



REPUBLIC OF KENYA



In re Estate of Peter Chebigio Kurumei (Deceased) (Miscellaneous Succession Application 2 of 2023) [2025] KEHC 8551 (KLR) (18 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8551 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

MISCELLANEOUS SUCCESSION APPLICATION 2 OF 2023

E OMINDE, J

JUNE 18, 2025

IN THE MATTER OF THE ESTATE OF THE LATE PETER CHEBIGIO KURUMEI

BETWEEN

MARY SUMBEIYWO OBJECTOR

AND

PHILIP K. KURUMEI RESPONDENT

RULING

1. The Applicant approached this court vide the Notice of Motion Application dated 16/02/2025 seeking the following orders;
 1. Spent
 2. That the firm of Messrs Kelvin Bett & Associates be granted leave to come on record as advocates for the Respondent/Applicant in place of Messrs Bulbul-Koitui & Company Advocates.
 3. That this Honourable Court be pleased to issue an order of stay of execution of the Judgment delivered herein by Honourable Justice R. Nyakundi on 7th August, 2023 and all other consequential orders issued thereafter pending the hearing and determination of the intended appeal.
 4. That this Honourable court be pleased to grant an extension of time to enable the Applicant to file an appeal out of time and the Notice of Appeal and Memorandum of Appeal annexed herein be deemed properly filed subject to such extension and payment to the requisite court fees.
 5. That the Applicant be at liberty to apply for further orders and/ or directions as this Honourable Court may deem just and expedient.



6. That costs of this application be provided for.
2. The Application is premised on the grounds on the face of it and the contents of the Supporting Affidavit sworn by the Applicant, Philip K. Kurumei. In his affidavit, he deposed that judgement having been delivered in this matter on 07/08/2023, and being dissatisfied with the same, he is desirous of filing an appeal against the same. He stated that he instructed his advocates to file the Notice of Appeal dated 21/08/2023 which was annexed and marked as annexure PK1. Further, that unless stay of execution is granted the appeal may be rendered nugatory. He additionally stated that the delay in filing the appeal was occasioned by failure of his Counsel to seek leave to appeal. He stated that he has an arguable appeal and that the Applicant would suffer no prejudice if the Application is allowed.
3. The Respondent opposed the Application vide a Replying Affidavit dated 01/05/2025. She urged that the Applicant failed to file a Notice of Appeal within the statutory timelines and further, that as he had failed to seek leave to appeal, the Notice of Appeal is defective, which fact he has admitted in his pleadings. The Deponent pointed out that the Notice of Appeal was filed by the firm of Bulbul-Koitui & Co Advocates which was not on record for the Applicant and further, that it was incumbent that they seek leave from the firm of Kalya and Co Advocates, who were on record for the Applicant, before filing the said Notice of Appeal.
4. The Respondent argued that there is no appeal that has been filed and therefore, this court lacks the jurisdiction to entertain the application as by doing so, it will be sitting as an appellate court on its own decision. She stated that the delay is inexcusable and inordinate and as such the Application should be dismissed. Additionally, that the orders for extension of time should be sought before the Appellate court and she shall be prejudiced with the prayers sought if granted. She urged the court dismiss the application with costs in the interests of justice.

Hearing of the Application

5. The parties filed submissions on the Application. The Applicant filed submissions dated 11/03/2025 whereas the Respondent filed submissions dated 20/05/2023.

