



REPUBLIC OF KENYA



**Wasike & 2 others v Wasike (Succession Appeal E006 of 2023)  
[2024] KEHC 3057 (KLR) (11 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3057 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION APPEAL E006 OF 2023  
SC CHIRCHIR, J  
MARCH 11, 2024**

**BETWEEN**

**GRACE LUNYORO WASIKE ..... 1<sup>ST</sup> PLAINTIFF**

**ALFRED KHAMAL WASIKE ..... 2<sup>ND</sup> PLAINTIFF**

**ISAAC KILUI WASIKE ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**FRANKLINE WASIKE ..... RESPONDENT**

**RULING**

1. By way of Notice of Motion dated 22<sup>nd</sup> March 2023, the Applicant seeks for the following orders;
  - a. Spent
  - b. Spent
  - c. That pending the hearing and determination of this appeal this honourable court be pleased to issue an order of stay, staying the implementation and/or executing of a “ruling” in Butali principle Magistrate’s succession cause no.368 of 2018 dated 14<sup>th</sup> March 2023 and all other order/decrees and or directives emanating there from
  - d. That the alternative to prayer 2 above this honourable court be pleased to issue an order of status quo to the estate of David Wasike pending the hearing and determination of the appeal.

**The Applicant’s case**

2. The Applicant states that the Respondent filed summons for confirmation of the grant dated 10<sup>th</sup> December 2019 to which he responded by filing a reply. It was upon the filing of this response that



the Respondent withdrew the said summons. The Respondent however filed fresh summons, that is, the summons dated 10<sup>th</sup> August 2021

3. The summons were heard by way of oral evidence, and at the conclusion, the parties filed submissions.
4. The Applicant contends that what the court delivered was a ruling and not a judgment. Further the said Ruling was premised on the Application dated 10<sup>th</sup> December 2019 which had already been withdrawn.
5. It is the Applicant's contention that the ruling therefore was erroneous on the face of it, and has since filed an Appeal against the said Ruling.
6. The Applicant further states, as a result of the said ruling a 3<sup>rd</sup> party, one Aineah Wafula Barasa has started ploughing the parcel of land. As far as the said 3<sup>rd</sup> party is concerned the Succession proceedings have been concluded
7. The Applicant states that as a result of the said Ruling, the 1<sup>st</sup> Applicant, who is a widow to the deceased, has been disinherited. That unless stay of the said Ruling is granted, the Appeal will be rendered nugatory.
8. The Application is opposed by the respondent.

#### **The Respondent's case**

9. In his replying affidavit dated 3<sup>rd</sup> April 2023, the respondent acknowledges that the Ruling had a typographic error in respect to the date for the summons of confirmation of the grant which indicated 10<sup>th</sup> December 2019 instead of 10<sup>th</sup> August 2021
10. He further states that the court was notified of the error and a corrected copy was issued. The corrected copy of the ruling is annexed to the replying Affidavit.
11. The respondent then went on to set out the history of the dispute and submits that the decision of the trial court was right in any event
12. He further states that the grant has since been confirmed pursuant to the said Ruling and a certificate of confirmation of Grant has been issued. A copy of the certificate of confirmation of grant is annexed to the Affidavit.
13. He argues that the present Application is simply a ploy to delay the distribution of the Estate.
14. The application was dispensed by way of written submissions.

#### **Applicants' submissions**

15. It is the Applicant's submission that no correction or review of the error on the confirmation of the grant was made and insists that the ruling was made on non-existing pleading.
16. On whether the Applicants have stand to suffer substantial loss, it is submitted that the ruling changed the stratum of the estate.
17. On whether the Application has been brought without undue delay, it is submitted that the ruling was delivered on 14<sup>th</sup> March 2023 and Appeal filed on 23<sup>rd</sup> March 2023, and hence there was no delay.
18. On the security, The Applicant contends that as long as the status quo is maintained, there is no need for security.



19. The Applicant has relied on the following decided cases:
- a). Civil Appeal E003 of 2022 Nicholas Stephen Okaka & another vs. Alfred Waga Wesonga (2022) eKLR,
  - b). Civil Appeal No E.030 of 2021 Jamii Bora Bank Limited & another vs. Samuel Wambugu Ndirangu,
  - c). Civil Appeal 20 of 2020 HE vs. SM (2020)eKLR .
  - d). Succession Cause No. 8 of 2018 in the estate of Richard Churko Stephen ‘alias’ Richard Chukro Guyo (deceased) (2021)eKLR.

