



**In re Estate of Njama Weru (Deceased) (Succession Cause
65 of 1987) [2023] KEHC 3934 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3934 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 65 OF 1987**

FN MUCHEMI, J

MAY 4, 2023

IN THE MATTER OF THE ESTATE OF NJAMA WERU (DECEASED)

BETWEEN

**RICHARD NJERU NJAMA 1ST APPLICANT
FRANCIS WACHIRA NJAMA 2ND APPLICANT
JOSEPH KANYINGI NJAMA 3RD APPLICANT
SIMON MAINA NJAMA 4TH APPLICANT
JOHN NGOTHO NJAMA (DECEASED) 5TH APPLICANT**

AND

STEPHEN NDEGWA NJAMA RESPONDENT

RULING

Brief Facts

1. The applications for determination dated 31st December 2022 and 7th October 2009 were consolidated for purpose of disposal. The first application seeks for orders of stay of execution of the ruling delivered on 22nd September 2022 pending the hearing and determination of the appeal whereas the second seeks for orders that the Deputy Registrar be authorised to sign transmission documents on behalf of the beneficiaries for purposes of transmission of the estate. For purposes of the consolidated applications, the five (5) applicants in the first application will be referred to as the applicants and Stephen Ndegwa Njama as the respondent.
2. The respondent filed grounds of opposition dated 6th February 2023 and a replying affidavit sworn on 20th February 2023 in opposition to the application dated 31st December 2022. In opposition to the



application dated 7th October 2009, the respondents filed a replying affidavit sworn on 23rd November 2009.

3. Essentially, the applicant in the application dated 7th October 2009 seeks for orders for the Deputy Registrar to sign the transfer documents on behalf of the respondents following a court order dated 24th July 2009 whereby the court ordered the sub division and transfer of LR No Sweetwaters/214, LR No Aguthi/Muruguru/1061 and LR No A/740 Burguret amongst four beneficiaries.
4. The respondents in opposing the application state that they were never served with any papers in this cause and by that the Deputy Registrar in signing the transmission documents on their behalf, would be deviating from the contents of the will that the applicant wants to execute.

The Applicants' Case on the application dated 31st December 2022

5. The applicants state that the ruling was delivered on 22nd September 2022 was adverse to the estate of the deceased and as such they lodged an appeal before the court of appeal. The applicants are apprehensive that they stand to suffer loss should the orders issued be executed and the transfer documents signed by the Deputy Registrar.
6. The applicants further state that an application for stay of execution suffices for purposes of preserving the subject matter before the appeal is heard and determined and thus in the event the application dated 7/10/2009 is allowed, the appeal shall be rendered nugatory and they stand to suffer substantial loss and damage which cannot be compensated monetarily if the appeal is allowed. The applicants aver that in the event the application is not allowed, they will be rendered homeless and destitute with nowhere to go and yet they have known the suit property to be theirs for over 70 years which they have developed and set up permanent structures.
7. The applicants state that they are elderly aged between 62-71 years respectively and are unable to provide security but they are amenable to abide by the terms and conditions the court may order in granting the prayers sought.

The Respondent's Case

8. The respondent argues that the application is misconceived, incompetent, bad in law, a gross abuse of the process of the court and untenable. The respondent states that the intended appeal has no chances of success and does not raise substantial arguable points of law in that a grant can only be revoked where the proceedings leading up to its making were defective or obtained by fraud and the applicants failed to demonstrate the same.
9. The respondent further states that the applicants have failed to demonstrate that they stand to suffer any substantial loss should the orders not be stayed. Furthermore, the applicants do not face any risk of irreversible consequences as the estate of the deceased was distributed to the letter in accordance to a valid will of the deceased.
10. It was further stated that the applicants are guilty of inordinate delay, which delay has not been explained. The ruling was delivered on 22nd September 2022 yet the application was filed on 31st January 2023, four months down the line. As such, the respondent argues that the applicants have failed to satisfy the conditions set to be granted stay of execution pending appeal.
11. According to the the applicants are adamant on ensuring that the estate of the deceased does not devolve to the rightful beneficiaries which is a total abuse of the court process. Moreover, the respondent states that the applicants have failed to place sufficient material before the court to enable it exercise its discretion in their favour.



- Parties disposed off the applications by way of written submissions.

The Applicants' Submissions on the application dated 31st December 2022

- The applicants rely on the cases of *Charles Ngigi Ndungu vs Joseph Kimani Gatheca & 2 Others* (2020) eKLR; *Michael Mugo Ireri vs Nelson Ntiga Ikou & Another* (2017) eKLR and *Joel Kazungu Yaa Mangi vs Director of Land Adjudication and Settlement & 3 Others* (2021) and submit that the application has been filed without any unreasonable delay. It is submitted that the ruling was issued on 22nd September 2022 and they lodged a Notice of Appeal on 5th October 2022.
- The applicants further submit that it is in the interests of justice that the substratum of the suit in this case be preserved so as not to render the appeal nugatory by staying execution pending appeal. To support their contentions, the applicants have cited the cases of *Mukuma vs Abuoga* (1988) KLR 645; *Consolidated Marine vs Nampijja & Another*, Civil Appeal No 93 of 1989 (Nairobi); *James Peter Kinyungu Mbadi vs Ngumbao Goda Dzombo & 72 Others* (2021) eKLR and *Charles Ngigi Ndungu vs Joseph Kimani Gatheca & 2 others* (2020) eKLR.

