



REPUBLIC OF KENYA



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**In re Estate of Peter Muraya Chege (Deceased) (Succession Cause
57 of 2018) [2024] KEHC 3486 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 57 OF 2018
HI ONG'UDI, J
APRIL 11, 2024**

IN THE MATTER OF THE ESTATE OF THE LATE PETER MURAYA CHEGE (DECEASED)

JOHN MUTHEE NGUNJIRI.....1ST PETITIONER

JAMES MACHARIA CHEGE.....2ND PETITIONER

JAMES MUGO MURAYA.....3RD PETITIONER

VERSUS

MARGARET WAIRIMU MURAYA.....1ST OBJECTOR

SUSAN WANJA MURAYA.....2ND OBJECTOR

JANE NYAMBURA.....3RD OBJECTOR

SAMUEL GITHINJI MURAYA.....4TH OBJECTOR

HANNAH NYOKABI.....5TH OBJECTOR

MIRIAM MUTHONI MURAYA.....6TH OBJECTOR

SIMON CHEGE MURAYA.....7TH OBJECTOR

CHRISTINE WANJIRU MURAYA.....8TH OBJECTOR

PAULINE WANGUI MUCHIRI.....9TH OBJECTOR

AND

JOSEPH GATURO MURAYA.....1ST BENEFICIARY

FRANCIS NGUMI MURAYA.....2ND BENEFICIARY



JOHN KAMAU MURAYA.....3RD BENEFICIARY
DANIEL MURIGA MURAYA.....4TH BENEFICIARY
ROSEMARY WAIRIMU MURAYA.....5TH BENEFICIARY
MARY WANJA MURAYA.....6TH BENEFICIARY

BETWEEN

JOHN MUTHEE NGUNJIRI 1ST PETITIONER
JAMES MACHARIA CHEGE 2ND PETITIONER
JAMES MUGO MURAYA 3RD PETITIONER

AND

MARGARET WAIRIMU MURAYA 1ST OBJECTOR
SUSAN WANJA MURAYA 2ND OBJECTOR
JANE NYAMBURA 3RD OBJECTOR
SAMUEL GITHINJI MURAYA 4TH OBJECTOR
HANNAH NYOKABI 5TH OBJECTOR
MIRIAM MUTHONI MURAYA 6TH OBJECTOR
SIMON CHEGE MURAYA 7TH OBJECTOR
CHRISTINE WANJIRU MURAYA 8TH OBJECTOR
PAULINE WANGUI MUCHIRI 9TH OBJECTOR

AND

JOSEPH GATURO MURAYA BENEFICIARY
FRANCIS NGUMI MURAYA BENEFICIARY
JOHN KAMAU MURAYA BENEFICIARY
DANIEL MURIGA MURAYA BENEFICIARY
ROSEMARY WAIRIMU MURAYA BENEFICIARY
MARY WANJA MURAYA BENEFICIARY

RULING

1. This ruling is in respect of two applications. The first application is dated 7th November 2023 filed by the 3rd petitioner, 8th and 9th objectors herein. The second application is dated 14th November 2023 filed by the 1st petitioner and the beneficiaries herein.



2. In the first application the applicants are seeking leave to appeal to the Court of Appeal and Notice of Appeal lodged and filed on 2nd November 2023 to be deemed as properly filed. Additionally, the application is seeking stay of any further proceedings pending the hearing and determination of the intended appeal plus costs of the application.
3. The said application is premised on the grounds on its face as well as the affidavit of the 8th objector herein. She deposed that on 14th February 2023 the grant issued on 11th February 2019 was revoked and the 3rd petitioner, 7th objector and herself were appointed as administrators. Further, that on diverse dates the honourable court proceeded to hear the objection proceedings and on 19th October 2023 delivered a judgment on the same.
4. She deposed further that being dissatisfied with the said judgment, they instructed their advocates on record who filed a Notice of Appeal and wrote a letter to the Deputy Registrar requesting for typed proceedings. In addition, they had been advised that there was no automatic right of appeal to the Court of Appeal from this court.
5. She went on to depose that the intended appeal raises issues that are significant and which would affect the distribution of the estate of the deceased and it was in the interest of justice that the instant application be considered on priority basis. She added that there was need for the proceedings of this court to be stayed pending the hearing of the appeal so that the appeal is not rendered nugatory. Further, that the applicants were ready and willing to abide by any directions by this court and that there had been no delay in filing the application.
6. The 1st objector herein, Margaret Wairimu Muraya filed a replying affidavit dated 24th November 2023 in response to the application. She averred that judgment was delivered on 19th October 2023, after all parties had been heard. She added that the applicants herein did not have an automatic right of appeal against the decision of the court in this matter. That they ought to have demonstrated that there exists a substantial issue of fact or law which required further and serious interrogation by a higher court.
7. She averred further that the applicants would stop at nothing to see that this matter remained in the court corridors as long as they live. That it was in the interest of justice that this court exercises its discretion and makes an order that would bring this succession matter to rest. Also, that the applicants would have an opportunity to protest in the event summons for confirmation were filed. She urged the court to dismiss the application with costs in her favour.
8. In the second application the applicants are seeking stay of proceedings in this cause pending hearing and determination of an appeal filed by the applicant in the Court of Appeal against the whole judgment of honourable Justice H.K Chemitei delivered on 19th October 2023. They also prayed that costs of the application do abide the outcome of the appeal.
9. The said application is premised on the grounds on its face as well as the affidavit of the 1st beneficiary herein. He deposed that following the Judgment of 19th October 2023 the next step by the respondents was to file an application for confirmation of the grant and distribution of the deceased's estate to the beneficiaries including those added by dint of the said judgment. He added that it would not be fair if the court proceeded with the confirmation of the grant and distribution of the estate when the applicants' appeal was still pending hearing and determination in the Court of Appeal.
10. He deposed further that neither the respondents nor the deceased's estate would suffer any loss or any prejudice if they await the outcome of the appeal. He added that the application had been filed expeditiously and that the applicants would suffer prejudice in the event stay of proceedings was not granted.



