



**In re Estate of Ainea Masinde Walubengo (Deceased) (Succession Cause 67 of 2001) [2024] KEHC 8922 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8922 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
SUCCESSION CAUSE 67 OF 2001**

**DK KEMEL, J**

**JULY 19, 2024**

**IN THE MATTAER OF THE ESTATE OF AINEA MASINDE WALUBENGO-DECEASED**

**BETWEEN**

**CHARLES MUSUNGU MASINDE ..... 1<sup>ST</sup> PETITIONER**

**ANN NANJALA MASINDE ..... 2<sup>ND</sup> PETITIONER**

**PETER WANYAMA OKUMU ..... 3<sup>RD</sup> PETITIONER**

**AND**

**ALDERT NYONGESA & 2 OTHERS ..... OBJECTOR**

**RULING**

1. *Vide* Notice of Motion application dated 11<sup>th</sup> January 2024, the Petitioners/Applicants herein sought the following orders:
  - a. That the Orders issued on 2<sup>nd</sup> March 2023, be vacated.
  - b. That the application dated 15<sup>th</sup> June 2023 be fixed for hearing.
  - c. That costs be in the cause.
2. The application was premised on the sworn a supporting affidavit of the 1<sup>st</sup> Petitioner/Applicant, Charles Mususngu Masinde, and the grounds on the face of the application.
3. In that affidavit, the 1<sup>st</sup> Petitioner/Applicant avers that on 2<sup>nd</sup> March 2023, the Respondents herein were issued with conditional stay of execution orders pending their filing of the intended appeal to the Court of Appeal within seven days from the date of the issuance of the stay orders. He averred that prior to the filing of the instant application, the Respondents are yet to comply with the Court orders and that the time required to file the respective record of appeal has since lapsed. He averred that the Respondents are still utilizing the land and have denied the Petitioners access to the same since the



Court issued the orders and that should this Court fail to issue the respective orders, some beneficiaries are likely to suffer irreparable loss.

4. In response to the application, the Respondents vide the 1<sup>st</sup> Respondent sworn their replying affidavit on 12<sup>th</sup> February 2024, averring that the notice of motion dated 11<sup>th</sup> January 2024 and the supporting affidavit is marred with falsehood and that after issuance of the court orders on 2<sup>nd</sup> March 2023, the Respondents herein proceeded to the Court of Appeal and filed an appeal in Kisumu Court of Appeal CA E052/2023 and that the same was duly served upon the Applicants. The Respondents further filed a replying affidavit dated 13.5.2024 wherein it was averred that upon lodging the appeal, they also sought orders of stay of execution of the judgement pending the determination of the appeal at the Court of Appeal and further averred that the delay in preparing the record of appeal has been caused by the court registry.
5. When the application came up for hearing, parties agreed to canvass the same through written submissions. However, it is only the Petitioners/Applicants who complied with the Court directions.
6. The Petitioners/Applicants submitted that the Respondents aggrieved by the judgement of the Court issued on 7<sup>th</sup> October 2022, granting the Petitioners/Applicants the greenlight to distribute the estate of their deceased father, Ainea Masinde Walubengo filed an application for stay of execution pending the filing of their appeal to the Court of Appeal. Counsel for the Petitioners submitted that this Court granted the orders of stay on the condition that the Respondents file and serve the memorandum of appeal to the Petitioners within seven days from the date of the orders. Counsel submitted that the Respondents failed to comply with the Court orders and that no explicit evidence was availed that their respective memorandum of appeal was filed and served upon the Petitioners within seven days as ordered by the Court. Counsel argued that the Respondents only proceeded to file the purported Case No. E052 of 2023 in Kisumu Court of Appeal after being served with the notice of motion application and that the same bears parties that are strangers to this matter. Counsel urged this Court to grant the Petitioners the prayers sought and set down for hearing the Petitioners application dated 15.6.2023 seeking for rectification of grant.
7. I have considered the application, grounds thereof, supporting affidavit and annexures. I have also considered the replying affidavit and submission of the Petitioners. The main issue for determination is whether the Petitioners/Applicants have demonstrated that the orders sought are merited.
8. Section 1A(2) of the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
9. In the case of *Republic v Kenya Urban Roads Authority & 3 others Ex-parte Cytonn Investments Management Limited* [2018] eKLR, the Court defined a stay order as follows: -

“A Stay Order is defined as a court order halting or suspending a judicial proceeding either fully or temporarily. Such orders are issued in order to suspend or stop a legal action until a certain condition is fulfilled or a particular event occurs. The court can lift the suspension later on and re-commence the legal proceeding. In general, however, there are two types of Stay Orders: a Stay of Execution and a Stay of Proceedings. A Stay of Execution is a Stay Order issued by court suspending or delaying the enforcement of a judgment against a person.”



