



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of James Mutonga Mulinge (Deceased) (Succession Cause
367 of 2015) [2024] KEHC 4155 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4155 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 367 OF 2015**

G MUTAI, J

APRIL 18, 2024

BETWEEN

SHOBEL MULINGE 1ST ADMINISTRATRIX

ELIZABETH KILOMBE MULINGE ALIAS ELIZABETH KILOMBE

MUELLER 2ND ADMINISTRATRIX

DAVID MUEMA MULINGE 3RD ADMINISTRATRIX

AND

KENNEDY MULINGE PROTESTOR

RULING

1. *vide* a decision delivered on 30th November 2023, this Court (per M. Thande, J) confirmed the grant and ordered that the estate of the deceased be distributed in accordance with the mode of distribution set out in the affidavit in support of the Summons for Confirmation of Grant, sworn on 1st November 2022 by Shobel Mulinge, (save for the properties excluded in the said ruling). The court also ordered payment of Kes.2,130,400/- owed to Bamburi Cement Ltd so that a suit between the said company and the estate of the deceased could be marked as settled. The court made no order as to costs.
2. The Protestor/Applicant was aggrieved by the said decision and filed the instant application. *vide* a Notice of Motion application dated 14th December, 2023. The application seeks the following orders:-
 - a. Spent;
 - b. That this honourable court be pleased to grant the applicant leave to appeal against the ruling and orders of this honourable court delivered on 30th November 2023 (“the ruling”) and the Notice of Appeal dated 14th December 2023 be deemed as properly filed;
 - c. Spent;



- d. Spent;
 - e. That the honourable be pleased to grant a stay of execution of the orders delivered by Lady Justice M. Thande on 30th November 2023 and all consequential orders pending the hearing determination of the appeal against the ruling; and
 - f. That an appropriate order be made for the costs of this application.
3. The application is supported by the affidavit of Kennedy Mulinge Mutonga (hereafter “Kennedy”), sworn on 14th December 2023. Kennedy deposed that being dissatisfied with the ruling delivered on 30th November 2023, he wished to appeal against it. He further deposed that his intended appeal was meritorious, with high chances of success, as evidenced by the draft Memorandum of Appeal. In his view, the honourable court erred by failing to appreciate that there are a few beneficiaries who have benefited from the estate of the deceased at the exclusion of other beneficiaries.
 4. Kennedy further deposed that the court erred in both fact and law by finding that Irene Wayua was recognised as a spouse under section 3(5) of the *Law of Succession Act*, and for failing to appreciate that with the enactment of the *Marriage Act*, 2014, marriages presumed under section 3(5) of the former Act cannot exist, since all marriages have to be registered to have the force of the law.
 5. He argued that pursuant to orders of 30th November 2023, the grant of letters of administration intestate of the estate of the deceased was confirmed. That being the case, there is the properties owned by the estate would be distributed to the beneficiaries, thus rendering the appeal nugatory. Kennedy urged that if a stay of execution was not granted, he would suffer a substantial loss as the properties the court found not to be available for distribution would be given to other beneficiaries. In his view, the estate of the deceased is vast, and if distributed, it would be difficult to have the properties revert to the name of the deceased if the appeal succeeds. The administrators had commenced steps to effect the confirmed grant. The beneficiaries would not suffer any prejudice if the application is allowed.
 6. In response, the 1st Administratrix filed a replying affidavit sworn on 12th January 2024. In the said affidavit; she stated that the Notice of Appeal is incompetent and offends the Court of Appeal rules as it was not served on her advocates, who only got sight of it as an annexure to the application herein. She further deposed that Kennedy had neither requested nor served her advocates with a letter requesting proceedings as required by the law.
 7. Shobel further deposed that Kennedy had not satisfied the requirements for issuance of stay of execution. If there is any loss to be occasioned, it is on the other beneficiaries as the proceedings have been ongoing since 2015, and the delay has all the while been occasioned by the Applicant. She argued that Kennedy’s aim was to frustrate the family and that the intended appeal was an abuse of the court process and tantamount to forum shopping with the aim of delaying justice. If the stay is granted, Shobel urged, the same should only apply to the properties and issues contested by Kennedy. She urged the court to dismiss the application.
 8. The application was also opposed by the other beneficiaries. Ms. Agnes Walker Mutonga filed a Replying Affidavit sworn on 11th January 2024.
 9. In the said affidavit, she stated both Jamie and herself, were opposed to Kennedy’s application. She deposed that this court issued a ruling confirming the grant of letters of administration in respect of the estate of the deceased herein, with orders that the mode of distribution be effected as per the affidavit in support of the summons for confirmation of grant sworn by Shobel Mulinge on 1st November 2022, save for properties which the court specifically excluded as they did not form part of the deceased’s estate. She urged that the application by the Protestor seeking a stay of execution is devoid of merit



