



**In re Estate of Akala Litili Mikhasi (Succession Cause
90 of 1996) [2025] KEHC 8814 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8814 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 90 OF 1996
JRA WANANDA, J
JUNE 20, 2025**

BETWEEN

JOHN KIPSEREM MARITIM APPLICANT

AND

**FRANCIS LUYALI AKALA (DECEASED) (SUBSTITUTED BY ATHANATUS
MUSYOMI MUKHASI) 1ST RESPONDENT**

WINFRED JEPKOECH BARSULA 2ND RESPONDENT

RULING

1. I delivered a Judgment in this matter on 31/07/2024 dismissing the Objector's Summons seeking Revocation of the Grant issued herein, and who has now returned with the present Application dated 7/11/2024 filed through his new Advocates, Messrs Kenei & Associates Advocates LLP. It seeks orders as follows:
 - i. [spent]
 - ii. [spent]
 - iii. That there be a stay of execution/implementation of the Amended Certificate of Confirmation and in particular subdivision of land title Uasin Gishu/Ndalat Scheme/4X4 pending the hearing and determination of the intended Appeal.
 - iv. That costs of this Application be awarded to the Objector/Applicant.
2. The grounds of the Application are as set out on the face thereof and it is supported by the Affidavit sworn by the Objector, John Kipserem Maritim. In the Affidavit, he has deponed that he is a purchaser from the estate of the deceased herein, pursuing a portion of 8.1 acres that he purchased between 1992-1994, that he lodged an Objection/Protest to the mode of distribution presented by the Administrator and adopted by this Court, and that this Court rendered the said Judgment dismissing



his claim for the said portion of 8.1 acres and affirming the Amended Certificate of Confirmation allocating to him the lesser portion of 5 acres. He deponed that dissatisfied with the Judgment, he lodged a Notice of Appeal and requested for copies of the proceedings to enable him prepare a Record of Appeal and served the same, that he has learnt that the Administrator has commenced the process of implementation of the Amended Certificate of Confirmation of Grant through the Surveyor-Uasin Gishu County who issued a Notice giving a date for subdivision of the said parcel of land Uasin Gishu/ Ndalat Scheme/4X4.

3. He deponed further that he is currently in occupation of the said 8.1 acres portion and the execution will alter the current status to his detriment, deprive him of a portion of 3.1 acres and also lead to his eviction therefrom. He also submitted that he has been in occupation of the said portion for about 30 years and has progressively made substantial developments thereon and any interference with the same will occasion extensive loss to him and to his family as they have known the parcel of land as their only source of livelihood and any interference will cause them irreparable harm that cannot be ameliorated at the Appellate stage and will cause the Appeal to be rendered nugatory and its substratum to be severely compromised and render the Appeal an academic exercise. In conclusion, he deponed that the implementation of the Amended Certificate of Confirmation will lead to transfer and registration of the parcel of land in the names of other persons which will require a tedious and costly legal process to recover should the Appeal succeed and that the Respondents have not been in possession, occupation or use of the said portion for the last 30 years.
4. In opposition, the Administrator, Athunatos Musiomi Agala, through Songok & Co. Advocates, filed the Replying Affidavit sworn by him on 17/12/2024. He deponed that this Court has adequately pronounced himself on this matter and the Application is a waste of time, that the Objector only bought 5 acres from the deceased and the allegation that he bought 8.1 acres is not true, and that the Application therefore lacks merit. He added that this matter has been pending for the last 28 years and it has affected the deceased's beneficiaries and their families as they need to be given property for their sustenance, and that litigation must come to an end. He deponed that due to the Objector's failure to demonstrate that he purchased 8.1 acres and not 5 acres, the Appeal cannot succeed and the Objector has not shown the loss he will suffer if the Application is dismissed.
5. The Application was canvassed by way of written Submissions. The Objector filed the Submissions dated 23/11/2025 while the Administrator filed the Submissions dated 16/01/2025.

Objector's Submissions.

