



REPUBLIC OF KENYA



**In re Estate of Gerald Muturi Maina (Deceased) (Succession Cause
949 of 2011) [2024] KEHC 4618 (KLR) (Family) (6 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4618 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 949 OF 2011
MA ODERO, J
MAY 6, 2024**

RULING

1. Before this court for determination is the summons dated 2nd March, 2023 by which the Applicants seek the following orders
 - “ 1 Spent
 - 2 Spent
 - 3 Spent
 - 4 That the Honourable Court be pleased to issue an order of stay of Execution of the order issued on 17th February, 2023 pending the hearing and determination of the intended appeal to the Court of Appeal.
 - 5 That, the costs of this application be provided for.”
2. The application which was premised upon Section 47 of the *Succession Act* and Rule 73 of the *Probate and Administration Rules* was supported by the Affidavit of even date sworn by the 2nd Appellant Washington Muchiri Muturi.
3. The Respondents opposed the application through the Replying Affidavit dated 17th March, 2023, sworn by the 1st Respondent Nickson Mwangi Muturi.
4. The matter was canvassed by way of written submissions. The Applicants filed the written submissions dated 12th April, 2023 whilst the Respondents relied upon the written submissions dated 20th April, 2023

Background

6. This matter concerns the estate of the late Gerald Muturi Maina (hereinafter ‘the Deceased’) who passed away on 10th January, 2011. A copy of the Death Certificate Serial Number 051429 appears as



Annexure 'A' to the Affidavit in support of the petition for letters of Administration dated 21st July, 2011.

7. The Deceased who died intestate was survived by the following persons:-
 - (a) Eunice Wairimu Muturi - Widow
 - (b) Stephen Maina Muturi - Son
 - (c) Washington Muchiri Muturi - Son
 - (d) Grace Waithera Muturi - Daughter
 - (e) Anthony Murathi Muturi - Son
 - (f) Catherine Nyambura Muturi - Daughter
 - (g) Nickson Mwangi Muturi - Son
 - (h) Elizabeth Wanjiku Muturi - Son
8. Following the demise of the Deceased Grant of letters of Administration intestate was on the October 2011 made to Eunice Wairimu Muturi (Widow) and Washington Muchiri Muturi (Son). A Certificate of Confirmed Grant was thereafter issued to the two (2) Administrators on 1st April 2014 which Grant was later rectified on 28th January, 2015. The confirmed grant set out the mode of distribution of the estate.
9. The parties herein are all beneficiaries of the estate of the Deceased. The Respondents are a son and a daughter of the Deceased whilst the 1st Applicant is the widow of the Deceased. The 2nd to 5th Applicants are also children of the Deceased and the siblings of the 1st and 2nd Respondent.
10. The Respondent contend that the Administrators and some of the beneficiaries have converted and alienated estate funds and assets for their own personal gain and to the detriment of the Respondents herein. That although the estate assets were required under the terms of the confirmed grant to be held by a limited liability company, to date more than seven (7) years after the Grant was confirmed the said assets have not been transferred.
11. The Respondents further aver that the Administrators continue to bank income derived from the estate into an account which is under the sole control of the 2nd Applicant and that the 2nd Applicant has not been accountable to the other beneficiaries regarding these funds. That dividends and bonuses which were initially paid to the beneficiaries have not been paid for several years.
12. The Respondents alleged that an auditor appointed by themselves to audit the estate accounts was denied access to the books by the 2nd and 3rd applicants. That the applicants have unreasonably demanded that the 1st Respondent bear fifty per cent (50%) of the cost of auditing the estate.
13. Vide an application dated 30th June, 2022 the Respondents sought



Inter alia orders to compel the Administrators of the estate to avail full and accurate inventory of all the assets and liabilities of the Deceased as well as a full and accurate account of their administration of the estate from 14th October, 2011 to date.

12. In a ruling delivered on 17th February, 2023 this court made inter alia the following orders

“.....I direct that the 1st and 2nd Respondents [the 1st and 2nd Applicants in this application] within sixty (60) days file in court true accounts of all their dealings with the estate of the Deceased from 1st April, 2014 to date.....”