10. Before delving into the merits of the instant application, i wish to comment on the averments made by the Respondents in asking the Court to grant them an opportunity to file the record of appeal at the Court of Appeal and the issuance of the conditional stay of execution orders on the condition that the Objectors/Respondents file the requisite memorandum of appeal within seven days from the date of the orders.
11. Justice Joel Ngugi in Nakuru HCC No. 193 of 2011, *Sammy Kuria Ndung'u v Samuel Mbugua Ikumbu* while addressing the issue of application made after the filing of a Notice of Appeal at the Court of Appeal held as follows: -

“... It makes sense that once a Notice of Appeal has been lodged, any further applications related to the appeal should be filed at the Court of Appeal which is then seized of the matter. This prevents the ugly spectacle or contretemps of a litigant litigating the same issue in two different layers of our Courts. It provides for a predictable docket management system...”
12. Any application touching on the Notice of Appeal and/or the intended Appeal should be filed at the Court of Appeal. Be that as it may, it is important to note that no conclusive evidence has been availed by the Objectors/Respondents that they filed the Notice of Appeal at the Court of Appeal within the required seven days from the date of grant of conditional stay orders.
13. It is not in dispute that there was a conditional order for stay of execution delivered on 2<sup>nd</sup> March 2023. It is also not in dispute that the Objectors/Respondents failed to comply with the conditions set out in the said order. This is a fact which has been acknowledged by the lack of an availed memorandum of appeal filed and served upon the Petitioners/Applicants by 14<sup>th</sup> March 2023. My strict perusal of the availed annexure marked as AN-1 clearly indicates that the appeal was filed on 12<sup>th</sup> February 2024 after the institution of this notice of motion application by the Petitioners/Applicants. It is evident that there was a delay in filing the Record of Appeal within the strict timelines as ordered. It is instructive that the Objectors/Respondents have not made any application seeking leave for extension of the period to lodge appeal out of time either in this court or the Court of Appeal.
14. Further, it is common ground that following the inaction or omission by the Objectors/Respondents to file and serve the Memorandum of Appeal, the Petitioners/Applicants herein filed this application seeking to vacate the orders of stay of execution granted by this Court on 3<sup>rd</sup> March 2023. That being the position, the orders issued by this court dated 2<sup>nd</sup> March, 2023 must be vacated so as to pave way for the hearing of the Petitioners' application for rectification of grant dated 15<sup>th</sup> June, 2023
15. Consequently, i find that in the absence of an order staying the judgment and decree from this Court or the Court of Appeal, it is my finding that the said ruling issued by S.N. Riechi J on the 7<sup>th</sup> October 2022, allows the Petitioners/Applicants to have access to the land pursuant to the orders aforesaid. Suffice here to add that the Objectors application for stay of execution dated 14<sup>th</sup> November, 2023 is yet to be determined by the Court of Appeal. It is apparent that the Objectors had lodged two similar applications for stay of execution both in this court and the Court of Appeal which leaves no doubt that they are playing lottery with the courts. This thus further bolsters the Petitioners' quest for the orders dated 2<sup>nd</sup> March, 2023 to be discharged.
16. In the result, it is my finding that the Petitioners' application dated 11<sup>th</sup> January, 2024 has merit. The same is allowed as prayed. The Petitioners application dated 15<sup>th</sup> June, 2023 be set down for hearing on priority basis.

It is so ordered.



**DATED AND DELIVERED AT BUNGOMA THIS 19<sup>TH</sup> DAY OF JULY 2024.**

**D. KEMEI**

**JUDGE**

In the presence of:

No appearance Kituyi for Petitioners/ Applicants

Albert Nyongesa 1st Objector Objectors/Respondents

Kizito Court Assistant

