Wasore v Kurgat; Kapsagawat Primary School & another (Interested Parties) (Miscellaneous Succession Cause 15 of 1999) [2025] KEHC 5859 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5859 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS SUCCESSION CAUSE 15 OF 1999

JRA WANANDA, J

MAY 9, 2025

BETWEEN

JOHN ADORI WASORE ..... APPLICANT

AND

MARTHA CHEPCHUMBA KURGAT ..... RESPONDENT

AND

KAPSAGAWAT PRIMARY SCHOOL ..... INTERESTED PARTY

HERMAN AGAROMBA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JORAM OPATI MULIMI) ..... INTERESTED PARTY

RULING

1. There are two Applications herein both filed by the Applicant. He seeks, respectively, leave to appeal against, and stay of execution of my Ruling dated 19/07/2024 whereof I declined to review and/or set aside the earlier orders given herein on 26/12/2022 by Ogola J. The two Applications being related, it was agreed that they be determined together in one Ruling.

2. The background of this matter was captured in my said Ruling as follows:

> " 2. This action begun as Kapsabet Principal Magistrates Court Succession Cause No. 67 of 1997 in which the Applicant had applied and obtained a Grant of Letters of Administration over the estate of the deceased. The Grant was subsequently confirmed on 13/01/1999 and pursuant thereto, the Applicant became the sole beneficiary of the deceased's parcel of land known as Nandi/Chebilat/517 measuring 2.6 Ha (6.5 Acres). Upon learning of this development, the Respondent, in her capacity as the widow of the deceased, moved to this High Court and filed this Cause seeking revocation of the Grant.

The ground advanced was that the Applicant, not being related to the deceased in any way, misled that Court that he was the heir to the deceased and thus fraudulently obtained the Grant.

"3. However, before the Application could be heard, the parties entered into a consent whereof the Grant was revoked and the title to the parcel of land acquired by the Applicant also nullified. Since the Applicant, the 1st Interested Party and the 2nd Interested Party were all claiming to have purchased portions of the parcel of land but with the Applicant and the 1st Interested Party alleging differing or overlapping acreages and conflicting portion identities, the matter proceeded to full viva voce trial in respect to those issues. Upon closure of the trial, Hon. Ogola J delivered his Ruling on 26/09/2022 by which he distributed the parcel of land as follows:

2nd Interested Party	Herman Agaromba	2 Acres
1st Interested Party	Kapsagwat Primary School	3.5 Acres
Applicant	John Adori Wasore	0.93 Acres

3. Dissatisfied with the decision, the Applicant, through his Advocates, Messrs C.D. Nyamweya & Co. filed a Notice of Appeal and followed it up with an Application for Stay of execution pending Appeal. The Application was however dismissed by Hon. Nyakundi J on 23/12/2022.

3. It was therefore against the above backdrop that the Applicant filed the Application seeking Review which I however dismissed on 19/07/2024 as aforesaid, and against which the Applicant has again returned with the current two fresh Applications. The Applications are dated 22/07/2024 (leave to appeal) and 30/07/2024 (stay of execution).

4. In support of the 1st Application dated 22/07/2024 seeking leave to appeal, the Applicant deponed that he is aggrieved with the said Ruling Court and wishes to challenge the same in the Court of Appeal, that the Interested Party alleges to have purchased from the Respondent and her son the subject parcel of land when clearly they had no capacity to do so and were in breach of Section 45 of the *Law of Succession Act*. He deponed that this Court in the said Ruling indicated that this is a matter that should have gone for appeal which the Applicant is now doing, that this a Succession matter upon which leave to appeal is a pre-requisite, the parcel of land is of colossal value and the Applicant stands to suffer irreparably if leave to appeal is denied. He also deponed that the Advocate who held brief during the time of delivery of the Ruling inadvertently failed to orally seek for leave to appeal.

5. In support of the 2nd Application dated 30/07/2022 seeking stay of execution, the Applicant basically reiterated the same matters already stated and added that he shall suffer great loss since the trees he planted on the subject parcel of land shall be cut down and sold by the Interested Party who has previously done so before this Court issued restrained orders. He also deponed that he is ready to abide by any condition that may be imposed as security for due performance.

6. The Applications are opposed by the 1st Interested Party, Kapsagawat Primary School. Against both, the Interested Party relies on the respective identical Replying Affidavits sworn on 2/10/2024 by one Jonathan Meli and filed through Messrs Z.K. Yego & Co. Law Offices Advocates. He deponed that he is the Chairman of the 1st Interested Party and deponed that the Applications are judicially handicapped as the Applicant has not disclosed any grounds to warrant grant of the orders sought, the Notice of Appeal filed is incompetent, the Applicant fully participated in the suit and as such, and there are no grounds to re-open the case, and that the Applications are an afterthought. He deponed further that the Applicant has not put forth any grounds to show the strength of the intended Appeal.

