



In re Estate of Michael Christopher Wamalwa (Deceased) (Succession Cause 2569 of 2003) [2024] KEHC 1397 (KLR) (Family) (15 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1397 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2569 OF 2003
HK CHEMITEI, J
FEBRUARY 15, 2024
IN THE MATTER OF THE ESTATE OF HIS EXCELLENCY THE
LATE MICHAEL CHRISTOPHER WAMALWA (DECEASED)**

BETWEEN

DEREK LUKE MBOYA APPLICANT

AND

ALICE MUTHONI RESPONDENT

AND

MICHELLE NAFUNA WAMALWA INTERESTED PARTY

RULING

1. This ruling relates to the affidavit of protect against confirmation of grant and summons for stay of proceedings both dated 17th May, 2023 and filed by the Applicant/ Protestor, Derek Luke Mboya. They *inter alia* seek for orders that:
 - a. Spent.
 - b. This application be hereby dealt with in priority to summons for confirmation of grant dated 7th December, 2022 and filed by the Respondent.
 - c. Pending the hearing and determination of Nairobi Civil Appeal No. E0239 of 2023: *Derek Luke Mboya v Alice Muthoni Wamalwa & Another*, all proceedings in this matter touching on the properties known as LR No. 10125/ 5 and LR No. 10125/ 6, Karen, Nairobi, including the Respondent's summons for confirmation of grant dated 7th December, 2022, be hereby stayed.



- d. The costs for this application be provided for.
2. The application dated 2nd June, 2023 was filed by the Applicant, Yvonne Tanui, and the preliminary objection dated 28th June, 2023 was filed by the Respondents Sussy Khaadi Nandama and Nataly Narano Sumbi.
3. The application dated 2nd June, 2023 seeks for orders that:
 - a. Spent.
 - b. The honorable Judge be pleased to make orders transferring this cause from Nairobi to Kakamega High Court Family Division for hearing and determination.
 - c. Costs be provided for.
4. The Applicant/ Protestor, in support of the applications above, has filed written submissions dated 14th July, 2023.
5. The applications above are supported by the Interested party's replying affidavit in support of the summons for stay of proceedings dated 17th May, 2023 and affidavit of protest against confirmation of grant both sworn by Michelle Nafuna Wamalwa, the Interested Party, on 8th August, 2023.
6. The applications above are opposed by replying affidavit in opposition of the summons for stay of proceedings and affidavit of protest against confirmation of grant sworn by Alice Muthoni, the Respondent, and respondent's written submissions in opposition to the applicant's summons for stay of proceedings and affidavit of protest against confirmation of grant.

Background

7. This matter relates to the Estate of His Excellency the late Michael Christopher Wamalwa who died intestate on 23rd August, 2003.
8. The instant applications are as a result of ruling delivered by Judge A. O. Muchelule (as he then was), on 29th June, 2022 where, in dismissing the applicant's preliminary objection, stated,

“... What is clear is that the deceased died intestate. As for registration, the affidavits of the respondent, the interested party, Hon. Moses Masika Wetangula, Hon. Cyrus Jirongo and correspondence from the Honourable the Attorney General all clearly show that the deceased was buying the properties, he had not completed the purchase when he died, and that, upon his death, the Government made an ex – gratia decision to pay the balance. This was an arrangement to honour the fallen Vice President. The widow of the deceased became registered when she became the administratrix of the estate of the deceased. In that capacity, under sections 79, 82 and 83 of the *Law of Succession Act*, she held the property on behalf of the estate of the deceased. It was not her property. It was never her property. This was the deceased's free property. Such property belongs to the estate of the deceased, to be dealt with under the act. In short, the applicant is stretching the facts of this case when he claims that there is a dispute as to the ownership of the two Karen properties. There is absolutely no dispute...”
9. The Applicant has preferred an appeal against the ruling above to which he has filed Nairobi Civil Appeal No. E023 of 2023: *Derek Luke Mboya v Alice Muthoni Wamalwa & Another*.



10. Subject to the appeal above, and through the instant applications, the Applicant/ Protestor and Interested Party seek for stay of proceedings and hearing and determination of the summons for confirmation of grant dated 7th December, 2022 in the instant suit until the appeal is heard and determined.
11. The summons for confirmation of grant dated 7th December, 2022 seeks for Orders that, “The Karen Properties known as LR no. 1025/ 5 and 1025/ 6 together with household furniture be sold in open market and the proceeds thereof be shared equally among all the beneficiaries of the estate of the deceased; and the costs of the application to be in the cause.”
12. The substratum of the appeal is, inter alia, the ownership of the properties known as LR No. 10125/ 5 and LR No. 10125/ 6, Karen, Nairobi.

Analysis and Determination

13. I have carefully considered the applications as well as the written submissions filed by the parties and wish to address them as follows:
14. The conditions to be met for stay of proceedings pending appeal to be granted were established in *Turbo Highway Eldoret Ltd v Muniu* (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR) (30 June 2022) (Ruling) - Civil Appeal E040 of 2021 - Kenya Law where Judge Joel Ngugi (as he then was) stated, at paragraph 18 as follows:

“In *William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others* [2019] eKLR, a 5-judge Bench of the High Court, after looking at our jurisprudential scan on the question of stay of proceedings, authoritatively laid out the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court [Emphasis mine]. See: *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR; *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No. 43 of 2000); *David Morton Silverstein v Atsango Chesoni* [2002] eKLR: They laid down the following six principles:

- 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. [Emphasis mine];
- 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.”

Determination

15. I find that the Applicant/ Protestor has met the conditions for grant of stay of proceedings save for condition number 2 which states,

“..... 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...”

16. Due to the nature of the prayer being sought in the summons for confirmation of grant and in light of the fact that the Applicant/ Protestor and the Interested Party have lived on the properties known as LR No. 10125/ 5 and LR No. 10125/ 6, Karen, Nairobi for over 20 years and continue to live there, I find that this is an extra ordinary reason for the grant of stay of proceedings to be granted pending the hearing and determination of the appeal.
17. Were the court for instance to proceed with the confirmation of grant application it will definitely jeopardize the matter in the Court of Appeal. Besides, there is no evidence other than effluxion of time that the respondents shall suffer much loss should the application be allowed.
18. In essence if the summons for confirmation of grant dated 7th December, 2022 is granted as prayed, the Applicant/ Protestor and the Interested Party may be rendered homeless and the appeal filed by the Applicant/ Protestor may be rendered nugatory.
19. All that the parties should do is to expedite the determination of the appeal.
20. As regards the application dated 2.6.2023 to transfer this cause to Kakamega I think it is too late in the day. Much has been done in this court and with the impending appeal at the Court of Appeal in Nairobi it is only fair and reasonable that this matter remains in Nairobi.
21. In the premises it is hereby ordered that:
- (a) There be stay of proceedings herein and in particular confirmation of grant pending the hearing and determination of the appeal at the Court of Appeal as prayed for under prayer (c) above.
 - (b) The application dated 2.6.23 is disallowed
 - (c) Each party shall bear its own costs.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 15TH DAY OF FEBRUARY, 2024.

H K CHEMITEI

JUDGE

