWEEN

WILSON ARIKA OORO 1ST APPELLANT

MOSES OKENDO OORO 2ND APPELLANT

MARGARET ADHIAMBO 3RD APPELLANT

AND

SOPHIA OGA ODHACH RESPONDENT

(Appeal from the Ruling of the Senior Resident Magistrate court at Bondo Hon. Stella Wanjiku Mathenge dated 14th Day 2023, in succession cause no.331 of 2021)

RULING

1. The Appellants herein have filed an application dated 27th July 2023 seeking the following reliefs:
 - i. Spent.
 - ii. Spent.
 - iii. Stay of the grant issued in succession cause number 331 of 2021 pending the hearing and determination of the appeal herein.
 - iv. That this honorable court to call for the lower court files in succession cause No. E331 of 2021 and E131 of 2021 and review the same.
 - v. The court be pleased to issue an order conserving the entire estate of Isaka Arudhi Ochaka pending the determination of the appeal.
 - vi. The court do issue an injunction against the Respondent barring the transfer of title number Uyoma/Ragengni/1658 pending the hearing and determination of the appeal.



- vii. That costs be provided for.
2. The application is supported by the grounds set out on the face of the application as well as the supporting affidavit of the first Appellant sworn on even date. The Appellants' gravamen is inter alia; that the Appellants had filed a summons for revocation of grant before the lower court and which was dismissed; that the suit parcel Uyoma/Ragen Gni/1658 belonged to the deceased herein; that the said parcel of land has since been distributed to two persons to their exclusion; that the Appellants have been dispossessed of their rightful portion of the land; that the Respondent had filed the succession cause and obtained the grant without full disclosure of the material facts to the court; that the whole parcel of land has since been given to the Respondent to the exclusion of the Appellants; that the Respondent has now commenced subdivision of the said land with a view to selling the portions to the detriment of the Appellants; that the Appellants are apprehensive that unless the orders of stay are granted, they stand to suffer great loss and damage.
 3. The application was opposed by the Respondent who filed a replying affidavit sworn on 14/9/2023 wherein she averred inter alia; that the Appellants' purported attempt to introduce new evidence was never placed before the trial court; that the application has been overtaken by events as the Respondent has already been issued with a title deed; that the Appellants are not related to the Respondent's late husband; that the claims by the Appellants is best ventilated before the Environment and Land Court and not in this cause; that the application does not meet the legal threshold so as to warrant the orders sought.
 4. The application was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
 2. The Applicants relied on the provisions of Order 42 Rule (6)(1) of the Civil Procedure Rules which provides as follows:

“No appeal or second appeal shall 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, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

3. The Applicant also submitted on section 76 of the *Law of Succession Act*, that a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—
 - (a) that the proceedings to obtain the grant were defective in substance;
 - (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
 - (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
 - (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-



- (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstance
4. Further in their submissions, the Appellants relied on several cases including Jamii Bora Bank Limited versus Samuel Wambugu Ndirangu Civil Appeal E030 of 2021 and Shell ltd Vs. Kibiru and Another (1986) KLR 410
- In the instant case, the Applicants contended that the Respondent was selling part of all that land parcel known as Uyoma/Ragengni/1658. That they had conducted a search and realized that the land had been registered in the name of the Respondent stemming from the certificate of Grant dated the 3rd October 2021. The Applicants further submitted that they have been disinherited of the land parcel where they have occupied for over 50 years. In conclusion, the Appellants submitted that they have satisfied the conditions imposed by Order 42 Rule 6(2) of the Civil Procedure Rules and hence their application should be allowed as prayed.
7. On her part, the Respondent vehemently opposed the application stating that some of the issues raised by the Applicants/appellants are wholly and materially land issues that can be best canvassed at the ELC court and not in this court.
8. The Respondent further submitted that the Applicants submission that the estate of Walter Odhach Arudhi Alias Odhach forms part of the estate of Isaka Ochaka Arudhi is an afterthought and misconceived as the appellants are not beneficiaries and have no locus standi over the estate of Walter Odhach Arudhi Alias Odhach Arudhi. That the Applicants are not related to her husband Walter Odhach Arudhi.
10. The Respondent submitted that the Applicants have not demonstrated to the court which interest they have in the estate of Walter Odhach Arudhi. That a careful analysis at the entries on the green cards show that the Respondent's husband Walter Odhach Arudhi Alias Odhach Arudhi owned half share of the suit land parcel No. UYOMA/RAGENGNI/1658 and the other half to Okech Arudhi.
- That the Respondent being the only wife to the late Walter Odhach Arudhi, she took letters of administration on the estate of her husband which was half share. That the green card does not mention any Isaka Ochaka Arudhi.
11. The Respondent relied on the case of Kenya Commercial Bank Vs. Sun City Properties ltd and 5 Others (2012) EKLK and submitted that the applicants have not demonstrated that they are willing to give ant security for costs and hence they are not entitled to a conditional stay pending appeal.
12. It was further submitted that the Appellants did not demonstrate how they stand to suffer irreparable damage if the stay is not granted. That the Applicants do not stay on the suit land and that they should have invited the court to visit the locus in quo to ascertain the same on the ground. That the Applicants stay on their own land parcels registered in their own names. On this, they relied on the case of Chris Munga Bichage Vs. Richard Nyagaka Tongi & 2 Others (2013) eKLR and submitted that the applicants failed to demonstrate how they would suffer irreparable damage