7. As the Applications were, in my view, quite straightforward, I informed the parties that I will not require them to file any written Submissions. Upon their concurrence, I proceeded to fix the Applications for Ruling.

Determination

8. The issue that arises for determination herein is "whether leave should be granted to the Applicant to appeal against the Ruling delivered herein on 19/07/2024, and whether an order of stay of execution in respect to the same Ruling should also be issued.

9. Regarding the prayer for leave to Appeal, the Court of Appeal in the case of Rhoda Wairimu Karanja & Another -Vs- Mary Wangui Karanja & Another [2014 eKLR made the following observations as regards filing of appeals in Succession matters against the decisions of the High Court while exercising its original jurisdiction:

> " We think we have said enough to demonstrate 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. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes."

10. It was therefore the correct move for the Applicant to have moved this Court for grant of leave to appeal. Needless to state, such leave will only be granted where justifiable circumstances are demonstrated such as where it is shown that there are weighty issues requiring further serious judicial interrogation by the Court of Appeal.

11. In this matter, no draft Memorandum of Appeal has been presented to the Court for scrutiny to enable me assess the alleged "weight" of the intended Appeal. I however note that in the Supporting Affidavit, the only ground of Appeal raised is that that the Interested Party alleges to have purchased from the Respondent and her son the subject parcel of land when clearly they had no capacity to do so and were in breach of Section 45 of the *Law of Succession Act*. This is the only ground alluded to. Clearly, the Applicant is mixing-up the Ruling of 26/09/2022 delivered by Ogola J with my subsequent Ruling delivered on 19/07/2024. The ground he has alleged is in regard to substantive matters that were determined in Ogola J's Ruling of 26/09/2022 which the Applicant did not appeal against. In respect to my subsequent Ruling of 19/07/2024 in which I declined to review the Ruling of Ogola J, if the Applicant files an appeal, then what he will have to demonstrate to the Court of Appeal will be limited to only showing that this Court misapplied the law in its determination of whether the Applicant had demonstrated that the Ruling of Ogola J contained "a mistake or error apparent on

the face of the record" which is the only ground for seeking review that the Applicant preferred. The ground that the Applicant has now presented for seeking to appeal does not at all arise from my Ruling of 19/07/2024 but from the Ruling of Ogola J. Evidently, the Applicant's Counsel failed to appreciate this very important but basic distinction.

12. In his current Application, the Applicant has not demonstrated how this Court may have misapplied the law in its determination of whether the Applicant had proved that the Ruling of Ogola J contained "a mistake or error apparent on the face of the record" and neither has he exhibited a draft Memorandum of Appeal to assist this Court in determining whether his intended Appeal is "weighty", and therefore, in turn, whether he deserves his day before the Court of Appeal.

13. For this reason alone, both the two Applications cannot succeed. I will however still nonetheless interrogate the prayer for stay of execution.

14. Regarding stay of execution, Rules 49 and 73 of the Probate and Administration Rules, read together, permit this Court to invoke its inherent jurisdiction to issue appropriate orders in order to meet the ends of justice and to prevent abuse of process. I am therefore of the view that the said provisions, read with Section 47 aforesaid, are wide enough to cover the prayer for stay of execution of an order in Succession matters. Indeed, it has not been denied that this Court has the jurisdiction to grant the order of stay of execution pending appeal.

15. Before I delve into the substantive aspect of the prayer for stay of execution, I must again state that the Applicant does not seem to appreciate that my Ruling of 19/07/2024 was simply a negative order. All it did was to refuse an Application for Review. What then would be there to be stayed? How does a refusal to review an order get stayed and to what end? The only Ruling capable of being stayed is the earlier one by Ogola J dated of 26/09/2022, not the subsequent one of 19/07/2024. On this further ground, again, the prayer for stay of execution cannot succeed. I will however still interrogate the merits of the prayer.

16. Having made the above findings, I may mention that stay of execution pending appeal is a discretionary power but which, needless to state, must not be exercised on whims, but judiciously, on defined principles and on the basis of facts. It is also the position that the objective of stay of execution is to prevent "substantial loss" from befalling an Applicant and thus to prevent the appeal from being rendered nugatory. It is also trite law that an Applicant for stay of execution of a decree or order pending Appeal is required to satisfy the conditions that the Application has been made without unreasonable delay, that "substantial loss" may result to the Applicant unless the order is granted, and where applicable, that the Applicant is willing or ready to deposit security for due performance of the decree or order.

17. The first condition that I need to consider is therefore whether the Applications have been made without unreasonable delay. In this case, my Ruling the subject of the Applications was delivered on 19/07/2024. The 2 Applications were then filed on 22/07/2024 and 30/07/2022, respectively. It cannot therefore be disputed that the Applications were filed timeously and without delay.

