



REPUBLIC OF KENYA



**In re Estate of Joseph Muhika Irungu (Deceased) (Succession Cause 441 of 2011) [2025] KEHC 3663 (KLR) (5 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3663 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 441 OF 2011  
JM NANG'EA, J  
MARCH 5, 2025**

**BETWEEN**

**KEZIAH NJOKI KIMANI & OTHERS ..... PROTESTOR**

**AND**

**HANNAH WANGARI MUHIKA ..... PETITIONER**

**RULING**

1. The Applicants bring a Summons dated 31<sup>st</sup> May 2024 praying for orders as hereunder;
  1. Spent.
  2. That this Honourable Court be pleased to stay distribution and/or stay execution of confirmed grant as ordered in the ruling delivered on the 1<sup>st</sup> March 2024 pending hearing and determination of the appellant's intended appeal to the Court of Appeal (sic).
  3. That applicant/intended Appellant be granted leave to appeal to the Court of Appeal against the ruling delivered on 1<sup>st</sup> March 2024(sic).
  4. That this Honourable Court be pleased to make and further orders as it may deem just and reasonable (sic).
  5. That costs of this application be provided for.
2. The application is predicated upon these grounds;
  - a. That the Applicants/Intended Appellants are greatly aggrieved by the ruling delivered in this Honourable Court on 1<sup>st</sup> March 2023 and prays for another opinion from the Court of Appeal (sic).



- b. That the Applicants/intended Appellants have an arguable appeal and it is in the interest of justice that the Applicants/Intended Appellants be granted leave by this honourable court to appeal against the honourable court's ruling that was delivered on 1<sup>st</sup> March 2024.
  - c. That the Applicants undertakes to expeditiously prosecute the intended appeal in a timely manner, so as not to prejudice the respondent (sic).
  - d. That unless the orders sought are granted, the Applicants/Intended Appellants stands to suffer irreparable damage (sic).
  - e. That the applicants are ready and willing to abide by any condition whatsoever issued by this Honourable Court.
  - f. That the Respondent shall not suffer prejudice if this application is allowed.
  - g. That it is in the best interest of justice that the applicants be afforded an opportunity to exercise their right of appeal.
  - h. That the application herein has been brought timeously.
  - i. That this application is made with utmost good faith.
  - j. That this Honourable court has jurisdiction to grant the prayers sought in the application herein.
3. One of the Applicants (Keziah Njoki Kimani) swore an affidavit supporting the Summons. She avers that by ruling delivered on 1<sup>st</sup> March 2024 the court dismissed their protest demanding a share of the deceased's estate. Aggrieved by the ruling, they intend to lodge appeal in the Court of Appeal and have filed Notice of Appeal. The Applicants contend inter alia that they have an arguable appeal that warrants stay of execution of the impugned ruling, hence this application.
4. The Respondent's advocate (Mr. John Githui) proffered affidavit evidence in reply opposing the application. Counsel dismisses the application as incompetent and an abuse of the court process for reasons that;-
- a. An application for stay of distribution proceeds from the factual premise that a party has either appealed or evinced his intention to appeal. An intention to appeal is expressed by the filing of a notice of appeal.
  - b. The appeal purportedly filed by the applicant is incompetent and cannot be a basis for an application for an application for stay of execution (sic).
  - c. The applicant filed a notice of appeal on 8th March 2024. Under rule 84 of the rules of the court of appeal, the applicant ought to have filed the appeal within 60 days of filing of the notice of appeal.
  - d. The period of 60 days could only be suspended if the applicant had applied for certified copies of the proceedings within 30 days from the date of the judgment.
  - e. The applicant applied for proceedings on 29th May 2024 which is 88 days after the filing of the notice of appeal.
  - f. Under rule 85 of the rules of the court of appeal, a party who fails to file an appeal in time is deemed to have withdrawn the notice of appeal.



- g. In the absence of a competent appeal, the application for stay of execution lacks substratum and it ought to be struck out.
5. The Respondent therefore wants the court to strike out and/or dismiss this Summons for the main reason that the Notice of Appeal was filed outside the period prescribed by the law without leave of the court.
6. The Respondent’s Legal Counsel further deposes that the Applicants have not laid a bonafide legal or factual basis demonstrating that the intended appeal is arguable.
7. The Respondent finally avers that the Applicants have not shown that they would suffer substantial loss if stay is not ordered. She asserts inter alia through her advocate that she has been in occupation of the property in contention for decades as her matrimonial home.
8. It would appear that only Learned Counsel for the Respondent filed Written Submissions on the Summons as directed. Citing Rule 41(1) (b) of the [Court of Appeal Rules \(2022\)](#), Counsel submit that where, as here, leave of the court is required to file appeal, an application for “such leave shall be made;
- i. In the manner laid down in Rules 44 and 45 within 14 days after the decision against which it is desired to appeal;
  - or
  - ii. Where application for leave to appeal has been made to the superior court and refused, within 14 days after such refusal.”
1. The Respondent places further reliance on the Court of Appeal’s decision in [Karanja v Karanja](#) (2014) KECA 255 (KLR) where it was observed that the matter of whether or not an application for leave is brought within the prescribed period “is crucial to its competence.” The superior court held in that case that delay of two months and four days was “way out of the 14 days stipulated by the Rules.” The court is told that in the instant matter, the application for leave was brought nearly 10 months after the contested ruling with no explanation for the long delay.
  2. The Respondent’s advocates further pitch tent on Rule 5(2) (b) of the [Court of Appeal Rules \(2022\)](#) which they submit to require the existence of a Notice of Appeal before stay of execution is ordered. I am also referred to Rule 85 of the same Rules which requires the appeal itself to be instituted within the timeline given in default of which the Notice of Appeal would be deemed to have been withdrawn and the court may order accordingly. In [Mwangi v Ngure & others](#) (2016) KECA 655 (KLR) also referred to by Counsel, the Court of Appeal underscored this legal position, observing that Notices of Appeal that have not been followed by Records of Appeal within 60 days of their filing are liable to be struck out.
  3. The Respondent’s Counsel further make reference to the often quoted case of [Kenya Shell Limited v Kibiru](#) (1986) KECA 94 (KLR) where the superior court noted that the question of substantial loss is central to determination whether or not stay of execution ought to be ordered. It is contended that such loss has not been proven by the Applicants as no evidence of risk of alienation of the disputed property is offered.
  4. For the foregoing reasons inter alia the court is urged to dismiss this application.
  5. The points for determination are identified as follows;



