In re Estate of Henry Masingu Shikuri alias Masingu Shikuri (Deceased) (Succession Appeal E002 of 2025) [2025] KEHC 13151 (KLR) (22 August 2025) (Ruling)

Neutral citation: [2025] KEHC 13151 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION APPEAL E002 OF 2025

S MBUNGI, J

AUGUST 22, 2025

BETWEEN

KHAMASI LABAN MASINGU ..... APPELLANT

AND

CECILIA NANJALA ..... RESPONDENT

(Being an Appeal arising from the Judgment dated 19th December, 2024 delivered by Honourable J.R Ndururi, in Kakamega Chief Magistrate's Court Succession Cause No. e368 of 2023)

RULING

1. Vide an application dated 6th April 2025, the appellant filed a notice of motion seeking the following orders;

    a. That the application be certified urgent and be dispensed with in the first instance. (spent)

    b. That a temporary order of stay be issued against the proceedings in the lower court in Kakamega MC. SUCC No. E368 of 2023 is pending hearing and determination of the instant application.

    c. That a temporary order of stay be issued against the proceedings in the lower court in Kakamega Misc. Succ. No. E368 of 2025 pending hearing and determination of the preferred appeal in Kakamega HCFA No. E002 of 2025

    d. That the costs be provided by the Respondent.

2. The application is premised on the grounds set out on its face and on the supporting affidavit sworn on the same day by the applicant. He avers that he preferred an appeal after the judgment was delivered in Kakamega CM SUCC. No. e368 of 2023, which is yet to be determined.

3. He prays that the lower court orders be stayed, awaiting the outcome of the appeal, and that the application is filed in due time to avoid concurrent judgments and orders of the court.

4. He prays that the application be allowed so as not to render the appeal an academic exercise.

5. In her replying affidavit, the respondent avers that there are no pending proceedings before the subordinate court in relation to the subject matter. It is submitted that the trial court is functus officio and that the application dated 6th April 2025 is calculated to mislead this Honourable Court.

6. She contends that the proceedings before the Lower Court were conclusively determined, and what remained was their application for execution of a Confirmed Grant, which had been issued pursuant to the judgment delivered on 19th December 2024. A Certificate of Confirmation of Grant dated 27th December 2024 is annexed and marked as "CN-1."

7. They aver that the application dated 6th April 2025 is fundamentally defective, having been brought under the wrong legal provisions. The use of Order 51 instead of Order 42 Rule 6(2) of the Civil Procedure Rules appears to be a calculated move to avoid the stringent requirements for stay of execution.

8. She opines that under Order 42 Rule 6(2), an order for stay of execution pending appeal may only be granted upon demonstration of substantial loss, provision of security, and prompt filing of the application. The Appellant has failed to satisfy these conditions.

9. Further, the Application is therefore incompetent, frivolous, vexatious, and designed to embarrass and harass the Respondent, and it contravenes sections 82, 83, and specifically section 83(g) of the *Law of Succession Act*.

10. She stated that the estate of the deceased has only three beneficiaries: herself (the Respondent), Khamasi Laban Masingu (the Appellant), and Prisca Busieka Shikuri.

11. She states that the appellant is fully aware of the urgency in finalizing the subdivision of the estate, which will be rendered nugatory if the Application is allowed, and that she and Prisca are widowed and suffer from serious medical conditions, including diabetes, hypertension, and kidney failure. (Annexed hereto as CN-2 are the medical reports.)

12. She stated that the appellant has continuously disobeyed court orders, neglected his responsibilities as a co-administrator, and has expressly vowed to frustrate both herself and Prisca through endless frivolous litigation.

13. That further, the appellant has openly stated he will file multiple applications to wear us down physically and emotionally, to deny them the fruits of the judgment delivered on 19th December 2024.

14. She contends that the estate remained unadministered for 49 years until she petitioned for Letters of Administration, following the deaths of her husband and mother-in-law, and that the appellant responded with hostility and intimidation.

15. That since the death of Prisca's husband, the Appellant's aggression escalated to the point that he killed her domestic animals, threatened to burn her home, physically assaulted her children, and exposed himself indecently on shared property, which is a grave cultural taboo. (CN-4 contains photographic evidence.)

16. She holds that the finalization of the estate subdivision would bring closure and peace, and granting this Application will unjustly prolong suffering endured for over 28 years.