13. The Respondent submitted that the Applicants' supporting affidavit paragraph 5 states that the court should issue an order conserving the entire estate of Isaka Arudhi Ochaka(deceased) pending hearing and determination of the appeal. However, the Respondent has rendered documents including official searches and copy of green card indicating that she succeeded the estate of her husband Walter Odhach Arudhi alias Odhach Arudhi. That the Applicants have not corroborated their application to show that the Respondent succeeded the estate of Asaka Achaka Arudhi. The same is thus frivolous and worth dismissing the same.
14. In conclusion, the Respondent submitted that the application is unmerited and actuated by malice and that the same should be dismissed.
15. I have given due consideration to the rival affidavits and the submissions. It is not in dispute that the green card indicates that the suit property was initially registered in the name of two proprietors in half shares namely Okech Arudhi (half share) and Walter Odhach Arudhi (half share). It is also not in dispute that the Respondent has since acquired the whole parcel of land Uyoma/Ragengni/1658 even though the initial. It is also not in dispute that the Appellants have since lodged a Memorandum of Appeal against the order of the trial court and that the said appeal is yet to be set down for hearing. I find the issue for determination is whether the application has merit.
16. The Appellants' application has been brought under the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules. The said Rule provides that an applicant seeking for orders of stay of execution of decree must satisfy three conditions inter alia; that the application has been filed without unreasonable delay; that the applicants stand to suffer substantial loss if the order is not granted; that the applicant is ready and willing to furnish security for the due performance of the decree which might become binding on him. The Appellants herein are thus under obligation to satisfy these conditions.
17. On whether the application was filed timeously, it is noted that the impugned ruling was delivered on 14/7/2023 while the present application was lodged on 28/7/2023 which is within two weeks thereafter. I find that the application was filed without inordinate delay.
18. As regards the issue of whether the Appellants stand to suffer substantial loss, the Appellants have averred that the Respondent has had herself registered as the sole proprietor of the suit land to the exclusion of the Appellants yet they have a beneficial interest in half share of the property that had belonged to Okech Arudhi. They have also averred that they have been in occupation of the suit land for over fifty years and that they stand to lose their ancestral land. I have perused the green card and note that the suit land had initially been registered in names of two proprietors with each holding a half share thereof. If the Respondent has since had herself registered as proprietor of the whole portion of land, I find that the Applicants stand to suffer substantial loss if an order of stay pending appeal is not granted herein. There is need to preserve the subject matter of the appeal since the same might be rendered nugatory.
19. As regards the aspect of security, it is noted that the Appellants in their supporting affidavit did not make any averment to the effect that they are ready and willing to furnish security for the due performance of the decree which might become binding upon them in the end. Indeed, the furnishing of security is a prerequisite for the grant of an order of stay of execution pending an appeal. The Appellants upon being served with a replying affidavit by the Respondent, failed to address themselves on the issue of security. Ordinarily, this court would have right away rejected the application on that ground. However, due to the dictates of natural justice and the need to do justice pursuant to the provisions of Article 159 (2) (d) of *the constitution*. I am also alive to the fact that the Respondent is entitled to enjoy the fruits of her judgement and hence no impediments or road blocks are placed in her way. I am of the view that an order that the Appellants be compelled to deposit a sum of Kshs 200, 000/



as security which should be paid into a joint interest earning account in the names of the Advocates for the parties within a certain timeline pending determination of the appeal will take care of the concerns of the parties herein.

20. Finally, it is noted that the Appellants have sought for a raft of prayers. I have perused the same and find that it is only prayer No. 3 that merits consideration by this court. As regards prayer No. 4, the same deals with matters of review of the lower court's orders in which the Appellants should seek the same before the said court. Further, prayer No. 5 is a duplication of prayer No. 3 and hence prayer No. 3 should be sufficient. Similarly, prayer No. 6 is a duplication of prayer No. 3.
21. In the result, the Appellants' application dated 27/7/2023 partly succeeds. The same is allowed in the following terms:
- a) An order of stay of execution of the confirmed grant in Bondo Succession Cause No. E331 of 2021 is hereby granted pending the determination of the Appeal herein upon the Appellants depositing a sum of Kshs 200, 000/ into a joint interest-earning account in the names of both Advocates for the parties herein within thirty (30) days from the date hereof failing which the stay shall lapse.
 - b) The rest of the prayers in the application stand dismissed.
 - c) The costs of the application shall abide in the appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 17TH DAY JANUARY, 2025.

D. KEMEI

JUDGE.

In the presence of:

M/s Odero.....for Appellants/Applicants

N/Afor Respondent

Mboya.....Court Assistant