6. The Objector's Counsel cited Order 42 Rule 2 of the *Civil Procedure Rules* and the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR and listed the matters to be satisfied for an Application for Stay pending Appeal to succeed. He recounted the grounds enumerated in the Objector's Affidavit as constituting "irreparable loss" and cited the case of *Rono & 4 others v Kirui* [2023] eKLR, the case of *Hannah Ngina & 2 others v Francis Kamau Thairu* [2016] eKLR, the case of *Silversten v Chesoni* [2002] eKLR and the case of *Rhoda Mukuma v John Abuoga* [1998] eKLR.
7. He submitted that the 2nd Respondent has not filed any Affidavit of Means to confirm her financial means or status to show that she can compensate the Objector for the extensive loss she is likely to suffer should the Appeal succeed. He cited the case of *Nicholas Stephen Okaka & another v Alfred Waga* [2022] eKLR. Counsel also submitted that the Judgment was delivered on 31/07/2024 and the Application was lodged on 7/11/2024 and that the period of 3 months cannot be deemed to be inordinate delay. On security for performance, he submitted that the Objector is willing to comply with the conditions that the Court may impose. He cited the case of *M'Aluma v M'Aluma* [2023] eKLR.



Respondent's Submissions.

8. On his part, Counsel for the Respondent recounted the various findings made by this Court against the Objector and which led to the Judgment dismissing his Summons for Revocation of the Grant. He then listed and recited several authorities setting out the purpose of an order of stay of execution pending Appeal and the matters that an Applicant for such order must satisfy. He then submitted that the Objector has not demonstrated any "substantial loss" considering that the 2nd Respondent currently resides on the disputed 2 acres hence the status quo will not be altered to the Objector's detriment if stay is not granted. He cited the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR.
9. On "delay", he submitted that the Application was filed more than 100 days after the Judgment, and that the delay has not been explained. He cited the case of *Jaber Mohsen Ali & another v Priscilla Boit & another*, E&L No 200 of 2012 [2014] eKLR.
10. On security for costs, he submitted that the Objector has not demonstrated willingness to deposit the same. He cited the case of *Exclusive Mines Limited & another v Ministry of Mining & 2 others*.
11. Counsel submitted further that stay of execution pending Appeal is an equitable remedy and as such the conduct of the Objector becomes material since "he who comes to equity must come with clean hands". He cited the case of *Lagoon Development Limited v Beijing Industrial Designing & Research Institute* [2015] eKLR and recounted some of the findings made by this Court in respect to the Objector's conduct, including, remaining in occupation of the suit in breach of the orders made in Eldoret Chief Magistrates Court Case No 92 of 2018 requiring him to vacate the same, thus a demonstration of contempt, giving of false testimony, including denying his past conviction for a criminal offence in respect to matters arising from this case, and his acts of meting out violence on the 2nd Respondent and which were extra judicial in nature.
12. Counsel also submitted that the Objector has not shown that his Appeal is arguable or has chances of succeeding considering that his claim in the said Eldoret Chief Magistrates Court ELC Case No 92 of 2018 was dismissed, and that there is no danger that the Appeal will be rendered nugatory given that he is not in possession of the portion in dispute. He cited the case of *Kenya Airports Authority v Mitu-Bell Welfare Society & another* (Civil Application No 114 of 2013) [2014] KECA 444 (KLR) (18 July 2014) (Ruling). In conclusion, he urged the Court to take cognisance of the fact that this matter has taken a very long time to come to conclusion, the deceased having died in 1981, which is over 30 years ago, and the Succession Cause having commenced in 1996, which is close to 20 years ago.

Determination.

13. Before I delve further in this matter, I observe that there is no indication that the Objector sought and/or obtained leave to Appeal. I have raised this issue because the Court of Appeal, in the case of *Rhoda Wairimu Karanja & another v 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.”

