



REPUBLIC OF KENYA



**Muganda (Suing on her behalf and as administrator of the Estate of Muganda Odunga Omolo - Deceased) & 6 others v Muga & 10 others (Family Appeal E004 of 2025) [2025] KEHC 2592 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2592 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
FAMILY APPEAL E004 OF 2025  
DK KEMEL, J  
MARCH 14, 2025**

**BETWEEN**

**HELINDA AKOTH MUGANDA (SUING ON HER BEHALF AND AS ADMINISTRATOR OF THE ESTATE OF MUGANDA ODUNGA OMOLO - DECEASED) ..... 1<sup>ST</sup> APPELLANT**  
**JOSEPH ONYANGO MUGANDA ..... 2<sup>ND</sup> APPELLANT**  
**TITUS OWINO MUGANDA ..... 3<sup>RD</sup> APPELLANT**  
**GEORGE ODHIAMBO MUGANDA ..... 4<sup>TH</sup> APPELLANT**  
**JOSEPH AKOTH OMOLLO ..... 5<sup>TH</sup> APPELLANT**  
**MICHAEL OTIENO MUGANDA ..... 6<sup>TH</sup> APPELLANT**  
**STEPHEN OTIENO AWUOR (ANDWIYO) ..... 7<sup>TH</sup> APPELLANT**

**AND**

**DANIEL MUGA ..... 1<sup>ST</sup> RESPONDENT**  
**CHARLES WILLIS OGOLA ODUOR ..... 2<sup>ND</sup> RESPONDENT**  
**MIKE ODUOR NYAKURE ..... 3<sup>RD</sup> RESPONDENT**  
**JAKIM OHUONO ODUOR ..... 4<sup>TH</sup> RESPONDENT**  
**FREDRICK OWUOR ..... 5<sup>TH</sup> RESPONDENT**  
**MANFREDOMONDI NYAKURE ..... 6<sup>TH</sup> RESPONDENT**  
**VINCENT OWINO ALOO ..... 7<sup>TH</sup> RESPONDENT**  
**CHARLES OTIENO MUGA ..... 8<sup>TH</sup> RESPONDENT**  
**ELIJA ODHIAMBO MUGA ..... 9<sup>TH</sup> RESPONDENT**



JOSEPH ODUOR MUGA ..... 10<sup>TH</sup> RESPONDENT

ANN JUMBA GUMBA ..... 11<sup>TH</sup> RESPONDENT

## RULING

1. This Ruling relates to the Notice of Preliminary objection dated 12<sup>th</sup> February 2025 raised by the Respondents. The Preliminary objection is against the applicant's application dated 23<sup>rd</sup> January 2025 as well as the entire appeal and seeks the same to be struck out in limine. The said Preliminary Objection is based on the following grounds:
  - i. That the application before the court offends the provisions of Order 42 Rule 6 of the Civil Procedure Rules and section 50(1) of the *Law of Succession Act*.
  - ii. That in the absence of a properly filed appeal on the record, the application for stay is misconceived, incompetent and an abuse of the court process, as it is not anchored on any valid appeal. Thus an omnibus application is incompetent.
  - iii. This Honorable Court lacks jurisdiction to entertain the application dated 23<sup>rd</sup> January 2025 and ought to be struck out with costs to the Respondent.
2. Parties herein took directions to the effect that the said Preliminary Objection be canvassed by way of written submissions,
3. The Respondents submitted that the application dated 25<sup>th</sup> January 2025 does not meet the prerequisites of granting a stay pending appeal as envisaged in Order 42 Rule 6 of the Civil Procedure Rules namely: the applicant is likely to suffer substantial loss; the applicant filed the application without unreasonable delay; the applicant is ready and willing to furnish security for costs for the due performance of the decree which may ultimately be binding against them. It was also submitted that the appeal has not been properly filed as the court has not granted leave to appeal.
4. The Applicants/Applicants submitted that the Preliminary Objection should be struck out as it alludes to matters of fact which is against the principles of preliminary objections. On this, reliance was placed in the case of *Ngugi & 5 others vs. Wanyoike & 6 others* [2022] KEELC 13558(KLR).
5. In response to ground No.1 of the preliminary objection, the Applicants submitted that in succession matters, the Probate and Administration Rules contain the complete code of the rules applicable. Thus Order 42 of the Civil Procedure Rules does not apply to succession matters. In the instant case, Rule 73 of the Probate and Administration Rules gives this court the inherent powers to make such orders as may be necessary for the ends of justice or to prevent the abuse of the court process. On the other hand, section 50(1) of the *Law of Succession Act* grants this court the power to hear appeals from the decisions of the subordinate courts. As such, the Applicants submitted that they are well on course and in the right court capable of granting the orders sought.
6. As regards the second ground that the absence of a properly filed appeal on record, the application for stay is misconceived and incompetent; the Applicants submitted that the appeal was filed without unreasonable delay. Further, the *Law of Succession Act* and the Probate and Administration Rules do not set timelines within which an appeal should be filed; nor do they state that every appeal requires prior leave of court. They submitted further that if the *Civil Procedure Act* and Rules were applicable, an appeal to the High Court would have to be lodged within 30 days of the impugned decision, taking



