



REPUBLIC OF KENYA



**In re Estate of John Mutio Mutua (Deceased) (Succession Cause 1360 of 2019)
[2024] KEHC 12895 (KLR) (Family) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12895 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1360 OF 2019
PM NYAUNDI, J
OCTOBER 11, 2024
IN THE MATTER OF THE ESTATE OF JOHN MUTIO MUTUA (DECEASED)**

RULING

1. This ruling relates to 2 applications. The first is dated 31st March 2022 and the second is dated 23rd May 2022. The Application dated 31st March 2022 is presented under Order 42 rule 6 of the [Civil Procedure Code](#), Section 47 of the [Law of Succession Act](#), Rule 49 and 73 of the [Probate and Succession Rules](#) and Sections 3 and 3A of the [Civil Procedure Act](#). The Applicant seeks the following orders-
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of the Appeal at the Court of Appeal this Honourable Court be pleased to stay execution of the Ruling delivered on 21st February 2022 and all consequential orders hereto.
 - d. Spent
 - e. That costs of this Application be in the Cause.
2. The Petitioner contends that she is a wife of the deceased and unless stay is granted, the estate and beneficiaries will be prejudiced. She contends that she has an arguable appeal as evidenced by the attached memorandum of appeal and that therefore she has met the threshold for the grant of a stay of proceedings.
3. The Application is opposed by the respondents and Counsel Mary Goretti Chepseba has sworn affidavits on 26th May 2022 and 3rd May 2022. The 4th Respondent / Executor, Gabriel Nzioki Mutinda has sworn affidavit on 4th May 2023. The interested party also opposes the application.
4. The Second Application dated 23rd May 2022 is presented under Section 47 of the [Law of Succession Act](#), Article 159 of the [Constitution](#) of Kenya and Sections 3 and 3A of the [Civil Procedure Act](#). The



Application is supported by the affidavit of Saphina Mulee Mutua annexed. The Petitioner herein opposes the Application and has sworn affidavit in opposition which is on record. This affidavit has triggered the filing of a supplementary affidavit. The Application is supported by the Executor and the Interested party, who have both filed affidavits in support.

5. The Applications were canvassed via written submissions. I have considered the pleadings and the submissions and the issues that this court must determine are
 - a. Whether the Court should grant stay of execution
 - b. Whether the Court should grant stay of proceedings
 - c. Who should pay costs of the suit.
6. I must at the outset thank all the counsel for the erudite submissions. It is common ground that the Court is yet to grant letters of administration in respect of the estate. The Petitioner submits that for this reason the orders cannot be executed as there is no administrator and relies on the decision in *Re Estate of Barrack Deya Okul (Deceased)* [2018] eKLR.
7. In the present case the Will of the deceased in which Gabriel Nzioki Mutinda is nominated as the Executor is contested. Indeed, in *Re Estate of Lawrence Nginyo Kariuki (Deceased)* [2021] eKLR the Court found that whereas under Section 80 (1) of the *Law of Succession Act* conferred upon the nominated Executor leeway to deal with the estate as an executor, even before the probate is granted, this is not the case once the will is challenged as the foundation of the executor's authority is challenged.
8. The law abhors a vacuum and therefore under paragraph 10 of the Fifth Schedule the law confers on the Court the authority to appoint an administrator of the estate of the deceased person, who shall have all the powers and rights of a general administrator, other than the right to distribute the estate, which administrator shall be under the immediate control of the Court and shall act under its direction.
9. On whether or not the Court should grant stay of execution; the law and judicial precedent are clear on the principles that will guide the court in exercising its discretion and are well articulated in the locus classicus case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal held that-
 1. The power of the court to grant or refuse an application for a stay of
 2. execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 3. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
 4. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 5. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
10. In *RWW v EKW* [2019] eKLR, the Court had this to say on the purpose of a stay of execution order pending appeal, in the following words



The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.

11. Even as the Petitioner pursues her right to appeal which is guaranteed by the Constitution, the Creditors ought not to be denied the fruits of their judgment. I have read that decision in Re Estate of Barrack Deya Okul (Deceased) [2018] eKLR in which the court underscored the fact that liabilities are a first charge and that administrators are bound by law to ensure that liabilities are settled prior to distributing the estate. The Court then proceeded to direct that the administrators list the debt owing to the applicants in the Petition as a liability.
12. Rule 73 of the Probate and Administration Rules gives this Court powers to make orders to meet the ends of Justice. Guided by the above authorities and having regard to the specific circumstances of this case I find that justice will be served if the following orders are made;
 - a. Stay of Execution of Pending Appeal is granted provided that the Petitioner files and serves record of Appeal within 45 days from the date hereof
 - b. Pursuant to Order 10 of the Probate and Administration Rules, I appoint Gabriel Nzioki Mutinda as the Administrator of the Estate of John Mutio Mutua pending the determination of this Cause. As administrator he will within 30 days -
 - i. open an Estate Account
 - ii. withdraw the sum of Kshs 4,730,145.30 from the deceased's bank accounts namely
 1. Account at ABSA, Premier Flagship Branch; Account No 0366xxxxxx and
 2. Account at Standard Chartered Bank, Yaya Centre Branch; Account No 0100210xxxxxx
 - iii. He shall deposit the entire sum of Kshs 4, 730.145.30 in the Estate Account and in the event that the Petitioner complies with the order in Paragraph 12 above hold that sum in the Estate Account pending the determination of the appeal. In the event however that the Petitioner defaults, he shall pay out the entire sum to the creditors as per the orders of 21st February 2022.
 - c. On account of the orders above the application dated 23rd May 2022 is dispensed with.
 - d. I note that this matter was commenced in 2019, it is in the interests of justice that the Succession Cause be dispensed off expeditiously, accordingly the matter will be mentioned on 23rd October 2024 before the Deputy Registrar to confirm compliance with Order 11 of the Civil Procedure Rules and to take further directions on the hearing of the Petition.
 - e. This Being a family matter each party will bear their own costs.

It is so ordered



**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 11TH DAY OF OCTOBER,
2024.**

P. NYAUNDI

JUDGE

In presence of: -

Fardosa Court Assistant

Advocate for Applicant

Advocate for Respondent