11. The 1st objector herein in response to the application, filed a replying affidavit dated 24th November 2023. She deposed that the applicants had no automatic right of appeal against the impugned judgment and that it was evident that no summons for confirmation of grant had been filed. Thus, the instant application was premature and pre-emptive hence an abuse of the court process. She added that the applicants would have an opportunity to protest in the event a summons for confirmation was filed. She urged the court to dismiss the application with costs in her favour.
12. Both applications were disposed of by way of written submissions.

Applicants' (3rd petitioner, 8th and 9th objectors) submissions to the application dated 7th December 2023

13. The said submissions were filed by Waiganjo & company advocates and are dated 23rd December, 2023. Counsel in regard to the threshold for stay of proceedings, placed reliance on several cases among them *Global Tours & Travels Limited*; Nairobi HC winding up case no. of 2000, where the court held as follows;

“As I understand the law, whether or not to grant a stay of proceedings of further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice.....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such actors as the need or expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

14. Counsel submitted further that on 15th November 2023, leave was granted for the parties not satisfied with the decision of the court rendered on 19th October 2023 to appeal, and notices of appeal were filed by the relevant parties. He added that since the applicants were dissatisfied with the decision of the court, as to who the beneficiaries of the estate were and had filed an appeal, it was only fair and just that there be a stay of further proceedings in this cause. He urged the court to allow the application.

Beneficiaries'/Applicants submissions in support of the application dated 14th November 2023

15. The said submissions were filed by Karanja-Mbugua advocates and are dated 19th December, 2023. Counsel submitted that if stay of proceedings was not granted, the petitioners herein together with the newly incorporated beneficiaries would promptly file an application for confirmation of the grant and distribution of the deceased's estate. He added that the said parties would suffer no prejudice if they are made to await the outcome of the appeal. He placed reliance on the cases of *William Odhiambo Ramogi & 2 others v The Hon. Attorney General & 3 Others* [2019] eKLR, *Global Tours & Travels Limited*; Nairobi HC winding up case(*supra*), *David Morton Silverstein v Atsango Chesoni* [2002] eKLR, *Stephen Maina Githiga & 5 Others v Kiru Factory Co. Ltd* and *Kenafri Matches Ltd v Match Masters Ltd v Anti-Counterfeit Agency*, Nairobi Court of Appeal Civil Application No. E092 of 2021.
16. Counsel submitted further that the arguability of an appeal was not a pre-requisite condition when an application of stay was made in the court that delivered the impugned judgment. As to whether an there was a right of appeal to the Court of Appeal, counsel placed reliance on the case of *Kenafri Matches*



Ltd v Match Masters Ltd v Anti-Counterfeit Agency (*supra*) where the court held that an appeal lay with the Court of Appeal from a decision of the High Court in probate matters.

17. He added that according to the Lordships in the aforementioned case, the high court by virtue of section 47 of the *Law of Succession Act* had jurisdiction to hear any applications, to pronounce decrees and orders and the same were appealable as a matter of right under section 66 of the *Civil Procedure Act*. He urged the court to allow his client's application in terms of prayers 2 and 3.

