



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mlango & 5 others v Ndiema (Civil Appeal E119 of 2023)  
[2025] KEHC 2960 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2960 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E119 OF 2023  
REA OUGO, J  
MARCH 13, 2025**

**BETWEEN**

**GEORGE MLANGO ..... 1<sup>ST</sup> APPELLANT  
RASHID NDIEMA ..... 2<sup>ND</sup> APPELLANT  
MOSS NDIEMA ..... 3<sup>RD</sup> APPELLANT  
TIMOTHY S. NDIEMA ..... 4<sup>TH</sup> APPELLANT  
PAULINE BOIT ..... 5<sup>TH</sup> APPELLANT  
EVERLINE BUSURU ..... 6<sup>TH</sup> APPELLANT**

**AND**

**FREDRICK MUSOWO NDIEMA ..... RESPONDENT**

*(Being an appeal from the Ruling delivered on 20.9.2023 by Hon.  
R.K. Langat PM in Sirisia Succession Cause No. 14 of 2020)*

**JUDGMENT**

1. The appellants are aggrieved by the Trial Court's Ruling dated 20.9.2023. The appellants filed an application before the trial court dated 9.6.2023, seeking that the succession proceedings be stayed generally pending the hearing and determination of Sirisia Criminal Case No. 258 of 2023 Republic vs Fredrick Musovo Ndiema. The trial Magistrate, after considering the application, declined to stay the cause pending the hearing of the criminal case number 258 of 2023 R vs Fredrick Musovo Ndiema.
2. The appellant's grounds of appeal as follows;
  - i. That the Learned Trial Magistrate erred in both law and fact when he failed to find that there is need to stay the proceeding in Sirisia Criminal Case No. E258 of 2023 where Fredrick Musowo



Ndiema ( Respondent ) is charged with forgery contrary to section 350 of the Penal Code where the complainant is George Mlango (1<sup>st</sup> Appellant) thereby occasioning a miscarriage of justice.

- ii. That the Learned Trial Magistrate erred in both law and fact when he failed to find that the pleadings in Sirisia Succession Cause No. 14 of 2020 were the subject of the forgery case no. E258 of 2023 and thus need to grant the order for stay of proceedings in Sirisia Succession Cause No. 14 of 2020.
  - iii. That the ruling of the Magistrate was poorly reasoned and without basis.
  - iv. That the Trial Magistrate erred in both law and fact when he failed to find that the pleadings/ petition is Sirisia Succession Cause No. 14 of 2020 being the subject of the forgery in Criminal Case No. E258 of 2023, the same had to await the outcome of allowing the application. That the learned Trial Magistrate erred in law and fact when he held that Sirisia Succession Cause No. 14 of 2020 can proceed for hearing and determination without regard that the pleadings that the pleadings therein were the subject matter of a forgery case being Sirisia Criminal case No. E258 of 2023 Republic vs Fredrick Musovo Ndiema (Respondent), hence occasioning a miscarriage of justice.
3. The appellants seek that the appeal be allowed and the Ruling of the Trial Magistrate be substituted with an order allowing the application dated 9.6.2023.
  4. Parties canvassed the appeal by way of written submissions. The appellant submits as follows: they challenge the lower court's ruling on five grounds of appeal. The respondent is the 2<sup>nd</sup> petitioner in Sirisia SPMC Succession Cause No. 14 of 2020 is facing a criminal charge of forgery in Criminal Case No. E258 of 2023. The 1<sup>st</sup> Appellant is the complainant in the said criminal case. The trial magistrate erred in both law and fact by failing to allow the appellant's application dated 9.6.2023 to stay the proceedings in Succession cause No. 14 of 2020 pending the hearing and determination of Criminal Case No. E258 of 2023. The pleadings in Sirisia Succession Cause No. 14 of 2020 being the subject of the charge of forgery in Criminal Case No. E258 of 2023 there was need for the trial court to have allowed the application dated 9.6.2023. The trial magistrate erred when he did not take into consideration the submissions of the appellants thus occasioning a miscarriage of justice. Reliance was made in the case of Feisal Mohammed( Administrators to the Estate of Mary Njeri )v Feisal Mohamed ( Administrator to the Estate of Mary Njeri) [2019] eKLR.
  5. The respondent submits as follows: the appellants are members of the 1<sup>st</sup> house, and the respondent is from the 2<sup>nd</sup> house. The appellants filed a chamber summons dated 23.01.2023 seeking a revocation of the letters of administration issued to George Mlango and Fredrick Musowo Ndiema in Sirisia Succession Cause No. 14 of 2020 on the grounds that the 1<sup>st</sup> appellant's signature had allegedly been forged. When the application was coming up for hearing, parties consented that the grant issued on 25.2.2021 be revoked and beneficiaries be at liberty to apply for fresh letters of administration. The appellants thereafter filed an application seeking a stay of proceedings generally pending the hearing and determination of Sirisia Criminal Case No. E258 of 2023 R vs Fredrick Ndiema Musowo. The court declined to stay the proceedings hence giving rise to this appeal. According to the appellants, the issue for determination in this appeal is whether the trial court erred in declining to stay the proceedings pending the hearing and determination of Sirisia Criminal Case No. E258 of 2023 R vs Fredrick Ndiema Musowo. Reliance was made in the case of Watu Credit vs Geoffrey Makaya Oboki & Caren Chepkurui [2022] eKLR, where the court stated as follows;

“ A stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is grave judicial action which seriously interferes with the right of a litigant



to conduct litigation. It impinges on the right to access justice, right to be heard without delay and overall the right to fair trial. Therefore, the test of stay of proceedings is high and stringent”.

