



REPUBLIC OF KENYA



**In re Estate of Richard Ochieng Olwenge (Deceased) (Probate & Administration
E003 of 2023) [2025] KEHC 7522 (KLR) (4 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 7522 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
PROBATE & ADMINISTRATION E003 OF 2023**

DK KEMEL, J

JUNE 4, 2025

BETWEEN

**JEANNET AUMA OCHIENG 1ST APPLICANT
MARGARET ATIENO OCHIENG 2ND APPLICANT
GRACE AKINYI OCHIENG 3RD APPLICANT
SHEILA ADHIAMBO OCHIENG 4TH APPLICANT**

AND

**FANUEL ODHIAMBO OCHIENG 1ST PETITIONER
JORAM OMONDI OCHIENG 2ND PETITIONER
IAN OCHIENG SEDA 3RD PETITIONER
ANNA ATIENO ONYANGO 4TH PETITIONER**

RULING

1. The 1st, 2nd and 3rd Objector herein have lodged the present application dated 15/5/2025 wherein they seek the following reliefs:
 - i. Spent.
 - ii. That there be stay of proceedings and/or further proceedings and or implementation and/or taking effect and/or giving effect the court orders of 9th May 2025 and/or any action in the matter pending the hearing and determination of the application.
 - iii. That there be an order staying and/or suspending the orders issued on 9/5/2025 to wit; the appointment of administrators, gazettelement of the estate in the Kenya Gazette and issuance of



the Grant of Letters of Administration Intestate and or taking effect of the said orders and/or directions pending the hearing and determination of the application.

- iv. That there be stay of proceedings and/or further implementation and/or taking effect and/or giving effect the court orders of 9/5/2025 and/or any action in the matter pending the hearing and determination of the appeal in the Court of Appeal.
 - v. That there be an order staying and/or suspending the orders issued on 9/5/2025 to wit; the appointment of administrators, gazettelement of the estate in the Kenya Gazette and issuance of the Grant of Letters of Administration Intestate and/or the taking effect of the said orders and/or directions pending the hearing and determination of the appeal to the Court of Appeal.
 - vi. That the costs of the application be provided for.
2. The application is supported by the grounds set out thereunder and by the affidavit of the 1st Objector/Applicant sworn on even date. The Applicants' gravamen is inter alia; that upon dismissal of the Applicant's application dated 1/9/2023, this court proceeded to appoint Petitioners; that the Applicants were aggrieved and lodged an appeal against the ruling to the Court of Appeal; that the Applicants are desirous of being heard on appeal before the orders of this court take effect; that there is need to stop or stay the proceedings and to put on hold this court's directions; that the 1st, 2nd and 3rd Objectors stand to suffer substantial loss that cannot be monetarily compensated should the orders of 9/5/2025 be implemented; that the appeal risks being rendered nugatory if the orders are not granted; that the Applicants risk being disinherited on account of the open bias and discrimination meted against them; that the Applicants are willing to abide by any condition to be imposed by the court; that the instant application does not require security to be provided because there is no decree in place capable of execution to warrant the provision of security for due performance thereof; that it is in the best interest of justice to grant the orders sought; that the application has been filed timeously and in good faith; that no prejudice will be suffered by the Respondents if the orders sought are granted.
 3. The 3rd Objector herein disassociated herself with 1st and 2nd Objectors in the application and filed a replying affidavit sworn on 26/5/2025 wherein she vehemently opposed the application and averred inter alia; that she has opted not to appeal against the orders of 9/5/2025 and support the process of succession to its conclusion; that the request for stay of proceedings by the 1st and 2nd Objectors should not be allowed.
 4. The 4th Objector herein opposed the application and swore a replying affidavit dated 27/5/2025 wherein she averred inter alia; that the application is meant to delay the succession process and thus lead to wastage of the estate; that the request for stay of proceedings will lead to wastage of the estate in the absence of administrators; that any issue regarding the administration of the estate such as filing of statements of account can only be raised once the administrators have been appointed; that the Applicants currently collect rent to her detriment and hence the stay of proceedings will delay the matter yet she is desirous of the process to continue so that distribution of the estate can be carried out so that each beneficiary gets their shares; that the application should be dismissed as it is not in the best interest of the estate.
 5. The Petitioners filed grounds of opposition dated 26/5/2025 wherein they opposed the Applicants' application and raised grounds of opposition inter alia; that the application is meant to delay the exercise of administration and distribution of the estate; that the Applicants' apprehension is uncalled for since the Law of Succession Act has in built processes to take all the concerns of beneficiaries and administrators; that no prejudice will be occasioned to the Applicants if the order for stay of proceedings is declined.



