



REPUBLIC OF KENYA



**Muchemi v Wambugu & 2 others (Probate & Administration Appeal  
7 of 2023) [2025] KEHC 1886 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1886 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
PROBATE & ADMINISTRATION APPEAL 7 OF 2023  
MA ODERO, J  
FEBRUARY 21, 2025**

**BETWEEN**

**BONIFACE BUNDI MUCHEMI ..... APPELLANT**

**AND**

**MARY WATURI WAMBUGU ..... 1<sup>ST</sup> RESPONDENT**

**PHILIP WANJOHI WAMBUGU ..... 2<sup>ND</sup> RESPONDENT**

**PRISCILLA MUTHONI WAMBUGU ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before this Court for determination is the Notice of Motion dated 8<sup>th</sup> June 2023 by which the Applicant Boniface Bundi Muchemi seeks the following orders;-

- “(a) Spent.
- (b) Spent.
- (c) That there by a stay of the order and Ruling of the Senior Resident Magistrate, Honourable M. M. Gituma dated 17<sup>th</sup> May, 2023 Succession Cause No. 96 of 1974 pending the hearing and determination of the instant Application and Appeal.
- (d) That a temporary injunction to issue restraining the respondents, their assigns and agents from disposing, transferring or interfering in any way with land Parcels Tetu Kiriti/937 and Tetu Kiriti/938.
- (e) That the court adds Lydia Wangechi Wambugu and Emma Wambugu the daughters of the deceased and current holders of Tetu Kiriti/937 and Tetu Kiriti/938 respectively as interested parties.



(f) That costs of this Application be in the appeal.”

2. The Applicant deponed that he had been born on the property known as TETU/KIRITI/135 which property was originally registered in the name of his Grandfather one Maingi Ndiangui. That the said Plot 135 was later fraudulently transferred to Harun Wambugu Muchemi as the sole proprietor.
3. That Harun Wambugu Muchemi thereafter subdivided the land into two parcels being Tetu Kiriti/1937 and Tetu Kiriti/938, which two parcels were gifted to the daughters of Harun Muchemi Wambugu namely Lydiah Wangechi Wambugu and Emma Wambui Wambugu (the 4<sup>th</sup> and 5<sup>th</sup> Respondents herein).
4. The Applicant stated that pursuant to the court ruling he was apprehensive that he may be evicted from the suit land which would render his appeal nugatory. He averred that in order to meet the ends of justice the 4<sup>th</sup> and 5<sup>th</sup> Respondents ought to be added as interested parties to the suit.  
Finally the Appellant argued that he stood to suffer substantial loss if the orders of stay were not granted.
5. On 4<sup>th</sup> July, 2023 Hon. lady Justice F. Muchemi granted a stay of Ruling of 17<sup>th</sup> May, 2023 and also granted a temporary injunction restraining the Respondents, their assigns and agents from disposing of or interfering with LR Tetu Kiriti 1937 and Tetu Kiriti/938 (hereinafter ‘the suit properties’). The above Interim Orders were to remain in force pending hearing and determination of the Application dated 8<sup>th</sup> June, 2023.
6. The Respondents Mary Waturi Wambugu And Philip Wanjohi Wambugu filed a Notice of Preliminary Objection dated 13<sup>th</sup> July 2023. This Preliminary Objection was heard by this court and was dismissed vide the ruling delivered on 27<sup>th</sup> May 2024.
7. The Applicants have now opted to canvass their application dated 8<sup>th</sup> June 2023, which application was canvassed by way of written submissions. The Applicants filed the written submissions dated 20<sup>th</sup> September 2024. The Respondents filed the submissions dated 28<sup>th</sup> March 2024.