on five grounds. Firstly, no Notice of Appeal was lodged or served in this matter, and thus, no orders should be issued based on an incompetent Notice of Appeal. Secondly, this application does not satisfy the legal tests for grant of stay of execution pending appeal as required under Order 42 Rule 6 of the [Civil Procedure Rules](#). It was urged that the application discloses no arguable appeal, nor does it justify how the appeal will be rendered nugatory nor the substantial loss to be suffered if the stay is not granted. Thirdly, the applicant has not furnished security for costs of the appeal; the applicant has repeated the same grounds of his affidavit of protest, which were already rejected on merits by the court for lack of substance. Fourthly, beneficiaries like her stand to suffer injustice and prejudice if stay is granted, as her son and co-beneficiary requires funds for medical treatment, continuous specialised care, and medication for his autism. In 2020, the court ordered that the application for funds for treatment should await the final decision confirming the grant, which had now been issued. Fifthly, the application is a delaying tactic, and that litigation must come to an end. Further, the application is frivolous and mischievous, meant to frustrate the distribution of all properties, including those covered by the protest. If a stay of execution is granted, it will inflate the costs and expenses of administering the estate as well as make the beneficiaries suffer prejudice and prolonged suffering.

10. She urged the court to consider ordering the Protestor/Applicant to deposit security for the costs of appeal into the court as required by Order 42 Rule 6(2)(b) of the [Civil Procedure Rules](#), to limit the scope of the orders of stay of execution to only the properties claimed by the protestor, and specifically named in the protest and leave the rest for distribution to the intended beneficiaries. She further urged the court to find that the application has no merit and dismiss it with costs.
11. Irene Wayua Katua, Ivy Mulinge and Elizabeth Mulinge filed Grounds of Opposition *vide* which they too opposed the application. David Muema Mulinge and Joseph Kioko Mulinge also filed Grounds of Opposition.
12. The application was canvassed through oral submissions on 23rd January 2024.
13. Ms Matiri, for the Applicant, submitted that they sought leave to appeal out of an abundance of caution. She relied on Articles 48 and 50 of the [Constitution](#). She urged that this court has inherent jurisdiction to give orders under Section 47 of the [Law of Succession Act](#) and Rule 73 of the [Probate and Administration Rules](#). She urged the court to allow the Protestor/Applicant to exercise his rights of appeal.
14. She relied on order 42 Rule 6 of the [Civil Procedure Rules](#) and urged that her client would suffer substantial loss if execution was allowed. She urged that her client was gifted Title No. Mbiuni/Mumbuni/780, as well as Title No. Mbiuni/Mumbuni/869, upon which he had carried out immense development and that he might be evicted from the said properties if distribution goes on. Counsel urged that if the appeal is allowed, Kes.88,000,000/-, which he reckoned as being due, would be taken into account. Further, if the subject matter was disposed of during the pendency of the appeal, it would be difficult to restore the parties. Counsel urged that the application was brought without delay. She urged the court to allow the application without requiring her client to provide security.
15. Ms Ndirangu, learned counsel for the 1st Administratrix, submitted that they were not served with the Notice of Appeal and that the request for typed proceedings was only sought after they raised the same. She urged that the appeal is an afterthought.
16. She submitted that the applicant had not satisfied the test provided for in Order 42 Rule 6 of the [Civil Procedure Rules](#) as no substantial loss had been demonstrated. The applicant won't be prejudiced if the estate is distributed. She urged that it had not been proven that Big View Ltd owes Kes.88,000,000/- to the deceased's estate. She urged the court to isolate issues and allow the rest to proceed.



