



REPUBLIC OF KENYA



**In re Estate of Mungai Ngumi (Deceased) (Succession Appeal
E001 of 2023) [2024] KEHC 15056 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 15056 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION APPEAL E001 OF 2023
AK NDUNG’U, J
OCTOBER 24, 2024**

BETWEEN

**CHARLES MWANGI GITUTU 1ST APPLICANT
NECTARIUS NYUTU GITUTU 2ND APPLICANT
MARY NYANJUGU GITUTU 3RD APPLICANT
ALICE MUTHONI GITUTU 4TH APPLICANT
GRACE WANGECI GITUTU 5TH APPLICANT
DANIEL WAMAITHA GITUTU 6TH APPLICANT
JANE WANGUI KIONGO 7TH APPLICANT**

AND

**MICHAEL MUCHIRI MURAGE 1ST RESPONDENT
BETH WANJIRU NG’ANG’A 2ND RESPONDENT**

RULING

1. The Applicants moved this court vide the Notice of Motion application dated 21st March, 2024 seeking the following orders;
 1. Spent
 2. Spent.
 3. That an order of stay of proceedings in Nyahururu CM Succ. Cause No. 212 of 2022 do issue pending the hearing and determination of the appeal herein.
 4. Costs of this application be provided for.



2. The application is supported the affidavit of Charles Mwangi Gititu dated 21st March, 2024 and based on the following grounds;
 - a. That the Applicants are beneficiaries of the estate of the deceased.
 - b. That all the beneficiaries were not involved in the process of succession hence the Applicants filed summons for revocation dated 17th January, 2023.
 - c. That the summons for revocation was dismissed by the lower court vide the ruling dated 7th August, 2023.
 - d. That the Respondents have filed summons seeking to distribute the estate of the deceased dated 24th January, 2023 and which is pending hearing and determination in the lower court and the same has been cause listed for mention on 25th March, 2024 for purpose of fixing a ruling date.
 - e. That if distribution is carried out as applied for by the Respondent the Applicants will suffer substantial loss in that they will stand disinherited.
 - f. That the proposed distribution by the Respondents in the lower court will result in displacement of the Applicants from the portions of land adhocly allocated to them by their deceased father.
 - g. That the proposed distribution will effectively uproot the Applicants' homestead and cultivated areas thus causing the Applicants substantial loss.
 - h. That the application herein has been brought without unreasonable delay as the delay herein was occasioned by the transfer of this file to Ol'kalou and change of advocates hence excusable.
 - i. That if the lower court grants the orders of execution of distribution of the estate of the deceased as proposed, this appeal shall be reduced to a mere academic exercise.
 - j. That the Applicants are ready, able and willing to meet any conditions regarding security as this court may deem fit to impulse. (sic).
 - k. That the Respondents will not suffer any prejudice if the orders sought herein are granted as they will continue to stay and cultivate the portions of land that was allocated to them by their father (deceased).
 - l. That it is in the interest of justice that the orders sought herein be granted to preserve the subject matter of the appeal herein and to prevent the appeal herein from being rendered nugatory.
3. Further, the application is supported by the affidavit of 1st Appellant dated 21st March, 2024 with authority of other Applicants.
4. It is deponed that the 1st, 2nd, 3rd, 4th, 5th and 7th Appellants are the children of the deceased while 6th Appellant is the grandson of the deceased and all reside on that parcel of land known as Gilgil/Karunga Block/56 Gitare.
5. That the Appellants are rightful beneficiaries of the deceased and that all that parcel of land known as Gilgil/Karunga Block/56 Gitare forms part of his estate.
6. That the deceased had 2 houses as indicated below;
 - a. 1st House