### **Respondent’s submissions**

20. In his submission dated 19<sup>th</sup> September 2023, the respondents prays that the application be struck out on the basis that the 1<sup>st</sup> applicant who sued did not have the locus stand since he was not a co-administrator.
21. It is further submitted that the correction of the error on the ruling was done pursuant to section 99 of the *Civil Procedure Act* and order 21 (2)(3) of the *civil procedure rules* as well as correction of an error under section 74 and section 76 of the *law of succession act*.
22. The Respondent further submits that the trial court was right in delivering a Ruling and not a Judgment as it was dealing with an Application
23. He stated that the applicants have not met all the threshold envisaged under order 42 Rule 6 (2) (b) of the *Civil Procedure Rules* as they have not provided any security as is provided in law.
24. He avers that the entire appeal and the application have no chance of success and since the applicants have not met the threshold and that the application should be struck out with cost.
25. The only issue for determination is whether the Applicant has met the conditions for stay pending Appeal.
26. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned;
- (a) that substantial loss may result to the applicant unless the order is made,
  - (b) that the application has been made without unreasonable delay, and
  - (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
27. In *Butt vs. Rent Restriction Tribunal* [1979], the Court of Appeal set out the following guidelines when the court is considering an Application of this nature:
- a). the power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal.
  - b). the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.



- c). a Judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  - d). the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
  - e). the court in exercising its power under order XLI rule 4(2) (b) of civil procedure Rules , can order security upon Application by either party or on its own motion.....”
28. On the issue of substantial loss the Applicant has stated that . the suit properties are at risk of distribution , and from the evidence some of the beneficiaries are heirs of the deceased who have priority to all others when it comes to inheritance. They have averred that “strangers” have already entered the estate property. Unlike a money decree, loss of inheritance or wastage of the estate is difficult to make good . The loss may be quantifiable but the loss is likely to be quite substantial. Am satisfied that this condition has been met.

### **Whether the Appeal has high chance of success**

29. The Appellant has not addressed the court on this matter , but it is one of the conditions that has been developed by the courts that an Applicant must satisfy. I have perused the grounds of Appeal . some of the issues taken up on Appeal include whether the trial court delivered a Ruling or Judgment ; if a judgment whether it met the basics of a judgment; whether the court relied on the correct Application to determine the rights of the parties; and whether the decision arrived at was based on the Evidence placed before court.
30. It is my considered view that these are weighty issues which the Applicants must be allowed to ventilate by way of an Appeal. It is important to remember that when considering an Application of this nature, the Appeal need not be the one that must succeed but one which is arguable with high chance of success. On this ground am satisfied that the Applicant has met the threshold.
31. The other condition is whether the application was filed without unreasonable delay. From the court records, the ruling by the trial court was delivered on 14<sup>th</sup> March 2023 while the present Application was filed on 23<sup>rd</sup> March 2023. There was no delay in bringing the Application.
32. On security the applicants submit that as the appeal is on the deceased asset and as long as status quo is maintained and that no party will suffer loss and thus no need for any security while respondents have emphasized the need for deposit of security as it is one of the conditions to grant a stay of execution.
33. In *Absalom Dova vs. Tarbo Transporters* [2013] eKLR, the court stated:
- “The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”
34. I have pointed out earlier that the decree/ order in dispute is not a money decree and therefore the question is whether this court should follow the beaten part of insisting on security pending Appeal. The subject matter is the property of a deceased person . To insist on security may require valuation of the properties and the Appellant be asked to deposit the equivalent of the value. I consider this to be



punitive on the Applicant and time consuming. In the circumstances of this case placement of security may not be tenable. In this regard, I wish to rely on the case of RWW vs. EKW (supra), where the court expressed the following view: “The other condition for granting stay orders is on the security to be offered. The law is that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. I am however of the considered view that in the circumstances of this cause and it being a matrimonial cause, the court can grant stay of execution of its orders without demanding that the Applicant furnish the Court with security for the due performance of the orders

35. From the Evidence, it is evident that most of the beneficiaries already occupy particular portions of the two properties. Staying the orders of the lower court would simply mean the situation remains as it was prior to the decisions of the trial court. Admittedly, interested parties with valid claims, if any, may be most inconvenienced, but the balance of convenience requires that stay be granted
36. Consequently, I proceed to make the following orders:
- a). That pending the hearing and determination of this Appeal there shall be a stay of execution or implementation of the Ruling of the Butali chief magistrate’s court dated 14th March 2023 in succession cause No. 368 of 2018 and any order/ decree arising therefrom, or any consequential order.
  - b). Each party to meet their own costs in this Appeal.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 11<sup>TH</sup> MARCH 2024.**

**S. Chirchir**

**Judge.**

**In the presence of:**

Godwin- Court Assistant

Mr. Atulo for the Respondent.