17. Mr Ochieng, learned counsel for Agnes Walker and Paul Jamie Mulinge, relied on Ms Walker’s replying affidavit and list of authorities dated 18 January 2024. He submitted that the grant of a prayer for stay is discretionary and has to be exercised judiciously. In his view, the Applicant had not satisfied the test under Order 42 Rule 6 of the Civil Procedure Rules. He urged that the appeal is not arguable.
18. Regarding the regularity of the Notice of Appeal, he stated that they were in agreement with Ms Ndirangu’s submissions that it wasn’t served in breach of the applicable Rules. The Notice of Appeal is, therefore, incompetent and cannot be used to argue for leave to appeal.
19. Mr Ochieng submitted that the beneficiaries are entitled to the distribution of their shares and that execution of the impugned ruling, a process he urged was lawful, should not be stopped. He urged the court to dismiss the application. If the court was, however, inclined to allow the same, to order security for the amount of protest and that the stay be limited to the properties claimed by the Protestor/ Applicant in his Protest. He further urged that the estate does not owe Big View money and, therefore, the claim is mistaken.
20. Mr Ananda, learned counsel for Ivy, Irine, and Elizabeth Mulinge, submitted that he was relying on the Grounds of Opposition filed in court and associated himself with the submissions of Ms Ndirangu and Mr Ochieng. He urged the court to dismiss the application for failure to comply with a mandatory provision of the law on stay of execution and that they, too, were not served with the Notice of Appeal.
21. Mr Musyimi, holding brief for Mr Mulwa, who acts for the beneficiary, Beth Mulinge, said that the matter has been in court since 2015 and that continued delay was prejudicial to his client. He submitted that the court has a duty to ensure matters are conducted in a timely manner. He submitted grant of the order of stay of execution would be prejudicial to other beneficiaries.
22. On Notice of Appeal, he referred the court to rule 77(1) of the Court Of Appeal Rules. He urged the court to dismiss the application.
23. In rejoinder Ms Matiri submitted that the Notice of Appeal was served and the letter done within the timelines. She urged the court to allow her client to articulate her issues in appeal. She further submitted that in succession matters, provision of security is not normally ordered.
24. I have considered the application herein, the responses and the rival submissions by counsels. In my view, the issues that require my determination are:-
 - a. Whether leave to appeal is necessary?
 - b. Whether a stay of execution pending appeal should be issued?
25. On whether leave to appeal is necessary, the court in the case of In re Estate of Wanga Ole Oiyie [2022] eKLR stated:-

“Even as the debate rages on, I should think that the focus should be on the considerations a court should take into account in granting or refusing leave. This necessity emerged in the case of *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another* [2014] eKLR when the Court of Appeal held that;

“In view of these and given the adversarial nature of litigation in our system of justice, it would be unconscionable to allow as final the decision of a single judge, and limit the right of appeal to the High Court, especially now when the court hierarchy has been opened by the creation of the Supreme Court as an apex court.



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 merit serious judicial consideration.

According to this precedent, leave to appeal should normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration by the Court of Appeal. I should add that, exercise of the discretion in granting leave to appeal in succession causes, should be underpinned by the right of appeal provided in the *Constitution*.”