17. She avers that the Appellant has tendered no evidence to show intent to preserve the estate. On the contrary, he has enriched himself unjustly, occupying more land, earning income from tea sales, and retaining the deceased's livestock and machinery, to the exclusion of other beneficiaries.

18. Further, the Court must act to protect her and Prisca from further exploitation and ensure the estate is justly administered.

19. That allowing subdivision pending appeal would deter frivolous litigation and expose the Appellant's desire to monopolize the estate, with the intent of disinheriting them.

20. According to her, the Appellant will suffer no prejudice if the Application is dismissed. Land is an immovable asset, and boundaries may be readjusted if necessary.

21. Further, the Appellant has not financially contributed to the succession process and is unlikely to do so during transfer, having opposed the petition from the outset.

22. That the Application is malicious, filed five months after judgment, and only after I applied to execute the Confirmed Grant. It is an afterthought to escape statutory duties under sections 82 and 83 of the *Law of Succession Act*.

23. That she initiated this succession cause alone, against the Appellant's wishes. Had it been left to him, the estate would have remained unadministered indefinitely.

24. She contends that the Appellant's Appeal has no merit since he was granted a larger share (1.4 hectares) than she and Prisca (0.7 hectares each), yet still expresses dissatisfaction a clear indication of his intent to disinherit them.

25. She avers that the Appeal is being used merely to delay the execution of the Lower Court's judgment and that the record of Appeal has not been filed despite typed proceedings being ready for over three months.

26. She contends that the four-month delay in filing the Record of Appeal is inordinate and unjustified and that the Appellant's actions are driven by gender-based discrimination, rooted in patriarchal customs within the Luhya community, targeting widows.

27. She finally submits that litigation must come to an end. The judgment and orders of the Lower Court must be respected and obeyed.

28. In their submissions dated 17th September 2025, the respondent raised three issues for determination. On whether the court should grant the stay pending hearing and determination of the application, he held that there were no pending proceedings before the lower court since the matter was concluded on 19/12/2025, and that he has a pending application for execution dated 12/2/2025, where he is seeking full execution of the grant as the administrator, claiming he never negated his duties.

29. He claims that the lower court had finalized its duties in the matter, and thus it was functus officio, and granting a stay would reverse the decision of the lower court, and pray that the court dismiss the application dated 06/04/2025 with costs.

30. On whether the court should grant a stay against the proceedings in the lower court pending the hearing and determination of the preferred appeal in Kakamega HFCA No. E002 of 2025, he stated that for the interim order to be granted, there ought to be an appeal pending at the higher court. According to the respondent, there is no such appeal at the High Court, and that the appeal in Kakamega HFCA No. E002 of 2025 ought to be struck out for want of prosecution since the appellant has not been keen to prosecute the matter.

31. They further submitted that the appellant has not met the criteria for stay of execution under the provisions of Order 422 Rule 6 (2), and his bringing the application under Order 51 Rule 1 and section 3A was a way to circumvent the set conditions.

32. On the substantial loss, he states that the applicant failed to demonstrate the irreparable loss he would incur if the respondent executed the order since his core intention was to preserve the assets of the deceased estate until they can be distributed to the beneficiaries, as the appellant has been seen to encroach on their land and start cultivating and earning from the tea plantation.

33. They hold that the appellant failed to preserve the estate of the deceased, and they continue to suffer loss from the appellant's actions.

34. On the claim of unreasonable delay, they state that the judgment was delivered on 19/12/2024 and the application filed on 8/4/2025, which they claim was undue delay as it was 4 months later and hence brought in bad faith and will delay justice.

35. On the claim of security, they hold that the appellant has not demonstrated how he would pay security for due performance and how he intends to provide a situation to return the respondent to the status quo and pray that the appeal be struck out for want of merit.

Analysis and Determination

36. Having carefully considered the pleadings and the submissions of the parties to this matter, it is my view that the substantive issue for determination is whether the application meets the threshold for granting the orders of stay of execution of the judgment pending Appeal.

37. The governing provision for stay of execution pending appeal is Order 42 Rule 6(2) of the Civil Procedure Rules, which provides:

> " No order for stay of execution shall be made under sub-rule (1) unless—
>
> (a) The court is satisfied that a substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
>
> (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

38. This position has been elaborated in Butt v Rent Restriction Tribunal [1982] KLR 417, where the Court of Appeal held that the power to grant a stay is discretionary and should be exercised to prevent injustice.