6. The respondent submits further that the grant issued in the succession matter in Sirisia was revoked by consent of the parties and as of now, the estate has no administrator and/or legal representative, thus exposing the estate to waste. The application for stay was meant to achieve one objective and further delay the distribution of the estate. Under section 76 of the [Law of Succession Act](#), it provides for revocation of grant when fraud among other irregularities are proved and a stay of proceedings is definitely not one of the remedies.

### **Analysis And Determination**

7. I have considered the rival submissions, the law and the proceedings before the trial court. The issue for determination is whether the trial court erred in law and fact in declining to stay proceedings in Sirisia Succession Cause. The trial magistrate in his Ruling stated as follows:

“The application is anchored under the provisions of section 76 of the [Law of Succession Act](#). The section lays down grounds for revocation of grants and has nothing to do with the stay of succession proceedings. I thus agree with the Respondents counsel that the application is brought under the wrong provisions of the law. However, rule 73 grants this court inherent powers to issue orders that meet the ends of justice. The Applicants must thus demonstrate that there is sufficient cause to warrant to stay of this matter.

While it is not rebutted that there is criminal case pending before the court where the 2<sup>nd</sup> petitioner is charged for an offence of forgery and while it is not rebutted that indeed there was such forgery during the institution of this suit, the law of succession provides for a remedy when such occurrence happens. Section 76 allows an aggrieved party to lodge an application for revocation of the grant based on fraudulent facts. Section 76 of the [Law of Succession Act](#) provides as follow:-...

.....

There is no provision for stay of proceedings awaiting the determination of the alleged fraudulent acts in a criminal matter. The Succession Act gives a clear path to be followed when such fraud is committed when succession proceedings are instituted. Indeed, the Applicants adopted this route and filed summons for revocation of grants based on reasons in the current application and the application was even allowed by consent. The grant was thus revoked and parties agreed to nominate afresh administrators. I’m not sure what the current application wishes to achieve other than to delay this cause which has been in court for 3 years now. Whatever the outcome of the criminal case, will not affect the administration of the estate of the deceased as the distribution will be purely governed by the [Law of Succession Act](#) and its rules.

The upshot is that the Applicants have failed to demonstrate sufficient cause to warrant a stay of the current proceedings. No prejudice at all has been demonstrated that the applicant will suffer if the application is not granted.”

8. The trial court did consider whether a stay of proceedings should be granted. The ruling gives the reasons why the trial magistrate declined to grant the order stay of proceeding, one was because the parties had recorded a consent on the application for revocation, 2ndly that the Succession Act provides for a procedure on how to challenge an act of fraud and lastly that the outcome of criminal case would



not affect the administration of the estate of the deceased as the distribution will be purely governed by the *Law of Succession Act* and its rules. The trial court, therefore, considered both fact and the law on why the application was merited.

9. The court proceedings before the trial court show that the appellants filed an application to revoke the grant dated 23.1.2023. This application was allowed by the trial court after Counsel for the 1<sup>st</sup> petitioner informed the trial court that the 1<sup>st</sup> petitioner was not opposed to the application and that since there are 2 houses involved he suggested that the court issues a grant to another petitioner and he can proceed with confirmation of the grant. The trial court allowed the application and gave a date, 14.6.2023 for confirmation of the grant. The 1<sup>st</sup> appellant, thereafter filed the application dated 9.6.2023 which was canvassed by way of written submissions. The application dated 9.7.2023 was brought under section 76 of the law of Succession. The said section does not provide for a stay of proceedings but for revocation of a grant on the grounds stated therein.
10. The law that governs a stay of proceedings is Order 42 Rule 6 (1) of the Civil Procedure Rules. It provides as follows;

“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.
11. Rule 73 provides for the “Saving of inherent powers of the court” it provides 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”.
12. The trial magistrate did not err in his ruling. He correctly observed and held that section 76 of the *Law of Succession Act* lays grounds for revocation of a grant and has nothing to do with stay of proceedings. This is the correct position in law, and I cannot fault the trial court’s finding.
13. The appellants further argued that there should be a stay of proceedings because of the criminal case against the respondent on a charge of forgery. A criminal case in law deals with matters alleged to be criminal as provided under the *Penal Code* Cap 63 Laws of Kenya. In this matter, the allegation in the criminal case is one of forgery. This criminal case appears to have been reported after the succession cause and application to revocation the grant was allowed. The two matters, the succession cause and criminal case are two very distinct cases.
14. Ringera J. in *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)* held as follows;

“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 Justice.....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, 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 ( emphasis mine).

15. I have weighed the pros and cons in this matter. I agree with the finding of the trial court that the outcome of the criminal case will not affect the administration of the deceased's estate. If found guilty, the respondent will be dealt with as per the provisions of the law. The Succession Cause was filed to determine the distribution of the estate of the deceased. The respondent did not oppose the revocation of the grant. The parties need to move on to have the estate of the deceased determined. I find no merit in the appeal, its dismissed. This being a family matter, each party to bear its own costs. The lower court file to returned to Sirisia Law Court forthwith for hearing and determination.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 13<sup>TH</sup> DAY OF MARCH 2025.**

**R.E.OUGO**

**JUDGE**

In the presence of:

Miss Wanyama h/b for Mr. Bw'Onchiri - For the 1<sup>st</sup> to 6<sup>th</sup> Appellants

Respondent - Absent

Wilkister - C/A