13. Being aggrieved by the above orders the Applicants filed a Notice of Appeal dated 21st February, 2023 (Annexure ‘WMMI’ to the Supporting Affidavit dated 2nd March, 2023)
14. The Applicants also filed this present summons seeking to stay the orders of the court pending hearing and determination of their intended appeal.
15. As stated earlier the application was opposed.

Analysis And Determination

16. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by both parties. The Applicants herein have sought for an order of stay of ruling delivered on 17th February, 2023 pending hearing of their intended Appeal.
17. It is a fact that orders for stay of Execution which are provided for under Order 42 Rule 6 of the Civil Procedure Rules cannot issue in Succession Proceedings. This is because Rule 63 of the Probate and Administration Rules which lists the orders of the Civil Procedure Rules which are to apply to Succession matters does not include order 42 as one of the orders applicable in the Succession Act.
18. In the matter of the Estate of Reuben Kiplagat Chesire (Deceased) Succession Cause No. 1194 of 2009 Hon. Justice Musyoka held that
- “.....As regards the jurisdiction in light of the provisions of Order 42 rule 6(1), (2) and (6) of the Civil Procedure Rules 2010 upon which the application based, I am in agreement with the Respondents’ contention that the order is not applicable in matters arising under the Law of Succession Act, and that the said provisions dealing with stay of execution pending appeal have not been imported into matters falling under the law of Succession Act by Rule 63 of the Probate and Administration Rules. The Law of Succession is complete with its own rules.”
19. Notwithstanding the above I will for purposes of completeness consider the merits of the application for stay of Execution.
20. Order 42 Rule 6 which sets out the principles for stay of execution provide 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 appeal case of in so far as the court appeal 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 to appeal is preferred may apply to the appellate court to have such order set aside. No order for stay of execution shall be made under sub rule

- (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.
 - (c)

20. Therefore in order to merit the orders being sought the applicants must satisfy the court.

- a. That the application for stay was filed without unreasonable delay.
- b. That they stand to suffer substantial loss unless the stay order is granted.
- c. That security for the performance of the decree or order has been given by the Applicants.

21. On the question of delay I note that the impugned ruling was delivered on 17th February, 2023. This application for stay was filed on 2nd March, 2023 barely two (2) weeks after the ruling had been delivered. I am satisfied that this application has been brought in a timely manner.

22. The Applicants object to the courts orders directing them to file full and accurate inventory and accounts relating to their administration of the estate of the Deceased.

23. In order to merit the order of stay the Applicant must satisfy the court that execution of those orders is likely to cause them substantial loss.

24. It must be remembered that it is not the duty of this court to decide the merits or otherwise of the intended appeal. The court is only required to decide if a stay is merited.

25. In the ruling of 17th March, 2023, the court cited and relied upon the provisions of Section 83 of the Law of Succession Act which sets out



- the duties of an Administrator.
26. Section 83 (e) particularly provides that an Administrator is required to supply
- “a full and accurate inventory of the assets and liabilities of the Deceased and a full and accurate account of all dealings therewith upto the date of the account.”
27. Thus the duty to provide accounts is a statutory duty and is not a figment of the courts imagination.
28. The 1st and 2nd Applicants do not deny that they were appointed as Administrators to the estate of the Deceased in the year 2011. Why would they be averse to providing accounts of how they have managed the estate unless they have something to hide.
29. I do not see what nature of substantial loss would be occasioned to the Applicants by directing that they comply with a statutory edict.
30. The estate property does not belong to the Administrators for them to utilize as they wish. The Administrators are but Trustees and their relationship with the beneficiaries is fiduciary in nature. They are accountable to the court and to the beneficiaries regarding their administration of the estate. [See *Estate Of Julius Mimano (Deceased)* [2019] eKLR]
31. Finally I find no persuasive reason/grounds to grant a stay of execution of the ruling delivered on 17th February, 2024. This application has no merit and the same is dismissed in its entirety. Costs will be met by the Applicants.

DATED IN NYERI THIS 6TH DAY OF MAY, 2024.

.....

MAUREEN A. ODERO

JUDGE

