



REPUBLIC OF KENYA



In re Estate of Solomon M’Kachuki (Deceased) (Succession Cause 288 of 2004) [2023] KEHC 935 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 935 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 288 OF 2004
TW CHERERE, J
FEBRUARY 9, 2023**

BETWEEN

ELIZABETH MUKOMBIRO PETITIONER

AND

LAWRENCE MUKARIA M’ACHIUKI OBJECTOR

AND

CHARLES NTONGAI 1ST RESPONDENT

PAUL MEME 2ND RESPONDENT

AND

MARGARET NCORORO APPLICANT

RULING

1. By an order dated July 12, 2018, Lawrence Mukaria M’Achiuki and Amos Karani M’Achiuki were appointed joint administrators of this estate.
2. Subsequently by a judgment dated May 25, 2022, the court ruled that all the daughters of the deceased, including Margaret Ncororo (applicant) herein had been provided for during the deceased’s lifetime and thereby distributed the deceased’s estate comprised in LR Ithima/Antuambui/20 equally to his sons Lawrence Mukaria M’achiuki and Charles Ntongai.
3. By summons dated October 24, 2022, applicant prays for stay of execution of the grant and leave to appeal. The application is premised on the grounds among others that applicant who is the daughter of the deceased has not been provided for and desires to appeal against the court’s decision made on May 25, 2022.



4. The application is supported by an affidavit sworn by the applicant on October 24, 2022 in which she reiterates the grounds on the face of the and on the ground that his brothers are moving with speed to execute the grant and deny her her rightful share.
5. The application is opposed vide a replying affidavit dated December 15, 2022 sworn by one Charles Ntongai (1st Respondent) who states that applicant was provided for by the deceased during his lifetime and this was considered by the court and she has not given any reasons for the 5 months' delay in filing an appeal from the 22nd day of May, 2022 when the judgement was delivered.
6. I have considered the summons in the light of the affidavit on record and annexures thereto and submissions for both parties and the issue for determination as whether orders for leave to appeal and stay of execution ought to be granted
7. The right to appeal to the Court of Appeal, in succession matters, lies with leave and the court has therefore been properly moved. (see [Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another](#) [2014] eKLR).
8. In the case of [Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission](#) [2014] eKLR, the Supreme Court held as follows;

“From the above case law it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant”.
9. The 5 months' delay has in my considered view has not been explained to the satisfaction of the court. The foregoing notwithstanding, land is a sensitive issue and parties should be allowed to come to the court to have the issues involved in their dispute determined by a court of last resort (See [Mugab v Kunga](#) [1988] KLR).
10. The right to be heard by a court of last resort is embodied by the provisions of article 50 (1) of the [Constitution](#) which provides that:
 - (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
11. As this is a succession matter involving land, I am persuaded that the interest of justice would be better served if the applicant is granted leave to appeal and the same is hence granted notwithstanding the 5 months' delay in bringing this application.
12. Concerning stay of execution, it is trite that an applicant who seeks an order of stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in order 42 rule 6(2), namely:
 - (a) that substantial loss may result to the applicant unless the order is made,
 - (b) that the application has been made without unreasonable delay, and
 - (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. (See [Halai & another v Thornton & Turpin](#) [1963] Ltd [1990] eKLR and [Beatrice Ndunguri Mwai & another v Sicily Wawira Titus & another](#) [2020] eKLR)



13. In *Butt vs. Rent Restriction Tribunal* [1979], the Court of Appeal stated that discretion whether or not to grant an order of stay pending appeal ought to be exercised in a manner that would not cause injustice to any party.
14. Substantial loss in its various forms is the corner stone of best jurisdictions for granting an order of stay of execution. In the instant case, the applicant does not deny that she was provided for by the deceased during his lifetime. I therefore find that she is unlikely to suffer any substantial loss if stay of execution of eth grant is not granted.
15. From the foregoing analysis therefore, the summons dated October 24, 2022 is considered and allowed in the following terms:
 1. Applicant is granted leave to appeal the judgment and grant dated May 25, 2022
 2. In order to preserve the subject matter of the appeal, it is hereby ordered that upon distribution of deceased's estate comprised in LR. Ithima/Antuambui/20, the beneficiaries shall neither sell, dispose off, charge nor in any adverse manner deal with their respective portions pending the hearing and determination of the intended appeal and/or until any and or further orders of the court
 3. Costs shall be costs in the intended appeal

DELIVERED IN MERU THIS 09TH DAY OF FEBRUARY 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Mr. Kinoti

For Applicant - Mr. Kimathi for L.Kimathi Kiara & Co. Advocates

For 1st Respondent - Mrs Mutegi for Mutegi Mugambi & Co. Advocates

For Objector - N/A