14. The above holding was recently upheld in the Court of Appeal’s subsequent case of *Mwaja v Mwaja* (Civil Appeal E078 of 2022) [2024] KECA 1055 (KLR) (26 July 2024) (Judgment).
15. In view of the above holding, and whereas I am aware that there is varying opinion on this issue, it would mean that this instant the Application for stay pending Appeal may be deemed “dead on arrival” if indeed, no leave to appeal was obtained in the first place.
16. Be that as it may, since the above issue was not raised or canvassed by any of the parties, it will be unfair and high-handed to determine the Application on the basis thereof as this Court has not received the benefit of the parties’ input thereon. I will therefore say no more about the issue.
17. I also note that although the Application continuously refers to an Amended Certificate of Confirmation as the subject thereof, the same has not been identified and the date thereof has also not been disclosed. Further, although the same is stated to have been annexed to the Supporting Affidavit as Exhibit “JM 1”, there is no such exhibit attached. On my part, the only Certificate of Confirmation of Grant that I can trace in the Court file is the one dated 20/06/2016.
18. Again, be that as it may, the one broad issue that arises for determination in this matter is evidently “whether an order of stay of execution barring implementation of the Certificate of Confirmation issued herein should be issued pending the hearing and determination of the Objector’s intended appeal”.
19. Regarding the prayer for stay of execution, Rules 49 and 73 of the Probate and Administration Rules, read together, permit the 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, judgment or decree in Succession proceedings. In any event, it has not been denied that indeed this Court has the jurisdiction to grant such order of stay pending appeal.
20. In view of the above, I may also 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 the facts of the case. It is also the position that the objective of stay of execution is to prevent “substantial loss” from befalling an Appellant or intended Appellant and thus to prevent the appeal from being rendered nugatory.
21. 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; (a) the Application has been made without unreasonable delay, (b) that “substantial loss” may result to the Applicant unless the order is granted, and (c) where applicable, that the Applicant is willing or ready to deposit security for due performance of the decree or order.
22. The first condition that I need to consider is therefore whether the instant Application has been made without unreasonable delay. Regarding delay, Munyao Sila J, in the case of *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR, held as follows:

“ 11. The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of *Christopher Kendagor v Christopher Kipkorir Eldoret E&L 919 of 2012* the applicant had been given 14 days to vacate the



suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.

12. Mr. Gicheru for the defendants was of the view that the 4 days period after the period given to vacate was not inordinate. On my part I am not convinced.”
23. In this case, the Judgment intended to be appealed against was delivered on 31/07/2024. The instant Application was then filed on 7/11/2024. The Application was therefore filed more than 3 months after the Judgment. According to Counsel for the Objector, 3 months cannot be deemed to be “inordinate delay” I disagree. An Application for stay pending Appeal filed 3 months after the Judgment is in my view, filed after an inordinate delay unless a credible explanation is given for such delay. In this case, the Objector’s Counsel, apart from simply submitting that a period 3 months cannot be deemed to be “inordinate delay”, did not offer any explanation for delay. There is also no explanation in the Supporting Affidavit. In the absence of any such explanation, I am deprived of any material to enable me find the delay to have been excusable, and in the circumstances, my only recourse is to find, as I hereby do, that the 3 months delay constituted an “inordinate delay”.
24. This above finding, alone, would be sufficient to dispose of the Application. I will however nonetheless consider the rest of the matters arising.
25. The second condition is whether the Applicant will suffer “substantial loss” should the order of stay 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.”



26. Platt, Ag. JA (as he then was) in *Kenya Shell Limited v Kibiru* [1986] KLR, held that:

“..... 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.”.

27. 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.”

28. From the foregoing, it is clear that in respect to the limb of “substantial loss”, an Applicant for an order of stay of execution has the obligation to first demonstrate that refusal by the Court to “preserve the status quo” will result into such loss that would “render the appeal nugatory”, which in turn includes the burden to also demonstrate that “the appeal is not frivolous” and that it possesses some “reasonable belief that it may succeed”. This is because, as held by Platt, Ag. JA (as he then was) above, “a frivolous appeal cannot in practical terms be rendered nugatory”.

29. On satisfaction that the Appeal “is not frivolous”, the Objector has not attached a draft Memorandum of Appeal for this Court to peruse and satisfy itself that the intended Appeal “is not frivolous”. The Supporting Affidavit, too, does not attempt to give any explanation on what is intended to be appealed against, or try to demonstrate the strength of the intended Appeal. In the absence of such material, again, I am unable to determine that that the intended Appeal “is not frivolous”. The flipside is that this “silence” also, in turn, means that the Objector has failed to demonstrate that the intended Appeal “is not frivolous”.

30. Still on the issue of whether the Appeal “is not frivolous” for the purposes of demonstrating “substantial loss”, and without going into the merits or demerits of the Judgment intended to be appealed against, which would be a preserve of the Court of Appeal, I may, nonetheless, very briefly state that the findings I made in the Judgment, having been based majorly on the fact that there was a complete lack of evidence, documentary or otherwise, to support the Objector’s allegation of having purchased from the family of the deceased, the additional 3.1 acres of the subject parcel of land, I have serious misgivings on the strength of the intended Appeal. My doubts about the chances of the intended of the Appeal are also bolstered by the fact that in an earlier case, namely, Eldoret Chief Magistrate’s Court, Environment and Lands (ELC) Case No 92 of 2018, which Judgment he never appealed against, the Objector was already found to have no claim over the same alleged portion of land, was found to be wrongly occupying the same, and was ordered to vacate

