



REPUBLIC OF KENYA



KENYA LAW
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**Nyabuto v Arisi (Probate & Administration E004 of 2024)
[2025] KEHC 8810 (KLR) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8810 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
PROBATE & ADMINISTRATION E004 OF 2024**

WA OKWANY, J

JUNE 19, 2025

BETWEEN

TERESA MORAA NYABUTO APPELLANT

AND

YOVENSIA KERUBO ARISI RESPONDENT

*(Being an Appeal from the Ruling delivered in the Chief Magistrate's
Court in Nyamira, Succession Cause No. E131 of 2023 by Hon.
B.O. Okong'o, Resident Magistrate on 21st November 2024)*

RULING

1. The Appellant/Applicant filed the Application dated 31st January 2024 wherein she seeks the following orders: -
 1. Spent
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 3. That this Honourable Court be pleased to grant Stay of Proceedings of Succession Cause No. E131 of 2023 pending the hearing and determination of this Application inter partes.
 4. Costs of this Application be provided for.
2. The Application is premised on the grounds listed on the face of the Notice of Motion and is supported by the Appellant's Affidavit wherein she avers that intended appeal will be rendered nugatory if the proceedings for confirmation of Grant in the Succession Cause E131 of 2023 are not stayed. She states that the issue of whether or not the Respondent was a wife to the deceased should be addressed as it is critical in determining her participation in the succession proceedings.



3. The Respondent filed a Replying Affidavit dated 14th February 2025 in which she vehemently opposed the Application and termed it as frivolous, malicious and vexatious. The Respondent states that the Application is only aimed at wasting the court's time as the Applicant had squandered all the chances that she was granted to ventilate her claim.
4. The Application was canvassed by way of written submissions.

The Appellant/Applicant's Submissions

5. The Applicant submitted that the Appeal is meritorious and arguable since the witnesses who filed their statements in the Succession Cause were not allowed to testify. She contended that the issue of whether the Respondent/Petitioner was a wife could only be determined at the hearing of the main Petition and not in a Citation cause.
6. It was submitted that the execution of the Ruling dated 21st November 2023 would irreparably affect and negate the core ground of appeal since the Respondent was likely to proceed with the distribution of the Estate of the deceased to the detriment of the Appellant/Applicant thereby rendering the intended Appeal nugatory.

The Respondent's Submissions

7. The Respondent submitted that stay of proceedings has weighty consequences as it directly touches on a litigant's right to a speedy determination of their case. Reference was made to the case of Global Tours & Travels Limited, Nairobi H.C. Winding Up Cause No. 43 of 2000 for the factors to be considered by a court when determining whether or not to grant stay of proceedings. It was submitted that the Applicant's intended appeal is not arguable and that the Appeal is an afterthought since the issue of whether the Respondent was a wife of the deceased had been heard and determined in the Ruling delivered on 25th May 2023 which the Applicant did not challenge on appeal.
8. It was submitted that no substantial loss will be occasioned to the Applicant since she was included, as a beneficiary, in the Succession Cause alongside her entire household. It was the Respondent's case that a considerable amount of time had lapsed since the trial court held that the Respondent/Petitioner was a wife to the deceased which finding the Applicant did not challenge until the trial court dismissed her Application for revocation of Grant.

Analysis and Determination

9. I have considered the pleadings filed herein and the submissions. I find that the only issue for my determination is whether the Application is merited.
10. The law governing stay of proceedings pending appeal is codified under Order 42 Rule 6 of the Civil Procedure Rules 2010 which provides as follows: -
 6. Stay in case of appeal [Order 42, rule 6]
 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made



by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

2. No order for stay of execution shall be made under subrule (1) unless—
 - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b.

11. It must be noted that there is a clear distinction between stay of proceedings pending appeal and stay of execution pending appeal. In *Kenya Wildlife Service vs. James Mutembei* (2019) eKLR, Gikonyo J. set out this distinction and held thus: -

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent.”

12. In *William Odhiambo Ramogi & 2 Others vs. the Honourable Attorney General & 3 Others* [2019] eKLR, a 5-judge Bench of the High Court laid down the following principles to be considered in an application for stay of proceedings pending appeal: -

- a. First, there must be an appeal pending before the higher Court;
- b. Second, 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 applications for stay being handled in the Court to 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;
- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- e. Fifth, the Applicant must demonstrate that there are 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; and
- f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.

13. I have also considered the decision by Prof. Ngugi J. (as he then was) in *Turbo Highway Eldoret Ltd v Muniu* (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR) (30 June 2022) (Ruling) where he held thus:-

“23. As a general matter, an appellate court will only exercise its discretion to grant a stay of proceedings pending an appeal over an interlocutory matter before



a magistrate's Court or Tribunal only in exceptional circumstances. While difficult to determine with mathematical precision when the Court will use this power, it is only to be sparingly used where, in the words of South African authors, Gardiner and Lansdown (6th Ed. Vol. 1 p. 750), "grave injustice might otherwise result or where justice might not by other means be attained." As the authors correctly write, the Court will generally "hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the Court below."

24. Hence, the propriety of granting a stay of proceedings pending an appeal over interlocutory matters is decided on the facts of each case and with "due regard to the salutary general rule that appeals are not entertained piecemeal." (Walhaus & Others v. Additional Magistrate, Johannesburg & Another, 1959 (3) SA 113(A) at 120D; S. v. Western Areas Ltd & Others 2005 (5) SA 214 (SCA) at 224D."

14. In the instant case, I note that it was not disputed that there is a succession cause pending before the trial court, which is at the stage of confirmation of Grant. I also note that the appeal filed before this Court emanates from the refusal, by the trial court, to revoke the Grant upon finding that the Applicant/Appellant did not controvert the evidence presented showing that the Respondent/Petitioner is a wife of the deceased and thus deserving to be issued with the Grant to administer the Estate.
15. It is trite that an intended appeal is not necessarily required to be one that will succeed but must raise arguable or triable points of law. In this case, the Applicant took issue with the fact that the trial court only relied on the evidence of the area Chief in establishing the Petitioner/Respondent's relationship with the deceased and did not allow other witnesses to testify. To my mind, the appeal raises arguable issues that must be considered.
16. I further find it necessary to balance the rights of the Applicant to appeal and the Respondent's right to an expedient and fair trial. While the Court appreciates that orders for stay of proceedings ought to be granted sparingly, it is my view that no prejudice will be caused to the Respondent if the proceedings in the subordinate court are stayed pending the determination of the appeal. In any case, having pointed out that she had included the Applicant and her household in the Application for confirmation of Grant, it clearly means that there would be no prejudice occasioned to her were the proceedings for confirmation of Grant be stayed in order to dispense with the issues raised in the Appeal. Indeed, it is possible that it is the Applicant who may stand to suffer irreparable loss if the succession cause was to proceed and the deceased Estate is administered by a person who may turn out not to have been legally permitted by the *Law of Succession Act* to take out the letters of administration in the first place.
17. In conclusion, I find that the instant Application is merited and I therefore allow it. The Applicant is directed to file and serve the record of Appeal within 30 days from the date of this ruling so as to expedite the hearing and determination of the appeal.
18. The costs of the Application shall abide the outcome of the appeal.
19. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 19TH JUNE 2025.

W. A. OKWANY
JUDGE

