



**In re Estate of the Late Kiiru Chomba (Deceased) (Succession Cause
9 of 2014) [2025] KEHC 12813 (KLR) (19 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12813 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 9 OF 2014
JRA WANANDA, J
SEPTEMBER 19, 2025
IN THE MATTER OF THE ESTATE OF THE LATE KIIRU CHOMBA (DECEASED)**

**IN THE MATTER OF
JULIUS MUNGIRI KIIRU PETITIONER
AND
LEONARD GICHORA KIIRU PETITIONER**

RULING

1. The Petitioners are 2 among 10 siblings left behind as survivors or heirs of their late father, whose estate the Court had distributed in the year 2023.
2. I delivered a Ruling in this matter on 24/01/2025 whereof I allowed the 1st Petitioner's Application which sought a review and/or amendment of the Certificate of Confirmation of Grant issued herein. The gist of the Application was to include one property, namely, Eldoret Municipality Block 21(Kingongo)/5255, which was still in the name of the 2nd Petitioner, and whose distribution had been earlier agreed upon by consent, in terms that the same was to be allocated to the 1st Petitioner, but which term was left out of the Certificate of Confirmation. The 2nd Petitioner had, in opposing the Application, attempted to disown existence of the consent, but which attempt I rejected, and proceeded to allow the Application.
3. The said property was one among 4 sub-plots that resulted from sub-division of the mother title, namely, Eldoret Municipality Block 21(Kingongo)/5255, presumably in accordance with the terms of the consent, and which 4 sub-plots I distributed, again in accordance with the consent, in the following manner:



(1)	Eldoret Municipality Block 21(Kingongo)/5254	Leonard Gachora Kiiru
(2)	Eldoret Municipality Block 21(Kingongo)/5255	Julius Mungiri Kiiru
(3)	Eldoret Municipality Block 21(Kingongo)/5256	Leonard Gachora Kiiru
(4)	Eldoret Municipality Block 21(Kingongo)/5257	Leonard Gachora Kiiru

4. It is relevant to state that at the time of delivery of the Ruling, Mr. Buluma, Counsel for the 1st Petitioner did apply for leave to appeal and for stay of execution pending Appeal. I however directed him to file a formal Application.
5. It is on the above background that the 2nd Petitioner, Leonard Gichora Kiiru, has returned to this Court with the instant Application, namely, the Summons dated 20/02/2025, filed through his Advocates, Messrs Buluma & Co. The remaining prayers are the following:
 - iii. That this Honourable Court be pleased to grant orders of stay of execution of its Ruling and orders issued on 24th January 2025 pending the hearing and determination of the intended Appeal.
 - iv. This Honourable Court be pleased to grant leave to appeal to the 2nd Petitioner/Applicant
 - v. Costs of this Application be provided for.
6. The Application is premised on the grounds set out on the face thereof and the Supporting Affidavit sworn by the 2nd Petitioner, in which he deponed that being aggrieved by the said Ruling delivered on 24/01/2025, he has instructed his Advocates to lodge an Appeal, which Appeal has high chances of success. He deponed further that the 1st Petitioner is likely to commence execution thus rendering the Appeal nugatory and occasioning great loss to the 2nd Petitioner and other beneficiaries of the estate of the deceased, and that he (2nd Petitioner) shall suffer loss and damage unless the prayers sought are granted. He also averred that the 1st Petitioner will not suffer any prejudice should the orders be granted.
7. The 1st Petitioner opposed the Application vide his Replying Affidavit sworn on 4/03/2025, and filed through his Advocates, Messrs Angu Kitgin & Co. He deponed that the Applicant has not stated what loss the 2nd Petitioner will suffer, that the 2nd Petitioner has not offered any security for performance, and that the 2nd Petitioner is guilty of non-disclosure as the subject property is charged to his Co-operative Society Limited for Kshs 5,000,000/-. He then however delved into explaining the background to the recording of the consent which consent he termed as legitimate, matters which however are not in issue herein, and then pointed out that even after the Ruling, the 2nd Petitioner has still declined to sign the transfer documents. According to him, the implementation of the Ruling is the only avenue to stop litigation in this Cause which has been in Court since 2014, and also observed that to date, the 2nd Petitioner is yet to file a Notice of Appeal. He also insisted that the registration of the title to the sub-plot Eldoret Municipality Block 21 (Kingongo)/5255 in the 2nd Petitioner's name was improperly effected as it was contrary to the said consent. He urged that a successful litigant ought to be allowed



to enjoy the fruits of his award, and contended further that the 2nd Petitioner has not disclosed the grounds for appeal to warrant grant of stay.