- i. Debora Kiringa – Wife (deceased)
 - ii. Joseph Kiongo Ngumi – Son (deceased)
 - iii. Beth Wanjiru Ng’ang’a – Daughter
 - iv. Alice Mukami Mwangi – Daughter
- b. 2nd House
- i. Milka Wambaire Gitutu – Wife (deceased)
 - ii. Mary Nyanjugu Gitutu – Daughter
 - iii. Alice Muthoni Gitutu – Daughter
 - iv. Charles Mwangi Gitutu – Son
 - v. Grace Wangeci Gitutu – Daughter
 - vi. Nectarius Nyutu Gitutu – Son
 - vii. Peris Wamaitha Gitutu – Daughter (deceased)
7. That the Respondents misled the Chief Magistrate’s court by indicating that the deceased had 3 houses while its known that the children indicated as beneficiaries in the first house were children of Miriam Nyanjugu (deceased) who was a dependant of the deceased Mugai Ngumi.
 8. Further, that on 14th December, 1992, at 7.30pm while their deceased father was still alive, he called a family meeting in which minutes were taken by Nectarius Nyutu Gitutu one of their elder brothers. The minutes are annexed.
 9. That over the years the Applicants have individually developed their parcels of land that were pointed to them by their late father and constructed their homes.
 10. That the parcel of land Gilgil/Karunga Block/56 Gitare is within Gilgil Sub-County in Nakuru County.
 11. Charles depones that the Respondents without the consent of the majority beneficiaries filed a petition for letters of administration in the Chief Magistrate Court at Nyahururu instead of Naivasha Chief Magistrate court thus offending the doctrine of the geographical jurisdiction of the court.
 12. He adds that the 2nd Appellant (one of the administrators) depones that he was never involved in the process of petitioning the court for grant of letters of administration in the Chief Magistrate’s Court at Nyahururu and that his signature appearing on the Petitioner’s application were forged.
 13. That the Respondents wants to disinherit and displace the majority beneficiaries from their parcels of land that were pointed to them by the deceased and that if allowed to continue with their illegal activities, some of the beneficiaries’ houses will be demolished and their parcels of land which they have developed for many years taken away from them.
 14. That on 9th December, 2022 the Respondents caused the suit property to be sub-divided without the consent of the majority beneficiaries and that if the said mutation is implemented almost all the beneficiaries will be displaced and their dwelling houses demolished to confirm with the illegal boundaries created.



15. It is averred that it is clear from the application for confirmation of grant filed in the Chief Magistrate's court Nyahururu on 27th May, 2022, the consent is signed by seven people only while the majority beneficiaries never appended their signatures. The signature of one of the Administrators one Nectarius Nyutu Gitutu appearing on the said application was forged.
16. It is the Applicants' case that the Chief Magistrate Court in Nyahururu lacked jurisdiction to issue letters of administration and a certificate of confirmation of grant. The said application was not dated.
17. That all the beneficiaries were not involved in the process of succession hence the Appellants filed summons for revocation dated 17th January, 2023 which summons was dismissed by the lower court vide a ruling dated 7th August, 2023.
18. That the Respondents have filed summons seeking to distribute the estate of the deceased dated 24th January, 2023 which is pending hearing and determination in the lower court and if allowed by the lower court the Applicant' shall suffer substantial loss and stand prejudiced and the appeal herein be reduced to an academic exercise.
19. The Appellants indicate that they are ready, able and willing to meet any conditions regarding security as this court may deem fit and no prejudice will be occasioned on the Respondents should the orders sought be granted.
20. The application is opposed and in a replying affidavit Michael Muchiri Murage and Beth Wanjiru Nganga (the Respondents) depone that the certificate for confirmation of grant dated 29th September, 2022 has since been executed by subdivision of L.R. No. Gilgil/Karunga Block 9/56 (Gitari) by a competent surveyor.
21. They add that the attempts to set aside the confirmation was unsuccessful after the application dated 17th January, 2023 for revocation of grant was dismissed after a full hearing and the only remaining issue is transfer of the land to the respective beneficiaries which has been hindered by the 2nd Appellant who is an administrator who has declined to execute transfers by way of transmission.
22. It is the Respondents' case that the Appellants have been enjoying the use of the estate of the deceased since his demise in exemption of the other beneficiaries especially members of the 1st and 2nd houses save for the 7th Appellant and the stay sought is solely meant to extend the unjust enrichment by the Appellants who are members of the 3rd house save for the 7th Appellant.
23. The Respondents further depone that attempts of the 1st and 2nd houses to take possession of the land are always met by acts of violence by the Appellants herein and which violence has been reported and that it is unjust and unfair for 7 people out of 21 beneficiaries to benefit exclusively for 30 years from the deceased's estate in exclusion of the others and that it is only fair and just for the prayers sought to be declined.
24. The stay sought is challenged in that it is intended to stop the prosecution of their application dated 24th January, 2023 seeking to restrain the Appellants herein from further interferences with the Respondents' entitlement of the estate amongst other prayers to enable the Appellants continue with their unlawful acts.
25. It is urged that the issues raised in the Appellants' supporting affidavit do not form grounds of appeal raised by the Applicants and they were never raised during the hearing before the Chief Magistrate's court and the same is an afterthought.