- a. Whether the Applicants deserve leave to prefer appeal to the Court of Appeal out of time.
  - b. Whether a case for stay of execution pending appeal has been made out.  
and
  - c. The orders commending themselves to the court on the application.
14. The contested ruling of this court was delivered on 1<sup>st</sup> March 2024 while Notice of Appeal to the Court of Appeal was filed on 8<sup>th</sup> March 2024. By dint of Rule 84 of the *Court of Appeal Rules (2022)*, the appeal itself evidenced by the Record of Appeal is required to be lodged within 60 days of filing the Notice of Appeal. As observed by the Respondent, the Applicants are seeking leave to appeal out of time some 88 days or thereabouts after filing the Notice of Appeal.
15. The Applicants appear to explain delay to lodge the appeal as having been caused by failure to obtain copies of proceedings and the impugned ruling in time. A copy of their letter dated 23<sup>rd</sup> May 2024 to the court requesting for the proceedings is exhibited. This request is made over 2½ months after delivery of the ruling intended to be appealed.
16. The impugned ruling dismissed the Applicants’ protest against a mode of distribution of the deceased’s estate proposed by the Respondent. As noted by the Respondent, it is not disputed that the Applicants required leave of the court to appeal the ruling, which leave was not sought and obtained. The Notice of Appeal is therefore defective having been lodged without leave.
17. Moreover, the Record of Appeal has not been filed within 60 days of lodging of the Notice of Appeal, assuming it was regularly filed, in breach of Rule 85 of the *Court of Appeal Rules (2022)*. There is also manifest unexplained delay to procure the necessary proceedings.
18. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 others* [2015] eKLR, it was observed that the court is enjoined under the overriding Objective Principle enunciated in Sections 1A and 1B of the *Civil Procedure Act* to ensure a just, expeditious, proportionate and affordable resolution of disputes. The following principles inter alia guide the court in exercising its discretion to enlarge time for compliance with court orders as laid down in the cited case law:-
- a. Extension of time is not a right but an equitable remedy only available to a deserving party.
  - b. A party seeking extension of time has the burden of laying the basis to the satisfaction of the court.
  - c. The court’s discretion depends on the circumstances of each case.
  - d. The question of any prejudice that may be suffered by the Respondent should be taken into account.  
and
  - e. The court should also consider whether the application was brought without undue delay.
19. The Applicants have not satisfied the above principles as already observed. The above finding is sufficient to dispose of this application. If I have to determine the second issue as framed hereinabove, Order 42 rule 6(1) (2) of the *Civil Procedure Rules 2010* governs disposal of an application such as before me for stay of execution pending appeal. The legal provisions stipulate that such order may not be granted;-



- a. unless 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.”
20. In *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, “Substantial Loss” in the context of an application for stay of execution pending appeal was defined thus:-
- “It is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory or of no consequence.”
21. This is similar to the holding in the case of *Shell Ltd supra*.
22. As already shown, the application has been brought after a long unexplained delay. The Applicants do not also express their readiness and willingness to offer security for costs that may ultimately be binding on them. Besides, the Applicants have not demonstrated that they would suffer substantial loss if stay of execution is not ordered. They have not therefore established a prima facie argument that the Respondent could transfer the contested property which is said to comprise her matrimonial home before the appeal is determined.
23. The upshot is that the application is dismissed in its entirety. This being a family matter, no order is made as to the costs of the application.
24. Ruling accordingly.

**J. M. NANG’EA - JUDGE**

**RULING DELIVERED VIRTUALLY THIS 5<sup>TH</sup> DAY OF MARCH, 2025 IN THE PRESENCE OF:**

Applicants’ Advocate. Ms Wanjiru for Mr. Njoroge

Respondent’s Advocate, Mr. Machoka for Mr. Githuri

Court Assistant (Jeniffer)

**J. M. NANG’EA - JUDGE**