6. The application was canvassed by way of oral submissions.
7. M/s Odwa for the Applicants submitted that the Applicants were aggrieved by this court's ruling dated 9/5/2025 and have filed a Notice of Appeal to the Court of Appeal and that they now seek for orders of stay of proceedings pending the determination of the appeal at the Court of Appeal in order to preserve the subject of the appeal. It was submitted that the Applicants have an arguable appeal and that there is need to suspend or stay the orders issued on 9/5/2025 as there is a likelihood of the estate being wasted to the detriment of the beneficiaries. Reliance was placed in the case of *Muga Vs Kunga* [1988] eKLR. It was further submitted that the grounds of opposition filed by the Petitioners are not a response to the averments by the Applicants and therefore the Applicants' averments should be allowed as unopposed. It was finally submitted that in view of the fact that the gazettement of the Petitioners has taken place, then an order of stay is merited.
8. Mr. Chumba learned counsel for the 4th Objector indicated that the 4th Objector has abandoned the need to lodge an appeal against the ruling of 9/5/2025. He submitted that this court should not stay the orders of 9/5/2025 as the estate will be wasted and that the issue of identifying assets can be done prior to confirmation of grant. It was submitted that an order of stay of confirmation of grant can be granted pending the appeal. It was finally submitted that the 4th Objector stands to suffer if the proceedings are prolonged.
9. Mr. Ragot, learned counsel for the Petitioners submitted that the Applicants are under obligation to discharge the burden of proof in convincing the court that an order of stay of proceedings pending appeal is merited. It was submitted that the Applicants have made general allegations without any basis and that they should wait until the summons for confirmation of grant are filed when they can file protests by way of affidavits at that stage and to interrogate and give their proposal on the distribution of the estate. It was submitted that the orders sought by the Applicants should not be allowed as they are drastic. Reliance was placed in the case of *Katangi Developers Ltd Vs. Pravul Enterprises Ltd* Kisumu C.A No. 65 of 2017.
10. I have considered the Applicants' application dated 15/5/2025 together with the rival affidavits and grounds of opposition. I have also considered the oral submissions of the learned counsels. It is not in dispute that pursuant to this court's ruling dated 9/5/2025 the Applicants being aggrieved, have moved to the Court of Appeal vide the Notice of Appeal dated 9/5/2025. It is also not in dispute that all the prayers sought by the Applicants seek for stay of proceedings and/or suspension of the orders of this court pending determination of the appeal at the Court of Appeal. It is also not in dispute that the merits or otherwise of the appeal at the Court of Appeal is a matter for the said appellate court to determine and not this court. It is not in dispute that the 3rd and 4th Objector are opposed to the application and are of the view that the proceedings should be allowed to continue in order to enable the beneficiaries to participate in the hearing of the summons for confirmation of grant regarding the distribution of the estate of the deceased. I find the issue for determination is whether the application has merit.
11. It is noted that several courts (High Court and Court of Appeal) have held that stay of proceedings is a grave judicial action which seriously interferes with the rights of a litigant to conduct his litigation and that it impinges on the right to access to justice, right to be heard without delay and the right to fair trial and thus the test for stay of proceedings is high and stringent. In *William Odhiambo Ramogi and 2 Others* [2019] eKLR a five (5) Judge bench of the High Court considered the issue of stay of proceedings and went ahead to lay down the principles to guide the court regarding the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher court. They went on to lay down the following six principles set out hereunder: -



