



**Mbiti & another v Thome & another (Civil Appeal E010 of 2024)
[2024] KEHC 5441 (KLR) (20 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E010 OF 2024**

**RK LIMO, J
MAY 20, 2024**

BETWEEN

MUEMA THOME MBITI 1ST APPELLANT

TITUS THOME MBITI 2ND APPELLANT

AND

MARYLEEN THOME 1ST RESPONDENT

SKYRINE SYOMITI 2ND RESPONDENT

RULING

1. The Appellants/Applicants herein, Muema Thome Mbiti and Titus Thome Mbiti have moved this court through a Notice of Motion dated 27th February 2024 seeking the following reliefs;
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to issue orders in the interim staying the proceedings in Kitui Chief Magistrates’ Court, Succession Cause 54 of 2019, In the Matter of the Estate of Thome Mbiti Ngula, pending hearing and determination of this application.
 - d. That this Honourable Court be pleased to order stay of proceedings in Kitui Chief Magistrates, Succession Cause 54 of 2019, In the Matter of the Estate of Thome Mbiti Ngula, pending hearing and final determination of the appeal lodged by the appellants herewith.
 - e. That this Honourable Court be pleased to issue orders in the interim staying execution of the ruling and orders made on 14th February 2024 in Succession Cause No. 54 of 2019 pending the hearing and determination of this application.



- f. That this Honourable Court be pleased to order stay of execution of the Ruling and order made on 14th February 2024 in Succession Cause No. 54 of 2019 pending the hearing and determination of the appeal lodged by the appellant herewith.
 - g. That the said stay of execution of the Ruling and orders be granted on an unconditional basis this being a family matter.
 - h. That costs of this application to abide the outcome of the intended appeal.
2. The application is premised on the following grounds;
- a. That a ruling was delivered on February 14, 2024 in favour of the respondents revoking the Grant of Letters of Administration as well as the confirmed Grant issued by the court.
 - b. That the ruling issued by the Learned Trial Magistrate indicates cancellation of a title being Nzambani/Kyanika/3930 which is registered to Priscilla Kavutha Mwendwa who was not a party to the proceedings before the lower court and which title does not form part of the deceased's estate.
 - c. That the appellants have been residing and utilizing their gifted portions of land since the year 1982 and that the deceased passed on 25th December 2000, 18 years later.
 - d. That the appellants, being aggrieved and dissatisfied with the said ruling have preferred an appeal against the same, filed together with this application.
 - e. That the said appeal has high chances of success.
 - f. That the said appeal risks being rendered nugatory unless orders sought herein are granted.
 - g. That the ruling delivered by the trial court is manifestly wrong, ambiguous and incapable of being executed.
 - h. That the learned trial magistrate court based her reason for revoking the grant on the process of confirmation of grant, yet the grounds for revocation of grant do not include the process of confirmation of grant or distribution of assets.
 - i. That in any event, the respondents herein applied before the lower court for orders of revocation of grant and not for redistribution of the deceased estate.
 - j. That in the said ruling, the trial court has revoked the grant of letter of administration as well as the confirmed grant and has directed the parties to pursue dispute resolution, failure to which she shall give further orders in distributing the deceased estate.
 - k. That alternative dispute resolution is attempted and/or pursued before a court determines a dispute and not after and where a court prefers alternative dispute resolution, it refers said matter to court annexed mediation before determining the dispute.
 - l. That the court in its ruling termed the appellants fraudulent by imputing fraud from the facts of the case whereas the same were not proved.
 - m. That the appellants went to great lengths to ensure the succession proceedings were done above board. Having labelled the appellants fraudsters, it is unrealistic to expect anything to come out of the proposed alternative dispute resolution.
 - n. That the court ought to have directed that the appellants apply for the Grant of Letters of Administration a new and the respondents file an objection if need be and or the appellants file a



new summons for confirmation of grant with opportunity to the respondents to file objections if need be.