into account that the days between 21<sup>st</sup> December and 13th January (both days inclusive) would not be counted and hence, in total there are 24 days.

7. The Applicants likewise submitted that out of precaution, they have sought the leave of court to appeal. In conclusion, the applicants submitted that the Preliminary objection lacks merit and that the same should be struck out.
8. A preliminary objection was well elucidated in the case of Mukisa Biscuits Manufacturing co. Ltd vs. West end Distributors Ltd (1969) E.A 696 where the court stated that

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which, if argued as a preliminary point, may dispose of the suit”
9. Further, in Ngugi & 5 others vs. Wanyoike & 6 others [2022] KEELC 13558(KLR) where the court stated at paragraph 9 that:

“Further, Sir Charles Newbold, JA stated that: - A preliminary objection is in the nature of a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs, and on occasion, confuse the issue. The improper practice should stop”
10. On the face of the Notice of Preliminary Objection, on ground 1, states that the application before the court offends the provisions of Order 42 Rule 6 of the Civil Procedure Rules and section 50(1) of the Law of Succession Act. First and foremost, Order 42 of the Civil Procedure Rules is not applicable in succession matters. In its place, it is Rule 73 of the Probate and Administration Rules and section 50(1) of the Law of Succession Act. The said Section 50(1) of the Law of Succession Act stipulates as follows:

“An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final”

Further, the fact that the application is purported to have been brought under the said Order 42 of the Civil Procedure Rules must be a mistake but that the same is not fatal. (See Focin Motorcycle Co. Ltd Vs. Ann Wambui Wangui & Another [2018] KEHC 8358(KLR)).
11. On page 4 paragraph 1 of the Respondent’s submissions, the respondents argue that the applicants are required to establish how they will incur a substantial loss if the Respondents proceed with execution of the court’s orders dated 16<sup>th</sup> December 2024. This in my view is tantamount to arguing a point of fact which will require to be ascertained. In my view, and guided by the above authorities, it goes against the principles of preliminary objection.
12. The second ground of the Notice of preliminary objection is that in the absence of a properly filed appeal on record, the application for stay is misconceived, incompetent, and an abuse of the court process, as it is not anchored on any valid appeal and thus an omnibus application is incompetent. Outrightly, this ground seems to argue the application in advance. It will need the applicants to raise matters of facts in order for the court to exercise its discretion on whether or not to grant an order of stay. Again, this fails the test of a ground in a preliminary objection. Further, there is no hard and fast rule that there must be an appeal already in place before one can seek for an order of stay pending an appeal or an intended appeal. A party is entitled to seek for such a prayer in addition to leave to lodge



an appeal out of time. Clearly, the preliminary objection in that regard is misconceived and must be rejected.

13. The third ground of the preliminary objection is that this court lacks jurisdiction to entertain the application dated 23<sup>rd</sup> January 2025. Section 50(1) of the Law of Succession Act stipulates that

“An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final”

Rule 73 of the Probate and Administration Rules stipulates that “Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

In light of the above statutory provisions, I find that this court has the requisite jurisdiction to entertain the application dated 23<sup>rd</sup> January 2025. This ground likewise fails.

14. In the result, it is my finding that the Respondents’ Preliminary Objection filed on 11/2/2025 is devoid of merit. The same is dismissed with costs to the applicants. Parties are directed to set down the application dated 27/1/2025 as a matter of priority.

Orders accordingly.

**DATED AND DELIVERED AT SIAYA THIS 14<sup>TH</sup> DAY OF MARCH, 2025.**

**D. KEMEI**

**JUDGE**

In the presence of:

M/s Nyambeki.....for Applicants

Jeji.....for Respondents

Ogendo.....Court Assistant