- i. There must be an appeal before the higher court.
- ii. Where such stay is sought in the court hearing the case as opposed to the higher court to which the appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of application for stay being handled in the court which an appeal is preferred because such a court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly.
- iii. The Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable.
- iv. The Applicant must demonstrate that the appeal would be rendered nugatory if the stay of proceedings is not granted.
- v. The Applicant must demonstrate that there are no exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal.
- vi. The Applicant must demonstrate that the application for stay was filed expeditiously and without delay.

The above factors have to be taken into consideration and that the court must take note of the fact that stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. In *Global Tours and Travels Ltd* (Nairobi HC Winding Up Cause NO. 43 of 2000 Ringera J (as he then was) 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 or not 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 optimum utilization of judicial time and whether the application has been brought expeditiously.”

Again, in *Halsbury's Laws of England* 4th Edition, Volume 37 at paragraph 330 the issue of stay of proceedings was stated as follows:

“Stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings ought not to be allowed to continue.”

12. Being guided by the foregoing authorities, it is quite clear that the order for stay of proceedings can only be given in rare situations so as not to impede the course and direction of hearing of matters. Already, this court has issued orders wherein the Applicants are aggrieved and have already lodged an appeal to the Court of Appeal. Ordinarily, a court hearing a matter finds itself in an awkward situation when one of the parties moves to the appellate court on appeal against the court's order or decree and then approaches the same court for orders to stay the proceedings pending appeal to the appellate court.



Again, the court does not have jurisdiction to inquire into whether the appeal in the appellate court is arguable as that is the province of the appellate court. In the present circumstances, the Applicants have urged this court to stay the proceedings and orders of 9/5/2025 pending determination of their appeal at the Court of Appeal. It is my considered view that this court is handicapped to grant the orders sought as it is proper for the same to be made by the Appellate Court. The Applicants have sought for orders of stay of proceedings and execution concurrently and hence this court is unable to separate and determine the issues of stay of execution in isolation yet the Applicant's sole aim to have an order of stay of proceedings or suspension of the same. As noted, in the case of *Willaim Odhiambo Ramogi* (supra), the Applicants should explain why the stay sought has not been made before the higher court (Court of Appeal) yet policy consideration demand that such applications for stay of proceedings should be handled in the court to which an appeal is preferred because such a court is familiar with its docket and therefore in a position to calibrate any order it gives accordingly.

13. It is noted that the 3rd Objector/Applicant and the 4th Objector have opposed the application and are of the view that the matter should be allowed to continue so as to enable them and other beneficiaries to challenge the administrators on such issues as statements of accounts, listing of assets and the distribution of the estate. I find that an order declining the orders sought will not prejudice the Applicants as they will have the opportunity to participate in the succession matter once the summons for confirmation of grant are filed as well as interrogate the statements of accounts to be filed by the administrators. As the Applicants have indicated that they are opposed to the appointment of two of the administrators, they shall be at liberty to approach the appellate court for orders and that in the event the same is allowed, the said administrators would be removed and the matter will proceed as guided by the Court of Appeal. I find that the Applicants herein do not stand to suffer any prejudice if the order they seek are not granted.
14. In view of the foregoing observations, it is my finding that the Applicants' application dated 15/5/2025 lacks merit. The same is dismissed. As the parties are members of one family, I order each party to bear their own costs.

DATED AND DELIVERED THIS 4TH DAY OF JUNE, 2025.

D. KEMEI

JUDGE

In the presence of:

M/s Odwa for Mutiso.....for 1st, 2nd and 3rd Objector

Chumba.....4th Objector

Ragot.....Petitioners

Okumu.....Court Assistant.