8. With leave of the Court, the 2nd Petitioner/Applicant swore a Further Affidavit on 19/03/2025 in which he deponed that he and other beneficiaries will suffer if the order of stay is not granted because the 1st Petitioner has not guaranteed to preserve the estate in its current state. He also deponed that this being a Succession matter, provision of security is not necessary. Regarding the charging of the land as security, he admitted that the same is indeed charged to the Kenya Bankers Sacco, and justified the charging by arguing that the property is his, and the charge was lodged long before the dispute herein arose. He deponed further that he could not have been the one who commissioned the sub-division of the mother property as alleged, since the same was sub-divided in the year 2015. The rest of the matters deponed are either repetitions or not relevant to the matter at hand and which I will not therefore recount.
9. I also note that the 2nd Petitioner subsequently filed the Supplementary Affidavit sworn on 27/03/2025. I however swiftly expunge the same from the record for three reasons. First, the same was filed without seeking or obtaining leave of the Court. Secondly, it contains matters and arguments that are totally irrelevant to the instant Application before Court. Thirdly, it introduces new evidence at a belated stage. Further, I have also come across a letter in the Court file, dated 8/04/2025, from the 2nd Petitioner's Advocates complaining about the late filing of the Supplementary Affidavit, and also protesting that the Affidavit had not been served upon them at the material time.
10. The Application was then canvassed by way of written Submissions. The 2nd Petitioner/Applicant filed the Submissions dated 19/03/2025, while the 1st Petitioner filed the Submissions dated 28/03/2025.

2nd Petitioner-Applicant's Submissions

11. The 2nd Petitioner's Counsel, recited the conditions to be met for grant of stay pending Appeal, and cited Order 42 Rule 6 of the *Civil Procedure Rules*, the case of *Antoine Ndiaye versus African Virtual University* [2015] eKLR, and the case of Hassan Guyo Wakelo vs Straman EA Ltd (2013). On "substantial loss", he submitted that the same may arise because his parcel of land will stand transferred to the 1st Petitioner who could dispose it off or put it to other use. On "unreasonable delay", he submitted that there was none as the Application was filed on 20/02/2025 and the Ruling was delivered on 24/01/2025. On "furnishing of security", he reiterated that this being a Succession Cause, the same is not necessary but was quick to clarify that the 2nd Petitioner is ready and willing to provide such security if so directed by the Court. He thus urged that the 2nd Petitioner has satisfied the conditions applicable to warrant grant of the orders. On the prayer for leave to appeal, he submitted that the 2nd Petitioner's Affidavits have disclosed various issues that warrant an Appeal.

1st Petitioner-Respondents' Submissions

12. On his part, in unnecessarily lengthy Submissions, Counsel not only cited Order 42 Rule 6 above, but also a long list of authorities restating the conditions to be met in applications for stay pending appeal. The authorities, being, again, unnecessarily too many, I will not recite them. He however reiterated that the 2nd Petitioner has not demonstrated what he may suffer if the consent order and orders flowing therefrom are executed, and also that the 2nd Petitioner has been utilizing the property and has not filed an account in Court. In further unnecessary effort, Counsel took the Court through an extensive recap on the principles guiding the setting aside of consent orders and even listed several authorities on the subject. I say unnecessary since there is no issue before me on whether to set aside any consent order. Regarding the intended Appeal, Counsel urged that there is no error in the Ruling and there is