31. Regarding the “loss” that the Objector alleges that he shall suffer if the distribution of the estate giving him 5 acres, rather than 8.1 acres, is implemented, it is not clear how much acreage he is occupying at the moment but if the distribution schedule adopted in the Certificate of Confirmation is implemented, he will still be entitled to 5 acres. I do not think being kept away from only the additional 3.1 acres can be described as causing “substantial loss” to the Objector when he will already have possession of the initial 5 acres. In any case, although the Objector alleges that he has made extensive developments to the parcel of land and which will be placed under threat if the stay pending Appeal is not granted, he has not described the nature of these investments nor has he explained whether these developments



even extend to the additional 3.1 acres in dispute. He has also not alleged that the house he resides in lies on this additional 3.1 acres. By this lack of clarity, he has again failed to present material to this Court to enable it determine whether he will indeed suffer the alleged “substantial loss”.

32. I also note that although the Objector alleges that he has been in occupation of the parcel of land for about 30 years, he suppresses the fact that even before this Court’s Judgment, he had, as aforesaid, already been found by another competent Court of law (Magistrate’s ELC Court) to have taken such possession unlawfully after extra-judicially violently chasing away the lawful owner - 2nd Respondent - from that same parcel of land. From the evidence on record, the Objector was even implicated in the criminal acts surrounding the whole eviction saga, including the demolishing of the 2nd Respondent’s house and uprooting of her crops, the unleashing of acts of violence on her and the desecration of her late sister’s grave situated in the said parcel of land. Indeed, the Objector was charged in a criminal case and was duly convicted. Under these circumstances, I find it hard to accept that the Objector will suffer “loss” yet the situation which he alleges will cause him such “loss” was created by himself, and even then, through criminal and extra-judicial means. Despite being
33. The Administrator’s Counsel has also asserted that the Objector’s bona fides and past conduct as described above renders him unfit to be granted the orders of stay. I find this assertion to carry substantial weight as it is a basic tenet of law that “he who comes to equity must come with clean hands” (see the case of *Caliph Properties Limited v Barbel Sharma and another* (2015) eKLR). A finding of “substantial loss” in favour of an Applicant for stay pending Appeal cannot justifiably arise from illegal acts committed by such Applicant.
34. I also agree with the Objector’s Counsel that this matter having been in Court since 1996, about 29 years so far, it will not be in the interest of justice to issue an order of stay pending Appeal whose effect will be to further perpetuate the delay in its conclusion, at least in this Court. While the Objector has the constitutional right to appeal, and is at liberty to pursue the intended Appeal, I do not think granting the order of stay pending that Appeal would be the right thing to do considering the lengthy period of time that the parties, beneficiaries and their families have been held hostage in this Court awaiting a determination. This Court having finally made its determination, it is only fair that such determination be implemented even as the Appeal is pending. Whatever will have been implemented pursuant to the determination of this Court can still very well, in my view, be undone with minimal cost and/or inconvenience should the Court of Appeal reverse the Judgment.
35. In the circumstances, my finding is that no “substantial loss” that may be suffered by the Objector should this Application be declined has been demonstrated to justify the grant of an order of stay of execution pending Appeal. Having found as such, consideration of the third condition - deposit of security - does not now arise.
36. In view of the foregoing, I believe I have said enough to demonstrate that the instant Application is, in my view, not merited.

Final Orders.

37. The upshot of the above is that I rule and order as follows:
 - i. The Objector’s Notice of Motion dated 7/11/2024 is hereby dismissed, thus the prayer for stay pending Appeal is declined.
 - ii. However, once the portions of the parcel of land known as Uasin Gishu/Ndalat Scheme/4X4 are transmitted to the beneficiaries as directed in the Certificate of Confirmation of Grant herein, they shall not sell, transfer, charge or offer the same as security for any transaction to any



person or third party, or in any other way or manner part with the ownership thereof, pending the hearing and determination of the Objector's intended Appeal.

- iii. As costs follow the event, I grant costs of this Application to the Administrator and the 2nd Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF JUNE 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Mr. Korir h/b for Mr. Kenei for the Objector-Applicant

Ms. Luseria h/b for Mr. Songok for the Respondents

Court Assistant: Edwin Lotieng