1st Objector's Submissions

18. The said submissions relate to both applications, they were filed by Elizabeth Wangari & Co. advocates and are dated 17th February, 2024. Counsel identified three issues for determination by this court. On the first issue, on whether the 1st to the 6th applicants' application dated 14th November, 2023 was properly before this court, counsel placed reliance on the case of *John Mwita Murimi & 2 others v Mwikabe Chacha Mwita & Another* [2019] eKLR and submitted that it was settled that there was no automatic right of appeal without leave of court in succession matters. That the applicants herein had not sought leave as required by the law and thus the said application was incompetent, fatally defective, bad in law hence the same should be struck out with costs to the respondent.
19. Counsel submitted further that the applicants in the application dated 14th November 2023 did not in any manner participate in the proceedings whose judgment they sought to challenge. She added that the said applicants did not therefore have locus standi to institute the aforementioned application. She placed reliance on the case of *Ibrahim v Hassan & Charles Kimenyi Macharia*, Interested parties [2019] eKLR.
20. On the second issue on whether the applicants were entitled to the orders sought in the applications dated 7th and 14th November 2023 respectively, counsel submitted in the negative. Lastly, on who should bear the costs of the instant applications, counsel placed reliance on the Probate and Administration Rules and urged the court to exercise its discretion in awarding costs in favour of the objector.

Analysis and Determination

21. I have considered both applications, affidavits and rivalry submissions by the parties herein. In my opinion the issues arising for determination by this court are as follows: -
- i. Whether a stay of proceedings should issue pending the determination of the appeal against the Judgment delivered on 19th October 2023.
 - ii. Who should bear the costs.
22. On the first issue on whether the stay of proceedings should issue as prayed it should be noted that this Court has powers to stay proceedings pending appeal under Order 42 rule 6 of the *Civil Procedure Rules* which stipulates as follows: -
- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 application being made, to consider such application and to make such order thereon as may to it seem



just, and any person aggrieved by an 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.

- (2) 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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

23. In the case of *Kenya Wildlife Service v James Mutembei* (2019) eKLR, Gikonyo J held that:

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent”.

24. The said court also quoted *Halsbury’s Law of England, 4th Edition. Vol. 37 at page 330 and 332*, which states as follows:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

25. Further, in the case of *Global Tours & Travels Limited; Nairobi HC Winding up Cause (supra)* also relied by the applicants herein, Ringera J (as he then was) stated as follows: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity



and optimum utilization of judicial time and whether the application has been brought expeditiously”.

26. In view of the above cited authorities, it is clear that stay of proceedings is a grave matter and should be entertained only in the most deserving cases as it impacts on the right to expeditious trial. It is a discretionary power exercisable by the court upon consideration of the facts and circumstances of each case. The Court of Appeal in the case of *David Morton Silverstein v Atsango Chesoni* (2002) eKLR status thus: “The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court’s own *rules*. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay”.
27. In the instant case, both applications are seeking to stay proceedings in this cause pending hearing and determination of an appeal filed by the applicants in the Court of Appeal against the whole judgment of Justice H. K Chemitei delivered on 19th October 2023. Mr. Waiganjo for the applicants in the application dated 7th November, 2023 informed the court that they had been granted leave to Appeal on 15th November, 2023 and Notices of Appeal were filed by the relevant parties. The record shows the filing of Notices of Appeal dated 2nd November, 2023. I have however not seen any proceedings before this court for 15th November, 2023 unless the leave was granted by another court besides this one. That will be an issue to be dealt with by the Court of Appeal.
28. The next issue is whether a prima facie case has been established to warrant the staying of the proceedings before this court.
29. It is clear that the impugned judgment delivered on 19th October, 2023 identified the beneficiaries to the deceased’s estate, but did not distribute the estate. There is still the process of distribution of the estate. Would it then be proper for this court to stay the proceedings herein to allow the applicants pursue the Appeal in the Court of Appeal? This would mean that the administrators are temporarily barred from filing summons for confirmation of grant as the Applicants battle out the issue of beneficiaries in the Court of Appeal.
30. On the other hand this court having made a determination in a judgment on who the beneficiaries of the estate are, would not address the same issue if it arose in the summons for confirmation of grant as suggested by the 1st objector. Doing so would amount to this court sitting on appeal over its own Judgment.
31. The use of discretion is to ensure proper use of judicial time and resources to dispense justice for the parties. This is also to guard against multiplicity of applications which are meant to delay the finalization of matters which go against the spirit of Article 159 that enjoins the court to hear matters expeditiously. However, this is not to turn a blind eye on deserving applications for stay of proceedings.
32. In the case of *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others* (2009) eKLR, the Court of Appeal stated that:

“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”
33. In view of the above analysis I find the middle ground to be a conditional stay of proceedings.



34. The upshot is that both applications have merit and I hereby grant an order staying the proceedings herein on condition that the Applicants fast track their Appeal in the Court of Appeal. The order of stay of proceedings shall be limited to six (6) months only from today's date.
35. After the six (6) months the administrators shall be at liberty to file the summons for confirmation of grant.
36. Costs in cause
37. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SINGED THIS 11TH DAY OF APRIL, 2024 IN OPEN COURT AT NAIROBI.

H. I. ONG'UDI

JUDGE