therefore no arguable appeal. He reiterated that the 2nd Petitioner charged the sub-plots after adoption of the consent order meaning that he had an ulterior motive, and that in any event, the 2nd Petitioner still has the 3 other portions which he can still use as security for the alleged charge. According to Counsel therefore, the 2nd Petitioner is not likely to lose on any investments on the subject parcel of land. On “deposit of security”, he reiterated that the 2nd Petitioner receives annual returns of Kshs 6,000,000/- from the subject land and urged that he should deposit Kshs 30,000,000/-. He then submitted that the right of appeal must be balanced against an equally weighty rigid right of the 1st Petitioner to enjoy the fruits of the consent order. He thus urged that the Application be dismissed with costs. In the end, he observed that the 2nd Petitioner does not deny the substance of what transpired in Court on 6/06/2019 when the consent was adopted, and has also never at any time challenged the authenticity of the consent.

Determination

13. The issues that arise for determination in this matter can be summarized as follows:
 - i. Whether leave should be granted to the 1st Petitioner to appeal against the Ruling delivered herein on 24/01/2025.
 - ii. Whether an order should be granted staying execution of the orders issued in the said Ruling pending the hearing and determination of the 1st Petitioner’s intended appeal.
14. Regarding the prayer for leave to Appeal, the Court of Appeal in the case of *Rhoda Wairimu Karanja & Another -Vs- Mary Wangui Karanja & Another* [2014 eKLR made the following observations as regards filing of appeals in Succession matters to challenge 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.”
15. It was therefore the correct move for the 1st Petitioner to have moved this Court for grant of leave to appeal. Needless to state, such leave will only be granted where justifiable circumstances are demonstrated such as where it is shown that there are weighty issues requiring further serious judicial interrogation by the Court of Appeal.
16. In this matter, the 2nd Petitioner has not presented any draft Memorandum of Appeal for scrutiny by this Court. Although in his Affidavits, he makes general statements that he has a weighty and arguable appeal, he does not very clearly articulate or disclose what grounds he wishes to present before the Court of Appeal. I say so because all this Court did by the impugned Ruling was to simply to implement the consent order that was already recorded in Court and adopted way back in the year 2019, and which consent, there is no evidence that the 2nd Petitioner had ever challenged.
17. Nonetheless, I am alive to the fact that the 1st Petitioner has been in occupation of the mother plot, namely, Eldoret Municipality Block 21(Kingongo)/3128 and by extension, all the 4 sub-plots excised therefrom, for a long time, and which sub-plots are registered in his name. Although only one sub-plot



out of the 4 has now been taken away from him and allocated to the 1st Petitioner, it is understandable that the 2nd Petitioner would find it difficult to let go, particularly since it is said that he charged the same as security with a financial institution. Although it is not clear what point he intends to argue before the Court of Appeal, I find no prejudice that may be suffered if he is granted leave to appeal, and so I hold.

18. 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. It is therefore generally agreed that the said provisions, read with Section 47 aforesaid, are wide enough to cover the prayer for stay of execution of a judgment or decree in Succession proceedings. In any event, it has not been denied that indeed this Court has the jurisdiction to grant the order of stay of execution pending appeal.
19. In this case, to my knowledge, no Notice of Appeal has been filed as yet as the 1st Petitioner had not yet obtained leave to Appeal. Filing of the Notice of Appeal under these circumstances would have therefore rendered the same liable for striking out.
20. Be that as it may, I may mention that, like grant of leave to appeal, stay of execution pending appeal is similarly a discretionary power but, which, needless to state, must also 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 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 pending Appeal is required to satisfy the conditions that the Application has been made “without unreasonable delay”, that “substantial loss” may result to the Applicant unless the order is granted, and 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 Application has been made without unreasonable delay. In this case, the Ruling the subject hereof was delivered on 24/01/2024, and the Application herein was then filed on 20/02/2025, about 1 month later. Relatively therefore, I would not say that there was “unreasonably delay”.
23. The second condition is whether the 2nd Petitioner/Applicant will suffer “substantial loss” should the order 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.”

24. Further, Platt, Ag. JA (as he then was) in *Kenya Shell Limited vs. Kibiru* [1986] KLR, expressed himself as follows:

“..... 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.”.

25. 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.”