Applicants' Submissions

6. Learned Counsel for the Applicant submitted that the law governing stay of execution is governed by Order 42 Rule 6 of the Civil Procedure Rules and emphasised that to grant or not to grant the same is an exercise of the court's discretion which discretion however must be exercised judiciously. He cited the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR among others. Counsel further submitted that Rule 49 of the Probate and Administration Rules is wide enough to cover the present application on stay of execution. He also cited Rule 73 of the Probate and Administration Rules in this regard and urged that a reading of both provisions indicates that the High Court is clothed with discretionary powers to do what is necessary to ensure the ends of justice are met. Counsel placed reliance on the case of *Millicent Mbatia Mbaru v Annah Ndunge Mulave & 3 Others* (2018) eKLR and the Court of Appeal Case of *Floris Piezzo & Another v Giancarlo Falasconi* (2014) eKLR and submitted that both cases affirmed that the High Court has powers to issue injunctive orders. Counsel further stated that the court may draw upon the wider powers in Section 47 and its inherent jurisdiction provided under Section 73 of the *Law of Succession Act* to entertain any application and determine any dispute under the Act.
7. Counsel urged that the land parcel known as Irong/Iten/1475 is the Matrimonial home of Tecla Kabiro Kurumei, the 1st widow of the deceased and that under the *Matrimonial Property Act* No. 49 of 2013, any property acquired by the 1st widow and the deceased during the subsistence of the



marriage prima facie constitutes matrimonial property and as such the Appeal raises arguable issues as to whether the said property is subject to Succession and sub division between the two houses as ordered by this court in its judgement and that since the widow, Tecla Kabiro Kurumei, lives on the said property, she stands to suffer substantial loss if the stay sought is not granted. He cited the case of *Machira t/a Machira & Co Advocates v East African Standard (No2)* [2002] KLR 63 in this regard and Article 40(1) of the *Constitution* on the right to acquire and own property.

8. Counsel posited that his intention to appeal the decision of this court is discernible from the fact that his former Counsel Bulbul-Koitui & Co. Advocates filed a Notice of Appeal Dated 21st August 2023 within 14 days of the delivery of the impugned judgement on 7th August 2023. That until recently, the Applicant was not aware that his advocates had not sought leave to file the intended appeal out of time hence his Application seeking extension of time to file the partial appeal. That the delay having been occasioned by the mistake of his Counsel should not be visited upon him, an innocent litigant as was held in the case of *Excelation Ltd. v Commercial Transporters Ltd.* Nairobi HCCC No. 1066 of 2001. Further, placing reliance on Article 159 (2) of the *Constitution*, he submitted that the court is mandated to administer substantive justice without undue regard to procedural technicalities
9. On whether leave to file the appeal out of time should be granted, Counsel placed reliance on the provisions of Section 7 of the *Appellate Jurisdiction Act*, Section 79G of the *Civil Procedure Act*, Section 47 of the *Law of Succession Act* and Rules 63 and 67 of the *Probate and Administration Rules*. Further, Counsel cited Article 164(3) of the *Constitution* and submitted that jurisprudence from the Court of Appeal suggests that a party requires leave of the High Court to file an Appeal at the Court of Appeal in Succession matters since the same is not automatically given in the statute. Counsel cited the cases of *Daniel Gicheru Kingori & 2 others v Wambugu* (2022) eKLR, *John Mwita Murimi & 2 others v Mwikabe Chacha Mwita & Another* (2019) eKLR and *Rboda Wairimu Kioi & John Kioi Karanja v Mary Wangui Karanja & Salome Njeri Karanja* CA Civ App. Nai 69 of 2004 in this regard, and urged that that a party should seek leave to appeal decisions of the High Court exercising original jurisdiction in succession matters and failure to obtain such leave is fatal.
10. Urging that the previous advocate partially appealed the decision by filing a Notice of Appeal and that the delay is attributable to Counsel's misconception of the appellate procedure in succession matters, Counsel submitted that they have fast tracked the matter by obtaining typed proceedings and pleaded with the court to allow the application as prayed with costs to the Applicants. He also prayed for costs.

