



In re Lyduska Hornik alias Lyduska Hornik Piootto alias Lidia Hornik Piottio (Succession Cause 2039 & 2090 of 2008 (Consolidated)) [2025] KEHC 3009 (KLR) (Family) (4 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3009 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2039 & 2090 OF 2008 (CONSOLIDATED)
CJ KENDAGOR, J
MARCH 4, 2025
IN THE MATTER OF LYDUSKA HORNIK ALIAS LYDUSKA
HORNIK PIOOTTO ALIAS LIDIA HORNIK PIOTTIO

BETWEEN

DIANIELLA MORETTI PROSQUE 1ST RESPONDENT

ROBERTO CARLOS SAINAGHI 2ND RESPONDENT

AND

DANNIS MOTURI MACHANA 1ST OBJECTOR

ROMEO PIERINO ROCCO 2ND OBJECTOR

OLEG ORLOV 3RD OBJECTOR

RULING

1. For consideration before this Court is the Notice of Motion dated 10th July, 2024 brought under Order 42 Rule 6 of the [Civil Procedure Rules](#), Article 157 of the [Constitution](#) and Article 11 of the [International Covenant on Economic and Civil Rights](#) wherein the 1st Objector/Applicants sought for orders that:
 - a. Spent;
 - b. That this Honourable Court be pleased to stay the judgment dated 6th June, 2024 and all subsequent Orders and/or Decree thereof pending the hearing and determination of this Application;



- c. That this Honourable Court be pleased to stay the judgment dated 6th June, 2024 and all subsequent Orders and/or Decree thereof pending the hearing and determination of the intended Appeal;
 - d. That the Respondents be condemned to pay the costs of this application.
2. The Application is supported by the Applicant's Affidavit of the same date and was countered by the Administrators through Replying Affidavits sworn on 13th August, 2024 and 27th August, 2024. The 2nd and 3rd objectors did not file any responses to the application.
 3. The background of the matter is that the applicant lodged an objection dated 04th March, 2013, which the court dismissed on 6th June, 2024. The 2nd and 3rd Objectors lodged two other objections. In the Judgment, Hon. A. Aroni, Judge (as she then was), in determining the objections that had been lodged, made the following orders:
 - “ 113. In the end the court;
 - a. Dismisses the objections of:
 - i. Dannis Moturi Machana dated 4th January 2013.
 - ii. Romeo Pierino Rocco dated 4th September 2018.
 - iii. Oleg Orlov dated 24th January 2013.
 - b. Finds and declares the Will dated 23rd May 2003 (Machana's Will) to be a forgery and therefore invalid.
 - c. Finds and declares the set of Wills dated 13th March 2005 and 7th September 2007 to be the valid Will of the deceased.
 - d. Cost of the suit to be paid jointly and severally by the objectors.”
 4. The Applicant, aggrieved by the Judgment, filed a Notice of Appeal dated 6th June, 2024. The present application for stay concerns this Judgment and its consequential orders.
 5. The Applicant and the two Administrators filed their respective submissions regarding the application. They also referenced authorities that I have duly considered. The 2nd Objector informed the Court that they rely on the submissions filed by the Applicant.

Applicant's case

6. The Applicant submitted that the application is for stay of execution and that it is brought without delay. He contends that he wishes to exercise his constitutional right to appeal against the judgment and has demonstrated this intention by filing the Notice of Appeal dated 6th June, 2024. The Applicant asserts that he stands to suffer substantial loss if a stay is not granted, due to concerns that the respondents may transfer the properties in question before the hearing of the intended appeal. The Applicant further stated that the intended appeal has not yet been filed and that he will seek leave at the appropriate time once the proceedings are ready.
7. The Respondents assert that the application is not merited and that it is an abuse of the court process and should be dismissed. The 1st Administrator contends that the orders sought if granted will occasion delay that is detrimental to the of the beneficiaries. The 2nd Administrator criticized the applicant for approaching the Court with unclean hands, noting that he had failed to pay the costs ordered



in Succession Cause 457 of 2010, which had been struck out. Additionally, the 2nd Administrator pointed out that the Applicant, having been indicted by the Court, should not continue to subject the beneficiaries to endless litigation.