26. Further, that none of the Appellants stand to be displaced and/or evicted as alleged and the buildings referred to were constructed before the filing of a succession cause for the estate of the deceased without the involvement of all the beneficiaries and in violation of the law.
27. That 14 beneficiaries as opposed to the 7 Applicants are contended with the mode of distribution of the estate which is equitable and fair and that the Appellants have not denied the fact that the 14 beneficiaries in support of the confirmation are indeed beneficiaries of the estate of the deceased and the estate was distributed equally as per the law and the appeal is just a waste of court's time and has no chances of success.
28. The application was canvassed by way of written submissions. The Applicants filed their submissions dated 14th June, 2024 and it's their case that they were not satisfied with the mode of distribution that was adopted at the confirmation of grant and filed revocation summons dated 17th January, 2023 which summons were eventually dismissed by the court, hence filing of this appeal.
29. That upon filing of the appeal, the Respondents hurriedly invited a surveyor to subdivide the land in a move clearly intended to defeat the appeal, and that upon the Respondents' realization that they could not transfer the subdivided portions rushed to the lower court and filed summons dated 24th January, 2024 seeking execution of the transfer documents.
30. It is urged that this application was brought without unreasonable delay and that the appeal was filed together with the application for stay of execution which appears to have been misplaced hence the present application. The Applicant has not been indolent in any way and have acted vigilantly in bringing this application as required by Order 42 Rule 6(2) of the Civil Procedure Rules.
31. It is the Appellants' case that they are farmers depending wholly on the farming activities that they carry out on the suit land and have no other source of income to sustain their livelihood to support their families and will therefore suffer substantial loss if the stay is not granted.
32. That the Respondents have not offered to compensate the Applicants if the appeal is successful.
33. It is submitted that the Respondents were allowed to file the succession cause in the lower court without consideration of the lack of jurisdiction and that the grant was issued on 4th July, 2024 and confirmed barely 2 months later on 29th September, 2024 which is alarming.
34. That the only justifiable order to be made in this case is for stay of proceedings in the lower court to allow the Applicants ventilate their appeal.
35. Applicants urge the court to find that they have demonstrated to the satisfaction of the court the conditions enumerated under Order 42 Rule 6 (2) of the Civil Procedure Rules.
36. They rely on the following cases;
 1. Nicholas Stephen Okaka vs Alfred Waga Wesonga (2022) eKLR.
 2. Festus Nyambeka vs Texco Spinning Mills (2014) eKLR.
 3. Jaber Mohsen Ali & Another vs Priscillah Boit & Another (2014).
 4. Commercial Bank Limited vs Sun City Properties Limited & 5 Others (2012) eKLR.
37. The Respondents filed their submissions dated 2nd August, 2024 where they invite the court to make determination on the following issues;



- a. Whether stay orders should be issued.
 - b. Whether proceedings of the lower court should be stayed pending hearing and determination on this appeal.
 - c. Who should bear the costs of this application
38. The Respondents maintain that that the Applicants have not met the conditions necessary for the grant of the orders sought. Reliance is placed on the case of R Estate of the late Kaburachi Peter (deceased) [2021] eKLR .
39. Further reliance was placed on the decision in James Wangalwa & Another vs Agnes Naliaka Chesoto [2012] eKLR the court observed as follows;

“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.... This is so because execution is a lawful process.

The Applicant must establish other factors which show that the execution will create state of affairs that will irreparably effect 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 discusses in the case of Silverstein vs Chesoni [2002] ILR 867, and also in the case of Mukuma vs Abuoga quoted above. This is the last case, referring to the exercise of the discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the Civil Procedure Rules 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.”