- o. That it is in the interest of justice that the orders sought herein be granted.
3. The application is supported by the 2nd Applicant Titus Thome Mbiti's supporting affidavit, sworn on 27th February 2024 where he avers as follows; that the trial court erred in ordering cancellation of title for Nzambani/Kyanika/3930 registered to Priscilla Kavutha Mwendwa who the deponent avers was not party to the proceedings. He proceeds that the property which forms part of the estate of the deceased is Nzambani/Kyanika/3931 which was erroneously allocated to Priscilla Kavutha Mwendwa during adjudication but the same was gifted to the 1st Respondent by the deceased during his lifetime. The deponent avers the trial court erred in revoking the grant and that there is a risk of execution as there are no orders of stay in place.
4. In their submissions made through their learned counsel Mr. Ong'uti, the Applicants contend that the deceased in the cause pending in the lower court had gifted his children some parcels of land but died before formal transfers were effected.
5. They aver that the Respondents are their sisters but fault them for asking for revocation of grant without first trying to resolve the matter. They claim that revocation of grant has now affected parcels of land that have been registered and titles issued.
6. They express the fears that the trial court may proceed with the distribution of the estate when they have filed an appeal against revocation of grant and contend that the appeal may be rendered nugatory. They maintain that the appeal filed raises triable issues and submit that staying the ruling will be in the interest of justice.
7. The Respondents have opposed the application vide a Replying Affidavit of Maryleen Thome (the 1st Respondent) herein where she avers as follows; that the present application fails to meet the threshold for grant of orders sought. That the applicants lack locus standi to seek orders on behalf of Priscilla Kavutha Mwenda. That orders of the trial court preserved the estate of the deceased and issuing orders of stay sought herein exposes the estate of the deceased to depletion, disposal and wastage as the applicants would be affirmed as the administrators of the estate of the deceased. It is also averred that the applicants have not demonstrated that they would suffer irreparable loss and I have not met the other threshold for grant of orders of stay such as security. It is averred that subdivision of the estate of the deceased emanated from a defective process initiated by the applicants.
8. They have further submitted through the learned counsel Mr. Wairegi that the issues raised in their application for revocation of grant touched on fraud, concealment and misrepresentation of facts. They aver that the initial distribution of the estate based on the revoked grant failed to cover all the beneficiaries adding that the Ruling delivered revoking the grant was made after the trial court heard *viva voce* evidence.
9. They contend that the ruling delivered in the lower court is for the preservation of the estate pending administration and distribution of the estate.
10. This court has considered this application and the response made. The applicants are basically asking for two reliefs namely;
 - a. Stay of proceedings
 - b. Stay of execution



11. I will begin with the prayer for Stay of Execution. The principles guiding the grant of a stay of execution or proceedings are provided under Order 42 Rule 6 (1) & (2) of the [Civil Procedure Rules](#) which provides;
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 make such orders 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 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.
12. There are conditions which a party must establish before a court can order a stay of execution. The same are provided for under Order 42 rule 6(2) [Civil Procedure Rules](#). Basically, the Applicant must satisfy the following conditions:
- i. that substantial loss may result to the applicant unless the order is made
 - ii. that the application has been made without unreasonable delay; and
 - iii. that the applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
13. Apart from the above listed conditions, an applicant must demonstrate that he has a good cause for a stay of execution. Now looking at issues at hand in this respect, the Applicants seek to stay a lower court's ruling which ruling revoked a grant of letter of administration issued to the Applicants on 15th October 2019 and confirmed on 17th July 2020 and rectified on 9th November 2020. The grant is already revoked and once the revocation was done, it meant that the estate automatically reverted back to the deceased pending distribution. The applicants have not demonstrated the loss they are likely to suffer at this stage because for one the trial court is yet to appoint new administrators/administratrix pursuant to the provisions of Section 53 (d) of [Law of Succession Act](#).
- Secondly, no grant has been issued pursuant to Rules 25 & 26 of [Probate & Administration Rules](#) and no one has made an application for confirmation of grant yet. So the fears expressed by the applicants for now have no basis in law.
14. On the questing of stay of proceedings, this court takes the position that a stay of proceedings is unlike stay of execution because it has serious ramifications. It has the effect to completely stall proceedings which in turn interferes with the right of a litigant to conduct litigation and access justice. A court can only issue a stay of proceedings in exceptional circumstances where such proceedings are likely to infringe on constitutional right of one of the parties or prejudice the interest of justice.



15. In *Halsbury's Laws of England, 4th Edition, Vol. 37 at p. 330*: The authors say:

“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 proceedings, beyond reasonable doubt, ought not to be allowed to continue....This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case.”

16. A 5-judge Bench of the High Court in the case of *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR laid down six principles for the grant of stay of proceedings pending the hearing and determination of an appeal as follows;

“A scan of our decisional law reveals that our Courts have established the following principles for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. 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:

- 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
- 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.”



17. This court has considered the grounds raised in this application and in fact went to some lengths trying to find out from the counsel of the applicants what the applicants stand to suffer in the event that the trial court proceeds in entertaining the matter and all I could decipher was that there is a pending appeal that ought to be determined first. The parties herein are brothers and sisters. The deceased was their father and the issues raised in the appeal regarding revocation of grant are basic questions of fact and law which would not take long to determine. This court does not find it just or expedient to stay the proceedings.
18. The appeal herein relates to the questions whether the trial court erred in finding that the deceased had not left a valid oral will and whether the trial court was correct in revoking the grant going by the provisions of Section 76 of the *Law of Succession Act*.
19. The Appellants have not demonstrated how their appeal will be rendered nugatory unless a stay of proceedings is granted. The threshold for a stay of proceedings is high as showed above and that threshold has not been met herein.
20. In the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR, Gikonyo J made the following observations in regard to an application to stay proceedings;

“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 proceeding is high and stringent”.
21. In light of the above cited authorities and for the reasons advanced, this court finds no merit in the application dated 27th February 2024. The same is disallowed. Costs will be in the main Appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 20TH DAY OF MAY, 2024

HON. JUSTICE R. K. LIMO

JUDGE

