



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oduke v Machio & 2 others (Family Appeal E009 of 2024)  
[2025] KEHC 3454 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3454 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
FAMILY APPEAL E009 OF 2024  
WM MUSYOKA, J  
MARCH 21, 2025**

**BETWEEN**

**BENSON SELBYS ODUKE ..... APPELLANT**

**AND**

**ROSELINE AKOMBI MACHIO ..... 1<sup>ST</sup> RESPONDENT**

**MERCELINE EUNICE ODUKE ..... 2<sup>ND</sup> RESPONDENT**

**JACKLINE AKINYI MACHIO ..... 3<sup>RD</sup> RESPONDENT**

*(An appeal arising from orders made in the ruling of Hon. Anne Njeru, Senior Resident Magistrate, SRM, in Port Victoria SRMCSC No. E066 of 2024, of 17th December 2024)*

**RULING**

1. The Motion, dated 6<sup>th</sup> January 2025, is for stay of execution of orders made in the ruling of the trial court, delivered on 16<sup>th</sup> December 2024, in Port Victoria SRMCSC No. E066 of 2024.
2. The impugned orders were made on a summons for revocation of grant, filed in that matter, which pitted the appellant against his sisters, the respondents herein, over the estate of their father. The respondents had been excluded from the distribution of the estate. The bone of contention was involvement of daughters in the administration and distribution of their estate their late father. The court, relying on section 38 of the *Law of Succession Act*, Cap 160, Laws of Kenya, and *In re Estate of M'Ngarithi M'Miriti alias Paul M'Ngarithi M'Miriti* [2017] KEHC 7904 (KLR)(Gikonyo, J), found that the respondents had been discriminated against, on the basis of gender and marital status, and proceeded to allow the application, revoke the certificate of confirmation of grant, cancel transmission of the estate based on that certificate, and direct fresh proceedings for distribution of the estate.



3. The appellant was aggrieved; hence he filed this appeal, *vide* a memorandum of appeal, dated 17<sup>th</sup> December 2024, lodged herein on even date.
4. In the affidavit in support of the application, the appellant avers that the respondents had moved to have the orders executed, by way of cancellation of the subtitles created after confirmation, which, he claims would occasion on him substantial loss, and that the respondents did not stand to be prejudiced should stay be granted.
5. The application is opposed. There is an affidavit by the 1<sup>st</sup> respondent, sworn on 11<sup>th</sup> January 2025. It is averred that the orders cannot be granted, as the estate was not distributed, for the trial court merely cancelled the certificate of confirmation of grant. It is averred that stay orders cannot issue when the substance to be stayed does not exist.
6. Directions were given, on 15<sup>th</sup> January 2025, for canvassing of the application by written submissions, and, from the record, I have only come across written submissions by the respondents, which I have read and noted the arguments made.
7. The application seeks “stay of execution of the ruling and orders issued on 16<sup>th</sup> December 2024,” in the matter before the trial court. The concern, from the averments in the affidavit, is on the reversal of the transmission process, which would affect the titles of the appellant and others.
8. Are the orders of 16<sup>th</sup> December 2024, capable of being executed, to warrant stay orders being made? Yes, they are. 3 of the orders made in that impugned ruling are substantive. There is revocation of the certificate of confirmation of grant, cancellation of titles and fresh distribution proceedings. Of the 3, the order on cancellation of titles is executable. Upon being presented to the land registrar, the registrar, in compliance, shall cancel the subtitles and revert the property to the mother title, in the name of the deceased.
9. I agree, though, with the respondents, that the appellant has misread aspects of those orders. He has this notion, evidently from the memorandum of appeal and the application, that the grant was revoked. It was not. What was revoked was the certificate of confirmation of grant. Order (i), in the ruling, reads: “The certificate of confirmation of grant is revoked and set aside.” However, the misreading is not fatal to the appeal, because ground 1, in the memorandum of appeal, refers to both the grant and certificate of confirmation.
10. Have the conditions in order 42 rule 6 of the [Civil Procedure Rules](#) been complied with? Those rules were designed with ordinary civil proceedings in mind, and, often, they do not fit neatly with respect to probate and administration proceedings, especially with respect to the matter of substantial loss, and the need to furnish security for due performance. However, I do note that the appellant moved quickly, in bringing this application, for it was filed 10 days after the impugned orders were made.
11. Probate and administration are about family property. There are intense emotions involved in proceedings of this kind, which necessitate that efforts be made to hear the parties on all what concern them, so that all the issues that bother them are thrashed out fully and finally. There is a right of appeal, from a decision of the magistrate’s court to the High Court, in probate and administration matters, according to section 50(1) of the [Law of Succession Act](#). The appellant has exercised that right, and it would only be fair to preserve the subject-matter of the dispute, the status quo with respect to the estate property, as at the date the impugned orders were made, pending appeal.
12. I shall, accordingly, grant the order sought, in terms of prayer 2 of the Motion, dated 6<sup>th</sup> January 2025, but direct the Land Registrar to make entries in the registers for all the titles created out of Samia/



Budongo/1667, prohibiting any dealings with those titles, pending hearing and disposal of this appeal, or for as long as this stay order is in force.

13. To move this matter forward. Let the appellant file and serve the record of appeal, in the next 21 days. The appeal shall be mentioned on 29<sup>th</sup> April 2025, for directions on disposal. It is so ordered.

**DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 21ST DAY OF MARCH 2025.**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Ouma, instructed by BM Ouma & Company, Advocates for the appellant.

Mr. Odhiambo, instructed by OJ Okoth & Company, Advocates for the respondents.