39. In Antoine Ndiaye v African Virtual University [2015] eKLR, the court emphasized that bare allegations of potential loss are insufficient; substantial loss must be specifically demonstrated.

40. The obligation to ensure finality of litigation and respect for court orders is reinforced by Article 159(2)(b) and (e) of *the Constitution* and judicial pronouncements in Benja Properties Ltd vs. Standard Chartered Bank Kenya Ltd [2020] eKLR, which cautions courts against countenancing litigation as a tool of oppression or delay.

(a) Procedural Regularity and Competence

41. The Respondent argues that the Application was brought under Order 51 instead of the correct provision—Order 42 Rule 6(2). The misapplication is not fatal on its own, as courts are enjoined

under Article 159(2)(d) of *the Constitution* to administer justice without undue regard to procedural technicalities. Nonetheless, the Applicant must still meet the substantive legal threshold required for a stay order.

(b) Substantial Loss and Security

42. The Appellant has not provided any evidence or compelling justification to show that he will suffer substantial loss if the estate is subdivided pending appeal. On the contrary, the Respondent has shown that the Appellant was allocated the largest share of the estate (1.4 hectares out of 2.8 hectares);

43. The Appellant has enjoyed proceeds from the estate, that is, tea bonuses, livestock, to the exclusion of the other beneficiaries;

44. He has neither demonstrated willingness to comply with the judgment nor offered any security as mandated under Order 42 Rule 6(2)(b).

45. Courts have consistently held that speculative hardship or dissatisfaction with the outcome is not a ground for a stay, as seen in the case of Kenya Shell Ltd v Benjamin Karuga [1986] KLR 410.

(c) Delay in Bringing the Application

46. The judgment was rendered on 19th December 2024, and the Application was brought on 6th April 2025, a five-month delay. The Respondent avers, and it is not disputed, that the Appellant only moved to court after the Respondent filed for execution. This Court finds the delay inordinate and unexplained, and in breach of the requirement of timeliness.

(d) Conduct of the Appellant and Risk of Prejudice

47. The Respondent accuses the Appellant of disobeying court orders and vowing not to implement the Confirmed Grant; Intimidation, harassment, and cultural violations, including exposing himself indecently and threatening family members; engaging in gender-based discrimination, exploiting patriarchal norms to frustrate two widows.

48. These serious accusations, supported by annexures including medical reports and photographs, have not been refuted by the Appellant. In Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR, it was affirmed that court orders must be respected, and litigants must not weaponize the judicial process to perpetuate illegality or abuse.

49. This Court takes judicial notice of the societal vulnerabilities widows often face in succession matters, especially in patriarchal communities. Denying them their share based on discriminatory customs is unconstitutional and contrary to Article 27 of *the Constitution* (equality and non-discrimination) and the *Law of Succession Act*, particularly Section 38, which mandates equal distribution among beneficiaries.

(e) Abuse of Court Process and Interest of Justice

50. The evidence before the Court supports a finding that the Application was filed to delay and frustrate the Respondent's efforts to finalize the administration of the estate. The estate has been pending administration for 49 years, and litigation must come to an end.

51. The Appellant's failure to file a Record of Appeal despite proceedings being ready for over three months reinforces the assertion that the Appeal is merely a delaying tactic.

Conclusion

52. This Court is satisfied that the Application is incompetent, lacking merit, and an abuse of the court process. The Appellant has not met the requirements of Order 42 Rule 6(2), and the balance of convenience tilts in favor of allowing the estate to be administered as per the Confirmed Grant.

53. Accordingly, the Court makes the following orders:

    a. The Application dated 6th April 2025 is hereby dismissed.

    b. The Respondent is at liberty to proceed with the execution of the Confirmed Grant dated 27th December 2024.

    c. Each party shall bear their own costs of the application.

    d. Right of Appeal 30 days explained.

    e. Mention on 27.11.2025 for directions on how to dispose off the Appeal.

DATED SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 22ND DAY OF AUGUST, 2025.

S.N. MBUNGI

JUDGE

In the prescence of;

CA: Angong'a

Mr Shaka for holding brief for Mr. Mukavale J for Appellant, present.

Wanyonyi for the Respondent absent.