26. On the Appeal not being “frivolous”, I have already made a finding that the 2nd Petitioner/Applicant has not attached a draft Memorandum of Appeal and has, also in his Affidavits, not clearly explained the grounds or nature of the grievances he intends to place before the Court of Appeal. For purposes of the Application for stay therefore, this Court is devoid of sufficient material to enable it determine that the intended Appeal “is not a frivolous” one. While this omission may be excused in respect to the prayer for leave to appeal, the same cannot be ignored in considering the prayer for stay of execution. Under these circumstances, the result is that the 2nd Petitioner has failed to demonstrate that the intended Appeal “is not frivolous”.

27. On “substantial loss”, the 1st Petitioner, again, in both his Affidavits, simply makes the general statement that he will suffer “substantial loss” but he does not go further to clearly explain the nature of such alleged “substantial loss”. He seems to leave it to the Court to speculate or “grope in the dark” in trying to unravel what the alleged “substantial loss” could be. This, the Court will not do, as it is the Applicant’s duty and burden to discharge.

28. It is not enough for the 2nd Petitioner to simply assert that that “substantial loss” may arise because his parcel of land will stand transferred to the 1st Petitioner who could dispose it off or put it to some other use. Even if the orders were to be enforced or executed, the 2nd Petitioner has not demonstrated that the same cannot be undone or cured should he succeed before the Court of Appeal. There is therefore no demonstration that the Appeal would be rendered “nugatory” if the order of stay pending appeal



is not granted. Although execution may cause some inconvenience to the 2nd Petitioner, I do not think that such inconvenience would amount to rendering the Appeal “nugatory”.

29. I have also considered that the deceased died way back in the year 2013, and this matter was then commenced in 2014, meaning that this Cause has been in Court for more than 10 years. The subject consent was itself recorded and adopted by the Court in 2019, 6 years ago, and which consent has never been challenged, or set aside, or appealed against. The consent order having allocated the subject parcel of land to the 1st Petitioner, it means that the 1st Petitioner has been kept out of his rightful entitlement for 6 years now, during which period, it has been alleged, and this has not been denied, that the 2nd Petitioner has been deriving substantial income therefrom. In any event, any prejudice that may be suffered by him, if any, is minimal considering that only one out of the 4 sub-plots has been taken away from him and handed to the 1st Petitioner. Under these circumstances, my view is that it will be most unjust for a Court of law to perpetuate this apparent “injustice” against the 1st Petitioner any further by staying the same yet the consent is on record and validly so.
30. Having found that no “substantial loss” to be suffered has been demonstrated by the 2nd Petitioner, consideration of the third condition - deposit of security - does not now arise.
31. In the circumstances, after very carefully weighing and balancing the competing interests of the protagonists herein, and considering all relevant factors, I find that the prayer for stay of execution must fail as the scales of justice clearly tilt towards denying the prayer.

Final Orders

32. The upshot of my findings is that the Summons dated 20/02/2025 only partially succeeds, and I rule and order as follows:
 - i. The 2nd Petitioner is granted leave to file an appeal against the Ruling dated and delivered herein on 24/01/2025, on condition that the Notice of Appeal is filed and served within 14 days from the date hereof.
 - ii. That the prayer for stay of execution of the orders made in the said Ruling pending the hearing and determination of the intended Appeal is declined, save that once the 1st Petitioner obtains transfer and/or registration of the property known as Eldoret Municipality Block 21 (Kingongo)/5255 to his name, he shall not, in turn, transfer or charge or in any other manner offer the same as security, or in any other way, part with the ownership of the said property or effect any other action or steps that may jeopardize such ownership, for a period of six (6) months from the date hereof, so as to give the 2nd Petitioner time to prepare and file the formal Appeal and if necessary, seek any further directions or orders from the Court of Appeal, once it is seized of the formal Appeal.
 - iii. As this is a family matter, I direct that each party bears his own costs of the Application.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 19TH DAY OF SEPTEMBER 2025

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WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Mr. Buluma for the 2nd Petitioner/Applicant



Ms. Omala h/b for Mr. Angu for the 1st Petitioner/Respondent
Court Assistant: Brian Kimathi

