In re Estate of the Late Samuel Waweru Mugo (Deceased) (Succession Cause E231 of 2010) [2025] KEHC 2120 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2120 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE E231 OF 2010

RN NYAKUNDI, J

FEBRUARY 21, 2025

IN THE MATTER OF THE ESTATE OF THE LATE SAMUEL WAWERU MUGO (DECEASED)

BETWEEN

MIRIAM NJOKI WAWERU .... 1ST PETITIONER

PETER KINYANJUI WAWERU .... 2ND PETITIONER

MARY WAMBUI GACHAHI .... 3RD PETITIONER

AND

ANN WANJIRU MUREITHI .... 1ST OBJECTOR

OBADIAH KARURU .... 2ND OBJECTOR

DAVID GATHURU .... 3RD OBJECTOR

KOHN WAWERU NJOGU .... 4TH OBJECTOR

RULING

1. Before me for determination is the Petitioners' application dated 7th November, 2024 seeking stay of execution of the judgement delivered on 11th October, 2024 by this court pending appeal. The application was supported by grounds on the face of it as well as the affidavit sworn by the 1st Petitioner/ Applicant.

2. In response to the application, the 3rd Objector filed a replying affidavit in which he deposed as follows:

    a. That the application is incompetent and unsustainable.

    b. That an application seeking leave to appeal ought to be filed within two (2) weeks of the decision to be appealed from.

c. That the application herein was filed almost a month after the decision was made and it is outside the two (2) weeks limitation period for filing of such an application.

d. That there is no basis for seeking stay of enforcement of the decision delivered on 11/10/2024.

e. That the conditions to be met for stay of execution of the decision namely:

   i. An appeal having been filed

   ii. The application has been made timeously and

   iii. The likelihood of one sustaining do not obtain substantial loss.

f. That the filing of an appeal is not a synonymous with obtaining stay of execution of a decision.

g. That I have learned from my counsel Mr. Momanyi that this honourable court lacks jurisdiction to validate a notice of appeal as the same falls within the province of the Court of Appeal.

h. That the DNA exercise will not render the intended appeal nugatory and or defeat it.

i. That the DNA exercise will cost approximately Kshs. 30,000/= - Kshs. 42,000/= which is a paltry sum.

j. That the DNA exercise will determine my paternity and that of my brother Obadiah Karuru.

k. That if the Court of Appeal finally or eventually reverses the decision on DNA then I and my brother will be excluded from the list of beneficiaries and there is no loss the petitioners or the estate will sustain.

l. That the ends of justice dictate that the DNA exercise be undertaken without further delay.

3. The application was canvassed by way of written submissions and at the tie of drafting this decision, I only had sight of the Petitioners' submissions which have been summarized as hereunder:

Petitioners' written submissions

4. Learned Counsel Mr. Yego argued that there were three key issues for determination: whether the Applicants had demonstrated reasons for grant of stay orders, whether the Objectors/Respondents would suffer prejudice, and who should bear the costs.

5. On the first issue, learned counsel submitted that jurisprudence for stay of execution pending appeal was well settled by the courts. In support of this argument, counsel cited the decision in Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another (2014) eKLR, where the court stressed that automatic right of appeal does not exist in probate and administration matters. Counsel relied on the cases of John Mwita Murimi v Mwikabe Chacha Mwita (2019) eKLR and Re Estate of Wanga Ole Oiye (2022) eKLR to further buttress this point.

6. It was further submitted that in RWW v EKW (2019) eKLR, the court had established that the purpose of stay applications was to preserve the subject matter in dispute to safeguard the appellant's rights and ensure the appeal, if successful, is not rendered nugatory. Learned counsel emphasized that this must be balanced against the right of a successful litigant to enjoy the fruits of their judgment.

7. In developing this argument, counsel relied on Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990, which established that while the Court of Appeal's power to grant

stay is unfettered, the High Court's jurisdiction is fettered by three conditions: establishment of sufficient cause, satisfaction of substantial loss, and furnishing of security.

8. On the issue of substantial loss, learned counsel cited the case of Michael Ntouthi Mitheu v Abraham Musau (2021) eKLR, which referenced Kenya Shell Limited v Kibiru (1986) KLR 410. It was argued that substantial loss forms the cornerstone for granting stay.

9. Turning to the specific circumstances of the case, counsel submitted that the Petitioners were aggrieved by the part of the judgment ordering DNA testing and had duly filed a notice of appeal. It was contended that the Objectors, while also aggrieved and having filed their own notice of appeal, were nonetheless seeking to execute the judgment through an application dated 31st October 2024 to compel DNA testing.

10. Learned counsel emphasized that since all parties were aggrieved by the judgment, it was in the interest of justice to stay execution pending appeal. It was argued that the application was filed expeditiously, being filed on 7th November 2024 following judgment on 11th October 2024. Significantly, counsel submitted that the Applicants would suffer irreparable harm as the DNA testing would infringe their constitutional right to privacy under Article 35 of *the Constitution*.

11. On the issue of prejudice, it was submitted that the Objectors would suffer no prejudice as they had already expressed dissatisfaction with the judgment through their own notice of appeal. Counsel characterized the Respondents' attempt to execute the judgment while simultaneously appealing as mischievous and in bad faith.

12. In conclusion, learned counsel submitted that the application was meritorious and deserving of the orders sought, with the Applicants having demonstrated sufficient reasons and expressing willingness to abide by any security orders imposed by the court. It was prayed that costs be borne by the Objectors/Respondents.