18. The second condition is whether the application would suffer "substantial loss" should the order not be granted. As to what constitutes "substantial loss", F. Gikonyo J in the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, stated as follows:

> " 11. No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, ..., does not in itself

amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, ..., emphasized the centrality of substantial loss thus:

> " ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion ..... only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above." [Emphasis mine]

19. Further, Platt, Ag. JA (as he then was) in Kenya Shell Limited vs. Kibiru [1986] KLR, expressed himself as follows:

> " ..... If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. .....".

20. On his part, Gachuhi, Ag. JA (as he then was) in the same case, stated as follows:

> " ..... What sort of loss would this be? In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement." [Emphasis mine]

21. From the foregoing, it is clear that an Applicant for an order of stay of execution has the obligation to first demonstrate, as part of the limb of "substantial loss", that refusal by the Court to "preserve the status quo" will result into such loss that would "render the appeal nugatory", which in turn means that such Applicant must demonstrate that "the appeal is not frivolous" and that it possesses some "reasonable belief that it may succeed".

22. On the merits of the Appeal, I have already made a finding that in his current Application, the Applicant has not made any attempt to demonstrate how this Court may have misapplied the law in its determination of whether the Applicant had proved that the Ruling of Ogola J contained "a mistake or error apparent on the face of the record" and neither has the Applicant exhibited a draft Memorandum of Appeal to assist this Court in determining whether his intended Appeal any "chances of success" or is "weighty".

23. For this reason further alone, the prayer for stay of execution cannot also succeed.

24. Further, Ogola J, in his Ruling dated 26/09/2022, which has not been appealed against, after conducting a full viva voce trial, already made findings that the 1st Interested Party has been in

occupation of the subject portion of the parcel of land in question since the year 1982 when it bought the same from the deceased, and that the 1st Interested Party therefore lawfully purchased the same, that the Applicant,

25. Ogola J also found that by his own admission, initially fraudulently instituted Succession proceedings in Kapsabet P&A No. 67 of 1997 in respect to the deceased's estate in which he obtained Grant of Letters of Administration by disguising himself as a son of the deceased, that the Appellant subsequently used the fraudulently acquired Grant to obtain title to the whole of the parcel of land, which Grant and title were later, when the Respondent (widow of the deceased) filed an objection thereto, the Applicant conceded and agreed to revocation thereof by consent. Ogola J also found that in the portion allocated to the Interested Party in the Certificate of Confirmation of Grant (a school), there are developments, including latrines and a nursery school and that, on his part, the Applicant did not mention what exactly occupies his portion of the land.

26. With the above findings, my view is that even if the Applicant were to show that he has an arguable appeal, still, granting any orders of stay of execution will harm the Interested Party more than it will harm the Applicant.

27. Further, in an earlier Ruling declining the same Applicant's similar Application for stay of execution pending Appeal filed in this same matter, Nyakundi J, in his Ruling dated 23/12/2022, held as follows:

> " 15. I have taken into consideration the age of the matter. Whereas the applicant is well within his rights to appeal there must be a balance struck with the rights of the respondent to enjoy the fruits of the judgment. In the premises, I find that the application for stay is not merited."

28. The above finding having been made by a Judge of this same Court with concurrent jurisdiction as mine, in this same matter and in respect to a similar prayer as the one now before me, and there being no demonstration by the Applicant that there has been any change in circumstances since the date of that Ruling, I have no justification to rule otherwise.

29. In any event, I, indeed, agree with Nyakundi J, that this is a very old matter that commenced in 1999 and even before it, there was Kapsabet Principal Magistrates Court Succession Cause No. 67 of 1997 filed by the Applicant in respect to the same estate. The deceased himself died much earlier in the year 1985, 40 years ago! The Court having distributed the estate in the year 2022 upon a full viva voce trial, no Appeal having been filed against that mode of distribution and the Application for review of that mode of distribution having been denied, the Applicant must now accept that the principle of finality must come into play and that litigation must at some point come to end.

30. As stated by the Court of Appeal in the case of Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2007] eKLR and later, by the same Court in Kamau James Gitutho & 3 others v Multiple ICD (K) Limited & another [2019] eKLR, the principle of finality "is a doctrine which enables the Courts to say litigation must end at a certain point regardless of what the parties think of the decision which has been handed down" and in spite of "the all-too human predilection to keep trying until something gives".

31. In the circumstances, in addition to my other findings above rendering the Application undeserving, it is my further finding is that no "substantial loss" to be suffered by the Applicant has also been demonstrated. Having found as such, consideration of the third condition - deposit of security - does not now arise.

Final Orders

32. In the premises, the Applicant's two Notices of Motion dated 22/07/2024 (leave to appeal) and 30/07/2024, respectively, are hereby dismissed with costs to the Interested Party.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 9TH DAY OF MAY 2025

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WANANDA J. R. ANURO

JUDGE

None of the parties attended Court

Delivered in the absence of all parties

Court Assistant: Edward Lotieng