## **Background**

8. The genesis of this application are the orders made in Succession Cause No. 96 of 1974 by Hon. M. M. Gituma Senior Resident Magistrate on 17<sup>th</sup> May 2023.
9. The succession cause relates to the estate of the late Maingi S/o Ndiangui (hereinafter ‘the Deceased’) who died on 19<sup>th</sup> January 1968. Following the demise of the Deceased Grant of letters of Administration were issued to Harun Wambugu Muchemi which Grant was duly confirmed on 2<sup>nd</sup> January 1975.
10. Thereafter on 22<sup>nd</sup> March 2023 the Applicant Boniface Bundi Muchemi filed a Summons seeking revocation of the Grant issued in respect of the estate of the Deceased.
11. That Summons was heard in the lower court and vide the Ruling delivered on 17<sup>th</sup> May 2023 the same was dismissed in its entirety.

The Applicant then filed this present application seeking a stay of the orders made on 17<sup>th</sup> May 2023 as well as seeking an Interim injunction to prevent any dealings with estate property.



## Analysis And Determination

12. I have carefully considered the application before this court as well as the written submissions filed by both parties.
13. It is trite law that filing an appeal does not in and of itself operate as a stay of execution. The law sets out certain conditions which an applicant meet before a stay of execution may be granted.
14. Stay of Execution pending Appeal is provided for under Order 42 Rule 6 (2) of the Civil procedure Rules which sets out the principles that the court should consider while deciding whether to grant a stay or not.

These are:-

“No order for stay of execution shall be made under subrule

(1) unless -

- (a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;- and
- b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

15. From the foregoing, the Applicant should satisfy the court that:
  - (a) Substantial loss may result to him unless the order is made;
  - (b) That the application has been made without unreasonable delay; and
  - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
16. The Applicant has sought a stay of the ruling and orders made by the trial court. Exactly what orders is he seeking to stay. I have perused the Ruling delivered on 17<sup>th</sup> May 2023 and I find that no orders directing any party to do or to desist from doing any particular act were made. The ruling merely dismissed the summons seeking revocation of the Grant.
17. An order dismissing a suit or an application is a ‘negative order’ which cannot be stayed as such an order is incapable of execution.
18. In the case of Co-operative Bank Of Kenya Limited -vs- Banking Insurance & Finance Union (Kenya) [2015] eKLR, the court of Appeal stated as follows:-

“An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance pre-supposes the existence of a situation to stay called a positive order – either an order that has not been complied with or has partly been complied with”[own emphasis]



19. Likewise in the case of Raymond M. Omboge -vs- Augustine Pyan Maranga Kisii HCCA NO. 15/2010 the court held that a negative order was incapable of being stayed. In that case the court stated that;-

“The order dismissing the application is in the nature of a negative order and is incapable of stay of execution save perhaps for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such order..... The Applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issue of substantial loss that he is likely to suffer or the appeal being rendered nugatory does not arise.....’ (own emphasis)

20. Applying the above principles to this case I find that since the order being appealed against is a negative order, the Applicants prayer for a stay of execution cannot lie. That prayer is hereby dismissed.

21. The Applicants have sought for interim interlocutory orders to prevent any further dealings with the parcels of land known as Tetu Kiriti/937 and Tetu Kiriti/938.

22. The grounds on which an interlocutory injunction may be given are well established in the case of Giella -vs- Casman Brown [1973] E.A 358. Moreover such injunctions are ordinarily granted in order to preserve the subject matter of the suit pending hearing and determination of the main suit. This is a suit which has already been heard and determined. The matter is now pending appeal.

23. It is not the duty of this court to discuss the merits or otherwise of the intended appeal. This is a case where a decision has been made by a court of competent jurisdiction. That decision remains binding until the same is set aside by an appellate court.

24. Finally this prayer for interim injunction is merely a way of seeking a stay in a roundabout way. This court has already determined that a stay is not merited. I therefore decline the prayer for an interim injunction.

25. Finally the Applicants seek to enjoin the daughters of the Deceased as parties to the suit. This application must be served upon the two to enable them respond to the application.

26. Finally I find no merit in this application. The Notice of Motion dated 8<sup>th</sup> June 2023 is hereby dismissed in its entirety. Costs will be met by the Applicants.

**DATED IN NYERI THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2025**

.....

**MAUREEN A. ODERO**

**JUDGE**