Analysis and determination

13. The basic principles that are applicable on an application off stay are trite as deducible from order 42 Rule 6 of the Civil Procedure Rules. The legal basis for grant of stay pending appeal is Order 42 Rule 6 of the Civil Procedure Rules, 2010. Basically, the Defendant/Applicant is required to demonstrate that:

> " Substantial loss may result unless the order is made; the application has been mad without unreasonable delay; such security as the court orders for the due performance of the decree has been given before the applicant"

14. The general rule is that an appeal does not apply as stay of execution except in so far as that court or this court otherwise directs exercising discretion on the well-established jurisprudential decisions. The court is also likely to grant a stay where the judgment or order will be rendered nugatory or the intended appellant/appellant will suffer substantial loss which will not easily be recovered or compensated by way of damages. In stay applications, an applicant who applies must satisfy the criteria set out in Order 42 Rules 6 of the Civil Procedure Rules. As if that is not enough, the court will also consider whether the appeal has a realistic prospect of succeeding. The approach to be adopted by this court in exercising discretion on this application on stay of execution is outlined in several decisions of the superior courts including just a few which I have discussed hereunder for purposes of this discussion:

15. The Court of Appeal in Halai and Another –vs- Thornton & Turpin (1963) Ltd [1990] KLR reiterated these conditions as follows: -

> " In Rasiklal Somabhai Patel v Parklands Properties Ltd the Court said that before it could decide the application (for stay of execution) it must have regard to the requirements of Order XLI Rule 4(2) of the Civil Procedure Rules under which the Applicant had to satisfy the Court of two matters application is granted, which prima facie means that if the appeal succeeds, the Respondent would not be in a position to make full restitution. Secondly, the Applicant had to give such security as the Court may order. Those are the requirements under Order XLI Rule 4(2) of the Civil Procedure Rules but that order mainly governs applications before the superior Court and not those to this Court, although in sub-rule (1) of the same Rule reference is made to the Court to which the appeal is preferred. It is, however, worth noting that as to the court to which the appeal is preferred it is at liberty to consider the application made to it and make such order thereon as may, to it, seem just.........."

16. In James Wangalwa & Another –-vs- Agnes Naliaka Cheseto [2012] eKLR the court held that: -

> " the applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

17. It is also important to point out that as a general rule, where there is no positive order capable of being executed, a stay of execution ought not to be issued. In Titus Kiema –vs- North Eastern Welfare Society [2016] eKLR the Court stated:

> " I appreciate the order to be a negative one authorizing no action nor placing any obligation upon the Appellant to be performed. In that event, therefore, one would pose the question: what execution is threatened and that needs to be stayed" I have been unable to see any such threat..... The question of executable order is in my view tied to the question of substantial loss. An Applicant need to approach the Court and demonstrate in a word akin to the following: "This is the order against me. It commands me to do a, b & c within this time and if I fail to do so as I await the outcome of this appeal, I stand the peril of the consequences which I need to be saved from facing so that my appeal does not turn out to have been an academic sojourn."

18. In examining the present application, it is crucial to consider the nature of the order sought to be stayed. The judgment delivered on 11th October 2024 contains a directive for DNA testing. Where there is no positive order capable of being executed, a stay of execution ought not to be issued. The Petitioners have not demonstrated what specific execution is threatened that requires staying.

19. While the Petitioners have raised concerns about the constitutional rights of the objectors to privacy under Article 35 and the irreversible nature of DNA testing, they have not shown how the order creates an immediate obligation that requires intervention through a stay.

20. The fundamental purpose of DNA testing in succession proceedings is to serve as a scientific tool for definitively establishing the rightful beneficiaries of an estate. However, when considering applications for stay of such orders, it is crucial to recognize their inherent nature as negative orders - they do

not impose an immediate executable obligation on any party. While DNA evidence may ultimately prove decisive in determining inheritance rights, an order for such testing does not create the type of immediate executable directive that stay orders are designed to prevent. The courts have consistently held that stay orders cannot be issued against negative orders, as there is no concrete action or obligation to stay. Therefore, while parties may have legitimate concerns about DNA testing, the appropriate recourse lies in pursuing an appeal rather than seeking a stay of execution, since there is no immediate action that requires suspension pending appellate review.

21. Be that as it may, it is well recognized in law that genetic science is one of the most dependable sources of truth particularly in disputes concerning human identity as to whether he is a heir, beneficiary or dependant to the deceased capable of inheriting the testate or intestate estate of the deceased. Genetic science as a result of DNA profiling produces truthful facts about human identity which is undisputable if correct samples are submitted within the bloodline, or affinity of the deceased in that lineage. That calibre of evidence establishes the truth in matters of identity of the beneficiaries to that family tree under discussion set to inherit the estate of the deceased in the legal proceedings under consideration. It is equivalent to ensuring justice is not only seen to be done but the same to be done with precision. At the time the court orders for a DNA information for justice delivery, the issues of human rights and privacy have been balanced to facilitate the resolution of complex succession matters. Further, the forced or non-consensual collection of DNA samples from individuals who have a stake in the succession disputes constitute a possible threat to the administration of justice in this branch of law.

22. In conclusion, I find that this is not a case that this court should exercise discretion to grant stay of execution pending appeal.

DELIVERED VIA CTS DATED AND SIGNED AT ELDORET ON THIS 21ST DAY OF FEBRUARY 2025

R. NYAKUNDI

JUDGE