



**In re Estate of Busolo Nambili (Deceased) (Succession Cause
198 of 2015) [2023] KEHC 17778 (KLR) (22 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17778 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 198 OF 2015**

DK KEMEL, J

MAY 22, 2023

IN THE MATTER OF THE ESTATE OF BUSOLO NAMBILI (DECEASED)

BETWEEN

JOHN WEKESA BUSOLO 1ST PETITIONER

MARTIN MSINDE SIKUKU 2ND PETITIONER

AND

GEOFFREY MASINDE SIKUKU INTERESTED PARTY

RULING

1. The Interested Party Applicant filed a notice of motion dated 26th October 2021 filed on 2nd November 2021 pursuant to the provisions of Article 159 of *the Constitution*, Section 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act*, Order 10 Rule 11 and Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law seeking the following orders: -
 - i. Spent;
 - ii. That there be stay of proceedings and/or further proceedings herein pending the hearing and determination of Eldoret Court of Appeal No. 14 of 2019, Kisumu Court of Appeal No. 62 of 2019.
 - iii. That the costs of this application be provided for.
2. The application is premised on the supporting affidavit of Geoffrey Masinde Sikuku and the grounds inter alia; that High Court ruling was delivered in favour of the Respondents against the applicant and being dissatisfied with the said ruling, he proceeded to lodge a notice of appeal on 10th April 2018 at the Court of Appeal in Eldoret. The same was served upon the respondents' counsel. The appeal was heard on 23rd June 2020 and the court directed that the parties file their respective written submissions



and that the same is pending judgement. The applicant averred that it is in the interest of justice that the stay of proceedings be granted until the outcome of the appeal is known.

3. The respondents filed a replying affidavit sworn by John Wekesa Busolo and stated that the application dated 26th October 2021 is geared towards denying the beneficiaries the joy of the fruits of their judgement and that their application dated 1st November 2019 as per prayer No. 2 only seeks to rectify the Certificate of Confirmation of Grant issued on 17th July 2019 on the issue of the name and share of Felistus Nafula Busolo to read 1.2 acres and not 12 acres. They deponed that the rectification will not render the appeal nugatory and that it is also not true that the appeal has a high chance of success as the appellant/applicant was the administrator herein prior to his removal by consent and he never filed any documents thereafter to challenge or support the cause.
4. Vide Court directions, the application was dispensed with via written submissions. Both parties duly complied.
5. The applicant submitted that he undertook all the necessary steps to appeal the decision of the High Court in a timely manner and that the same appeal was canvassed by way of written submission. He contended that parties are awaiting the outcome of the appeal and as such the order of stay of proceedings would avoid duplicating efforts of the Court and save judicial time and that no prejudice shall be incurred by the respondents. He relied on Order 42 Rule 6(1) of the Civil Procedure Rules, Section 1A, 1B & 3A of the *Civil Procedure Act* and the case of *Wachira Waruru & Another vs Francis Oyatsi* (200) eKLR and *Ezekiel Mule Musembi vs H. Young & Company (E.A) Limited* (2019) eKLR.
6. In response, the Respondents submitted that the decision to grant stay of proceedings is strictly discretionary and that this Court has the power to stay proceedings pending appeal with derived jurisdiction from Order 42 Rule 6(1) of the Civil Procedure Rules. Counsel relied on the case of *Re Global Tours Travel Limited* HCWC No. 43 of 2000. He contended that for this Court to grant stay of proceedings then the applicant ought to show that he had an arguable appeal with high chances of success such that if the stay of proceedings is not granted the appeal will be rendered nugatory. It was contended that the proceedings before the Court in respect to the application dated 1st November 2019 only seeks to rectify the Certificate of Confirmation of Grant that was issued on 17th July 2019 on the issue of name and share of Felistus Nafula Busolo and that the same cannot render the appeal nugatory. He relied on the case of *Kenya Wildlife Service versus James Mutembei* (2019) eKLR. It was argued that the applicant herein was a former administrator who wanted to administer the estate of the late Busolo Nambili despite purporting to be the grandchild and that he was removed by the Court as an administrator. His removal did not register any protest even towards the mode of distribution. It was submitted that the applicant alleged that he is the son of Stephen Masinde whose share was allocated to the two widows in trust for Stephen Masinde's family and that his only recourse was to claim a share from the estate of Stephen Masinde and not the estate of the deceased herein and thus the appeal has no high chances of success. Counsel urged this Court to dismiss the application with costs.
7. I have considered the rival affidavits and submissions. I find the only issue for determination is whether the applicant has met the threshold for grant of stay of proceedings.
8. Stay of proceeding should not be confused with stay of execution pending appeal. The test for stay of proceeding is high and stringent since it seriously interferes with the right of a litigant to conduct his/her litigation. It impinges on right of access to justice, right to be heard without delay, right to fair trial.



9. 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”

10. Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, illuminates the threshold for stay of proceedings as follows:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

11. It is trite law that in considering whether there is sufficient reason required by Order 42 Rule 6 of the Civil Procedure Rules to grant stay of execution or stay of proceedings pending appeal, the Court will consider whether an arguable case is established, and whether the appeal, if successful, shall be rendered nugatory.

12. I have not had a look at the memorandum of appeal, but I have successfully perused the application dated 1st November 2019 seeking to rectify the Certificate of Confirmation of the Grant and the ruling by Judge Ali Aroni (as she then was). According to the ruling, it was clearly established that the applicant’s contentions lay with the estate of the late Stephen Masinde and thus the issue of his status as a beneficiary did not arise in the matter of the estate of the late Busolo Nambili. On the application dated 1st November 2019, the petitioners strictly wanted the rectification of the errors on their names and the exact share apportionment of Felistus Nafula Busolo. The law governing the rectification of a Certificate of Confirmation of Grant is the *Law of Succession Act*, 1981. Section 77 of the Act provides that a person interested in a grant issued by a court may apply to the court to vary or revoke the grant on any of the following grounds:

- a) The grant was obtained fraudulently by the applicant or any other person;
- b) The grant was granted in error, whether in form or substance;



- c) The grant became inoperative or invalid;
 - d) There has been a change of circumstances since the grant was made, which makes it necessary to vary or revoke the grant.
13. It is my view that it would not be in the interest of justice to exercise the Court's discretion and grant stay of proceedings as it will only serve the purpose of delaying the process of proper administration of the estate of Busolo Nambili. I am not satisfied that the applicant has demonstrated that the rectification of the Certification of Confirmation of Grant issued to the Petitioners will be prejudicial to the applicant. The applicant has failed to establish before this Court how the act will affect his appeal at the Court of appeal, considering that it is well established that he is not a son to the deceased but an alleged grandchild. It is clear that the distribution of the estate of the deceased was duly effected with each of his children getting their entitled shares. The applicant claims to be the son of the late Stephen Masinde which means that his wrangles are with the estate of the late Stephen Masinde and not that of the late Busolo Nambili. In any event, the shares were given to the houses and thus the applicant can easily pursue his interest from the relevant house and should not vex the petitioners in their duty to administer the estate of the deceased. I am not persuaded that the applicant's appeal is meritorious in view of the fact that he did not file any documents in regard to his alleged claim.
14. In the result and for the reasons stated above, i do not find any merit in the applicant's application dated 26/10/2021. The same is dismissed with no order as to costs.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF MAY 2023

D. KEMEI

JUDGE

In the presence of:

Wekesa for Wamalwa Simiyu for Petitioners/Respondents

No appearance for Shikhu for Interested Party/Applicant

Kizito Court Assistant