40. It is urged the Applicants confirm that they have erected houses on the land and depend on the it for farming and the Respondents maintain that the Applicants save for the 7th Applicant been utilizing the entire land in exclusion of other beneficiaries and any attempts to take possession of the land has always been met with violence and those averments have not been refuted and/or denied by the Applicants.
41. Further, that none of the Applicants stands to be evicted and/or misplaced after the execution of the certificate of confirmation of grant and that the land has been divided equally and everyone was taken into consideration and that the Applicants ought to have proved the issue of substantial loss.
42. It is submitted that the Applicants have not tabled adequate evidence in support of substantial loss and urge this court to find and hold that this mandatory requirement has not been proved and it is urged that the application was not brought timeously the and the reason for delay has not been explained and, in addition, the Applicants’ failure to prove substantial loss, renders the application defective and disentitles the Applicant the exercise of discretion of the Court in their favour.
43. Reading through the pleadings, affidavit evidence and learned submissions, I note that a lot of energy has been expended addressing the question of the grant of a stay of execution yet from the prayers in the application, the focus ought to have been on the principles applicable in an application for stay of proceedings.
44. In a nutshell, the Applicants seek a stay of proceedings that are before the lower court, which proceedings aim at distribution and winding up of the subject estate. The issuance of a stay of



proceedings is not a light matter. This was well captured in the case of *Ama vs TVMA (Family Appeal 34 of 2021)* [2022] KEHC 14887 (KLR) (21st October, 2022) (Ruling) where the court observed as follows;

“Stay of proceeding 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. See Ringera J in the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No 43 of 2000* persuasively stated thus;

“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.” (emphasis added)”

32. From the above citation it's evident that there are two critical conditions that a court has to consider before issuing stay of proceedings namely;
 - a. Whether the appeal is arguable.
 - b. Whether the application was brought expeditiously.”
45. To these issues I would add, and again paraphrasing from the same judge's words that 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’.
46. Heavy weather has been made of the fact that a memorandum of appeal was not attached to the application. On perusal of the record, I note there is a memorandum of appeal dated 15th August 2023.
47. The nature of the matter before court is such that it is a succession cause. A succession cause is not filed for any party's personal gain. The administrators are only handmaidens in the process of ensuring all beneficiaries get what is rightfully theirs from an estate in which they are entitled. The substantial loss that would arise in such a situation is the disinheritance of a beneficiary(ies).
48. In the instant matter, it is plain and obvious that should the distribution of the estate herein proceed at the lower court to conclusion, the likely prejudice on the discontented beneficiaries stands out like a sore thumb.
49. It cannot be gainsaid that the estate herein being one where the available asset for distribution is land, once the distribution and transmission occur, beneficiaries will be at liberty to deal with their shares as they deem fit including disposal.
50. Such a scenario would portend the danger of rendering the appeal nugatory and any success by the appellants would be a pyrrhic victory not worth the paper it would be written on.



51. Other than the extended period of waiting for the outcome of the appeal, I see no prejudice at all that would be visited on the Respondents and the scales of justice tilt towards maintaining the subject asset intact to await a final determination of the respective rightful shares of all the beneficiaries including the respondents.
52. I say so in the knowledge that the grant of a stay of proceedings is a discretionary power. In the exercise of the discretion the court cannot legitimately look at a matter on one assumption alone, favouring one party and ignoring the other party. As aptly put Kuloba J (Rtd) in *Machira t/a Machira & Co Advocates v East African Standard* [2002] eKLR;
- “In applications of this nature there is no rule of law or practice or sound principle requiring a court to start and proceed on initial presumption that the appeal or intended appeal shall succeed and so prima facie the applicant is the preferred party. There would be no sound principle to back up such a presumption. The matter must remain in the discretion of the court always exercised judicially, i.e. circumspectly and considering all the material circumstances of the case and excluding everything that is extraneous, and never shutting one’s eyes to the interests of any party”.
53. Again, borrowing the wisdom of Kuloba J, when a party has been found by a court to be in the right at whatever stage in the litigation, he should ordinarily have access to the consequences of that judicial finding and decision and enjoy his rights as so found and determined. Any subsequent decision of the court which tends to impede the normal flow of justice, by suspending the enjoyment of the consequential benefits of one’s success can only be rendered in exceptional circumstances after an exercise of great caution and finding that suspension is necessary in justice and fairness.
54. I am persuaded that exceptional circumstances do exist that tilt in favour of suspending the trial at the lower court pending the hearing and determination of appeal.
55. In the premises, I find merit in the application. I allow the same and make the following orders;
- a. That an order of stay of proceedings in Nyahururu CM Succ. Cause No. 212 of 2022 be and is hereby issued pending the hearing and determination of the appeal herein.
 - b. The costs of this application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF OCTOBER, 2024

.....

A.K. NDUNG’U

JUDGE