26. I have looked at the draft Memorandum of Appeal. The issues raised therein are not idle. They merit consideration by the Court of Appeal. Therefore, in my view, leave to appeal against the ruling and orders of this honourable court delivered on 30 November 2023 is necessary.
27. On the second issue, stay of execution is provided for under Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules* 2010, which provides:-
- a. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 an application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by 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.
 - b. 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. 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.
28. From the above provision, there are three grounds for consideration by a court before issuing a stay of execution order. They include:-
- a. Substantial loss;
 - b. Application has been filed without unreasonable delay; and
 - c. Security for due performance of such decree or order.
29. In discussing substantial loss, the court in the case of *James Wangalwa & Another V Agnes Naliaka Cheseto* [2012] eKLR stated:-
- “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, that is to say, the attached properties have been sold, as is the case here, 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, under Order 42 of the *CPR* and Rule 5(2) (b) of the *Court of Appeal Rules*, respectively, 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.”

30. The Applicant has argued that if the stay is not granted, he will suffer substantial loss. The Respondents, on the other hand, take the converse position.

31. Given the deceased's vast estate, it is likely that if the distribution is allowed to continue, the Respondents may not be able to restore the estate to its current position. In my view, the possibility that the Applicant will suffer substantial loss is clear and present.

32. On whether the application has been filed without unreasonable delay, the court in the case of *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR stated that:-

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.”

33. The fact that the application was filed without undue delay has not been seriously disputed. It is therefore my view that the same was complied with.

34. On the issue of security for due performance of such decree or order, the court in the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR stated,

“Thirdly, the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal.”



35. In this case, the Respondents have argued that the Applicant should be ordered to deposit security in court, whereas the Applicant argued that this being a family matter, the same is not necessary. Considering the nature of this matter, it is my view that the same is not appropriate as this is a succession matter.
36. On whether the applicant has an arguable appeal with high chances of success, the court in the case of *Beatrice Ndunguri Mwai & another v Sicily Wawira Titus & another* [2020] eKLR stated:-
- “There is no requirement for a party to prove that he has an arguable appeal or one that has chances of success. Where a party has satisfied the above conditions, the court exercises discretion to order a stay. In the exercise of the discretion the court is supposed to do so in a manner that would not prevent the appeal from being heard and determined on merits. This was so held by the Court of Appeal in the case of *Bhutt –v- Rent Restriction Tribunal* (1982) KLR 417. The Court of Appeal held that discretion must be exercised in a manner that would not prevent an appeal. The purpose of a stay of execution may be stated to be a measure to preserve the subject matter so that the right of appeal can be exercised without any prejudice to the Applicant, as the appeal would be rendered nugatory if the stay is not ordered. An applicant in this kind of application invokes the discretionary powers of the court.”
37. I have already stated that the appeal appears to be arguable. This court will not impede the Applicant's quest to get a second opinion regarding his grievance.
38. Given how long this matter has taken and the urgent need some beneficiaries have, it would be in the interest of justice if the stay of execution is granted only in respect of the assets that are the subject of contestation. Those that aren't aren't contested should be distributed forthwith.
39. The orders that commend themselves, therefore, are as follows:-
1. Distribution of the underlisted assets of the deceased be and is hereby stayed pending the hearing and determination of the appeal:-
 - a. Title No. Mbiuni/Mumbuni/780;
 - b. Title No. Mbiuni /Mumbuni /869;
 - c. Mlolongo Plot No. 12, Phase II B registered in the name of Mutonga Investment Limited;
 - d. Shares in Pwani Trading Agencies Limited;
 - e. Shares in Mutonga Investments Ltd;
 - f. Kes.4,000,000/-;
 2. The Administrators are at liberty to distribute the rest of the estate as directed by the Court.
40. This being a family matter, parties will bear their own costs.
41. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 18TH DAY OF APRIL DAY OF 2024

GREGORY MUTAI

JUDGE



In the presence of:-

Mr Ochieng for Paul Jamie Mulinge;

Ms Ndirangu for Shobel Mulinge;

Mr Wasike holding brief for Mr Mulwa for Beth Mulinge; and

Ms Juma holding brief for Mr Mutubia for David Muema and Joseph Kioko.

Arthur – Court Assistant.

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