Respondents' Submissions

11. Learned Counsel for the Respondent submitted that there is no Appeal that has been filed, which fact the Applicant has conceded to and further, that the Notice of Appeal that was filed on 21/08/2023 is defective, pointing out that two years from the date of the judgement, no competent appeal has ever been filed. Counsel further submitted that the judgement in this matter was delivered on 07/08/2023 and there were no reasons given for the inordinate delay. Additionally, that as there is no competent appeal, orders for stay cannot issue as there would be no pending appeal for determination. Counsel urged that this court cannot stay its own judgement and that the Applicant has not shown what substantial loss it stands to suffer if the decision of the court is implemented.
12. The Respondent submitted that the application has its origin from the Resident Magistrates' Court in Iten being Iten P&A Cause No. 4 of 2000. He cited Section 50 of the *Law of Succession Act*, which provides that that the decision of this court on an appeal filed in a matter emanating from the Magistrate's Court is final. He therefore urged that the application lacks merit. Further, that extension of time is a creature of equity and he who seeks equity must do equity. Counsel reiterated that the delay was inordinate and pointed out that nowhere in the pleadings is the Applicant seeking leave to file an



appeal. He urged that the Application falls short of the requirements to be fulfilled prior to allowing said application and urged the court to disallow the application.

Analysis & Determination

13. The following issues arise for determination;
 1. Whether the Applicants' Advocates should be granted leave to come on record
 2. Whether there is a competent Appeal before the Court of Appeal
 3. Whether the Applicant should be granted extension of time to file the appeal out of time
 4. Whether the Notice of Appeal and Memorandum of Appeal should be deemed to be properly filed
 5. Whether orders of stay can issue

Whether the Applicant's Advocates should be granted leave to come on record

14. The rules and procedure for engagement of an advocate post judgment are set out under Order 9 rule 9 of the *Civil Procedure Rules* which provides as follows:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

15. On this limb, I am satisfied that the Application before the court is proper and the leave sought is accordingly granted.

Whether there is a competent Appeal before the Court of Appeal

16. It is to be noted at this stage that the court's determination on issue if it be in the affirmative, shall render the issues as drawn in 3), 4) and 5) moot. If this be the case then, the court shall not proceed to consider the same.
17. Section 50(1) of the *Law of Succession Act* on Appeals from the Magistrate's Court to High Court provides 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.

18. It is common ground that the leave of the court must be sought before a party can lodge an appeal against the decision of this court. However, the court notes that it has been submitted by the Respondent that the impugned judgement of this court is a decision that arose from an appeal against the decision of the Magistrate's Court at Iten being Iten P&A Cause No. 4 of 2000. The Respondent therefore submits that in light of the provisions of Section 50 herein cited, the said judgement of the High Court is final. I have noted that this submission has not been denied, rebutted and/or controverted by the Applicant and the court shall therefore proceed on the premise that this is the position.



19. In *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another* [2014] eKLR, Musinga, Ouko and Kairu, JJA affirmed that leave must be sought to appeal a decision of the High Court in Succession matters when it stated thus: -

“We have found that the application was presented out of time; that the applicant lacked capacity to bring it at the time he did; that leave of the High Court to appeal to this court in succession matters is necessary in the former's exercise of its original jurisdiction; and that where application for leave has been rejected by the High Court, it can be made to this court.”

20. From the above cited decision of the Court of Appeal, it should be noted that the Learned Judges were very clear on what decision of the High Court is there a requirement that leave to appeal must be sought. The position as per the said judgement is that it is the decision of the High Court in exercise of its original jurisdiction. It is to be noted that the decision of the High Court in the instant case was made by this court in the exercise of its appellate jurisdiction. In this regard, as provided under Section 50 of the *Law of Succession Act*, this decision is final.
21. The above being the case, it follows then that no appeal can lie against any such decision of this court and so therefore there is no competent appeal before the Court of Appeal to warrant the granting of the orders sought. As I have already indicated herein, an affirmative finding on this particular issue then renders the other issues drawn in 3) - 5) moot and the court shall therefore not deliberate upon them. In light of the conclusion reached, it is my finding that this Application is misconceived and lacks merit. The same is accordingly dismissed in its entirety with costs to the Respondent.

READ DATED AND SIGNED AT ELDORET ON 18TH JUNE 2025

E. OMINDE
JUDGE