8. Having considered the pleadings and the parties' submissions, I find the issue for determination to be whether the Court should grant an order of stay as sought by the Applicant.
9. The application is phrased in a way that is not explicitly clear regarding whether the Applicant is seeking a stay of proceedings or a stay of execution.
10. The Court observed that prayer no. 3 is drafted rather dubiously. To grant the request for a stay of judgment and the subsequent orders or decree effectively halts the ongoing proceedings. In summary, if the order is granted as framed, the parties will be unable to proceed further in the matter.
11. Courts generally assess whether the issuance of any stay orders would promote the interests of justice, ensure fairness, and prevent unnecessary delays in the legal process.
12. The judgment delivered dismissed the objection proceedings and declared the Will dated 23rd May, 2003 (referred to as the Applicant's Will) a forgery and, therefore, invalid. The court declared the set of Wills dated 13th March, 2005 and 7th September, 2007 to be the valid Will of the deceased. The Trial Judge's orders did not compel or restrain any of the parties to do anything; thus, they are considered negative orders. The Court cannot order a stay of execution for a negative order. I am guided by the Court of Appeal decision in the case of *Kaushik Panchamatia & 3 Others – Versus - Prime Bank Limited & Another* [2020]eKLR where it reiterated the point as follows:

“...that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants.”
13. Therefore, this Court need not address the tripartite conditions for stay of execution as enshrined under Order 42 Rule 6 (2) of the *Civil Procedure Rules*, as concerns that issue for determination.
14. The Applicant has based the stay application on Order 42, Rule 6 of the *Civil Procedure Rules*, which, in addition to the provision on stay of execution, also provides for stay of proceedings in the event of an appeal. I shall examine this ground in this ruling. The Rule states as follows on stay in case of appeal;
 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”
15. It is a well-established principle that the decision to issue an order for a stay of proceedings lies firmly within the court's discretion. This discretion is exercised with careful consideration of various factors, including the merits of the case at hand, the potential for irreparable harm to the parties involved, and the broader implications for justice.



16. The principles on granting stay of proceedings were expounded by Ringera, J. in *Global Tours & Travels Limited*, Nairobi HC Winding Up Cause No. 43 of 2000:-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justicethe sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

17. The Judgment was delivered on 6th June, 2024 and this application was filed on 10th July, 2024. There was no inordinate delay in the filing of the application.
18. The Applicant did not list any proposed grounds of appeal in the application. No appeal has also been filed to date, and the Applicant’s assertion of intent to appeal does not necessarily mean that the appeal is merited.
19. The Applicant also acknowledged that he has yet to seek leave to appeal and indicated in the submissions that he will do so at the appropriate time when he secures the typed proceedings. Section 50 of the *Law of Succession Act* does not envisage instances where an appeal from the decision or order of the High Court is allowed as of right. The Court of Appeal, in the case of *John Mwita Murimi & 2 others v. Mwikabe Chacha Mwita & another* [2019] eKLR, reaffirmed this and stated as follows:
9. We re-affirm the decisions of this Court in *Rhoda Wairimu Karanja & another – v- Mary Wangui Karanja & another* [2014] eKLR and *Josephine Wambui Wanyoike – v- Margaret Wanjari Kamau & another* [2013] eKLR, where it was clearly stated that in succession matters, there is no automatic right of appeal without leave of court.
10. It is not in dispute that the impugned ruling in this matter arises from a succession cause and the respondents did not obtain leave to appeal. The decision in *Makhangu – v- Kibwana* [1996] EA cited by the respondent was succinctly considered by this Court in *Rhoda Wairimu Karanja & another – v- Mary Wangui Karanja & another* [2014] eKLR. In analyzing the Makhangu decision (supra), this Court held that under the *Law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court. (See also in *Re Estate of Mbiyu Koinange (Deceased)* [2015] eKLR; HCC Succession Cause No. 527 of 1981).
- In the instant matter, we are satisfied that no leave of the court was obtained to file the instant appeal. The present application to strike out the record of appeal has merit. We allow the Notice of Motion dated 9th August 2018 with the result that the record of appeal filed in Civil Appeal No. 93 of 2018 be and is hereby struck out with costs to the applicant.”
20. It is important to note that the Applicant has been indicted for fraud, which is a serious issue. Stay of proceedings pending appeal can only be justified when a party has properly filed an appeal, clearly showing the grounds of appeal and sufficient cause as to why the order of stay should be issued. In the



absence of this, the court has no grounds to stop the further progression of the case, particularly when a party requests a stay but has no specific timeline for when they intend to pursue the intended appeal.

21. This case has been pending in court since 2008 and has been characterized by years of extensive applications, hearings, and legal arguments from both parties. All parties have been heard, and they continue to be heard; they have certainly had their day in Court. The Court has determined the validity of the will, and the administrators should be permitted to proceed with finalizing the estate administration. Granting a stay of proceedings would result in further unnecessary delays, prolonging the uncertainty faced by all involved. It is in the interests of justice for this succession matter to progress towards a conclusion.
22. The upshot of the foregoing is that the application dated 10th July, 2024 is not merited and is dismissed with costs to the Administrators.
23. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 4TH DAY OF MARCH, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Kahura Advocate for 1st Administrator

Mr. Muturi Advocate for 2nd Administrator

Ms. Gichuhi Advocate for 1st Objector/Applicant

