



**In re Estate of Joseph Ngiela Mbori (Deceased) (Civil Appeal
E078 of 2022) [2023] KEHC 2437 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2437 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E078 OF 2022**

**KW KIARIE, J
MARCH 23, 2023**

BETWEEN

MARY ACHIENG NGIELA APPELLANT

AND

WYCLIFFE OCHIENG NGIELA & 2 OTHERS RESPONDENT

RULING

1. The appellant/applicant moved the court by way of Notice of Motion dated December 15, 2022. It was brought under sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act, sections 45 & 47 of the Law of Succession Act, Rules 49, 63 (2) & 73 of the Probate & Administration Rules, Rule 3 of the High Court Practice and Procedure Rules & Articles 40, 48, 159 (2) & 165 of the Constitution of Kenya. She is seeking the following orders:
 - a. The instant application be certified urgent and same be heard on priority basis.
 - b. That pending the hearing and determination of the instant Application, the Honourable court be pleased to issue conservatory orders and /or preservative order restraining the respondents either by themselves, agents and /or servants from alienating ,transferring, selling, disposing or charging, subdividing and /or dealing with LR Nos Central Kasipul/Kamuma/9453.9454 & 9455, arising out of the sub-division of LR No Central Kasipul/Kamuma/474 (the original suit property) which parcel of land formed and/or constitute the estate of the deceased in any manner whatsoever pending the hearing and determination.
 - c. That pending the hearing and determination of the instant Application, the Honourable court be pleased to issue conservatory orders and /or preservative order restraining the respondents either by themselves, agents and /or servants from alienating, transferring, selling, disposing or charging, subdividing and /or in any other way whatsoever and/or howsoever interfering and/or dealing with LR Nos Central Kasipul/Kamuma/9453.9454 & 9455, arising out of the sub-



division of LR No Central Kasipul/Kamuma/474 (the original suit property) which parcel of land formed and/or constitute the estate of the deceased in any manner whatsoever

- d. That pending hearing and determination of the instant application, the honourable court be pleased to grant an order for maintenance of the status quo, over and in respect of LR Nos Central Kasipul/Kamuma/9453,9454 & 9455, arising out of the sub-division of LR No Central Kasipul/Kamuma/474 (the original suit property) more particularly, pertaining to the title, occupation and possession thereof.
 - e. Costs of this application be borne by the respondents.
2. The application was premised on the following grounds:
- a. The deceased herein died intestate on the December 16, 2003
 - b. Prior to the death of the deceased, he was registered as the proprietor of LR No Central Kasipul/Kamuma/474 (hereinafter referred to as the original suit property) and, thus, the original suit property formed and/or constituted part of the estate of the deceased.
 - c. Following the death of the deceased, the applicant herein lodged succession proceedings in respect of the estate of the deceased herein vide Kisii HCC Succession Cause No 406 of 2009 whereby same was appointed alongside Andronica Ondoro Ngiela the legal administrators of the estate of the deceased.
 - d. Subsequently the succession proceedings was heard and determined and the Grant issued to the applicant and her co-administrators, was confirmed on the September 28, 2017.
 - e. Besides the original suit property herein was one of the property that formed and /or constituted part of the estate of the deceased. For clarity, the original suit property was bequeathed and/or distributed to one Andronico Ondoro Ngiela now deceased and a son of the deceased.
 - f. Notwithstanding the foregoing, the 1st respondent herein equally, though in a fraudulent manner, applied for Grant of letters of administration in respect of the same estate of the deceased and same was also issued with a grant.
 - g. Subsequently, the 1st respondent caused the original suit property to be sub divided into LR Nos Central Kasipul/Kamuma/9453,9454 & 9454 & 9455 whereby same was transferred and registered in his name and the names of the 2nd and 3rd respondents, without regard to the rights and interest of other beneficiaries.
 - h. The 1st respondents has been disposing the original suit property to third parties including the 2nd and 3rd respondent herein, which is likely to seriously prejudice the other beneficiaries.
 - i. The respondents are threatening to further sell, dispose of and /or alienate the original suit property.
 - j. The 1st respondent conduct of fraudulently obtaining the grant and selling and/ or gifting the deceased estate to strangers and third parties has prejudiced the Applicant and the other beneficiaries and hence the need for conservatory orders to protect the estate of the deceased.
 - k. Owing to the foregoing, the actions and or threatened actions by and /or on behalf of the respondents, are null and void and thus illegal ab initio.



- l. Consequently as a result of the acts, threats and /or omissions of the respondents, the applicant is disposed to suffer an infringement of her Constitutional rights and thus requiring the protection of this honourable court.
 - m. As the legal administrator of the estate of the deceased, the appellant/applicant has the duty to safeguard the estate of the deceased from further offensive actions.
 - n. In the premises, the appellant /applicant has a prima facie case against the respondent's for acting without any legal authority.
 - o. In any event, the acts of the respondents shall occasion irreparable loss to the applicant, including but not limited to denial and /or deprivation of the applicants rights to inherit her father's estate.
 - p. Unless the estate of the deceased is preserved and/or conserved, there is real danger of the estate of the deceased and more particularly, the original suit property herein being wasted, alienated and /or disposed of.
 - q. Consequently, this is a fit and proper case to grant conservatory orders/preservatory orders.
 - r. It is in the interest of justice that the application herein be granted ex debito Justitiae.
3. The respondent opposed the application on the following grounds:
 - a. That the application is full of falsehoods meant to delay the hearing of the appeal.
 - b. That the applicant will not suffer any loss is orders sought are not issued.
 4. This is an application that is seeking stay of execution of orders of the trial court pending the hearing and the determination of the appeal. It is trite law that an appeal does not operate as a stay for execution. Order 42 Rule 6 of the [Civil Procedure Rules](#) states as follows:
 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 to make such order 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.
 5. In the case of [RWW v EKW \[2019\] eKLR](#), the court while addressing its mind to the purpose of a stay of execution order pending appeal, stated:

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.
 6. In the instant case, after perusing the record and the submissions by both parties and in the interest of justice, I will allow the application on grounds that the applicant sets down the appeal for hearing



within 30 days of this ruling. Failure to comply, the respondents may be at liberty to implement the orders of the trial court.

7. Costs shall abide with the appeal.

DELIVERED AND SIGNED AT HOMA BAY THIS 23RD DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