The Respondent's Submissions

- The respondent argues that the intended appeal does not raise any arguable points. The subject of the intended appeal is premised on the claim that the proceedings to obtaining the grant were unprocedural, irregular and defective in substance and that the respondent concealed material facts from the court as he failed to disclose facts material to the case nor did he seek consent from the applicants in his appointment as the administrator. The respondent argues that Rule 7 (6) of the *Probate & Administration Rules* requires that in applying for letters of administration the only mandatory written consent required is that of the executors of the will. The respondent further argues that it is not true that the applicants were not aware of the proceedings of obtaining the said grant as the executor of the will died on 15/10/2007, five years after the 1st applicant had filed his affidavit of protest that he never prosecuted.
- Pursuant to Section 76 of the *Law of Succession Act*, the applicants failed to adduce evidence to advance any of the grounds provided and the court thus found that the grant was legally and lawfully obtained. As such, it is evident that the appeal is groundless and has no clear cause of action. Although the applicant claim that they shall be rendered homeless, the respondent states that there is a valid will in place and the applicants have been provided for under the said will. More so, the applicants have blatantly refused to participate and sign all the documents to facilitate the distribution of the estate to themselves and the respondent.
- The respondent refers to the case of *Gichubi Macharia & another vs Kiai Mbaki & 2 others* [2016] eKLR and submits that the appeal is not arguable and seeks to waste precious judicial time as well as prohibit him from benefiting from the estate.
- The respondent cites the case of *Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited* [2015] eKLR and submits that it would not be in the interests of justice to stay the orders issued by this court pending the appeal. The respondent argues that the succession proceedings were commenced way back in the year 1987 with the first affidavit of protest by one of the applicants being filed in the year 2002 which he never made any effort to prosecute. The grant was confirmed on 24th July 2009 and seven years down the line on 20th February 2017, the applicants filed an application for revocation of grant.



19. In the application for revocation of grant, the applicants relied on the grounds that the grant of probate to the will was fraudulently obtained and that it was not disclosed to them nor was their consent to obtain the same sought in obtaining the grant of probate. Evidently, the applicants were well aware of the succession proceedings from the onset and it was within their knowledge that the estate of the deceased was subject to distribution pursuant to the will left by the deceased. The application failed with the learned judge stating that no elements of fraud had been proved by the applicants on part of the respondent.
20. It is argued by the respondent that the distribution of the estate followed the will to the letter and the applicants are provided for in the will. The respondent thus contends that the subject matter being testate succession it is futile for the applicants to purport to file an appeal trying to compel a court of law to issue unto them what was not bequeathed to them in the deceased's will. The respondent contends that it is clear that the applicants are bent on delaying the distribution of the estate of the deceased mainly because they are displeased with the will and the mode of distribution emanating from the said will.
21. The respondent states that he is entitled to equal treatment by the law in the same manner the applicant is. He is entitled to have the estate of the deceased distributed and the beneficiaries to benefit from the same as per the will just as the applicants are entitled to their right of the appeal. The respondent argues that this has not been the position since the year 1987 as he has been in the corridors of justice trying to conclude the distribution of the estate.
22. The right of appeal must be balanced against an equally weighty rigid right of the respondent to enjoy the fruits of the judgment delivered in his favour. The respondent cites that case of in *Re Estate of Leah Nyawira Njega (Deceased)* [2021] eKLR and submits that if the application for stay is allowed it will cause further delay in concluding the distribution of the estate that has been pending close to thirty six (36) years and thus occasioning prejudice to the respondent and the other beneficiaries.
23. It was further argued that no substantial loss will result as the estate will devolve as per the court orders and any property issued to a beneficiary as per the grant obtained will be devolved to the rightful beneficiary. Moreover, the respondent submits that the applicants have been provided for under the will and thus the claim that they will be rendered homeless and destitute cannot suffice as they have been allocated parcels of land where they ought to settle. The mere fact that the applicants live on a certain portion of land that has been allocated to another beneficiary does not invalidate the will nor occasion any injustice.
24. The respondent states that the applicants claim that they have built permanent structures on the land bequeathed to him, is just an analogy meant to try and distribute the estate to themselves void of the deceased's will. The respondent states that the applicant were well aware since 1987 that the properties were under succession and instead of objecting to the same they cunningly went ahead and developed the same properties with the aim that their actions would render the grant of probate impossible to execute. Thus, the applicants cannot come to this court and claim that they are likely to suffer substantial loss whilst all along it was their botched plan to abduct the will of the deceased.

The Applicants' Submissions on the application dated 7th October 2009

25. The applicants submit that the court ought to stay its determination in respect of the instant application as it shall render the appeal nugatory and deny them justice. In the event the court grants the application, the applicants state that they stand to suffer substantial loss for they will be evicted from their land where they have developed and were brought up therein since birth.



The Law Whether the applicants have met the prerequisite for grant of stay of execution pending appeal.

26. Section 47 of the *Law of Succession Act* gives the court jurisdiction to entertain any application such as the present one which seeks to preserve the status quo pending the appeal. Order 42 Rule 6(2) of the *Civil Procedure Rules* lays down the conditions which a party must establish in order for this court to order stay of execution. These conditions are:-
- a. Substantial loss may result to him/her unless the order is made;
 - b. That the application has been made without unreasonable delay; and
 - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
27. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-
1. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 2. Secondly, 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 the appeal court reverse the judge's discretion.
 3. Thirdly, 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.
 4. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.
28. On the issue of substantial loss, the case of *Re Estate of Wanga Ole Oiyie* [2022] eKLR Gikonyo J. relied on the case of *James Wangalwa & another vs Agnes Naliaka Cheseto* [2012] eKLR where the court held:-
- The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...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.
29. The applicants argue that they stand to suffer substantial loss if stay is not granted as they shall be rendered homeless and destitutes. The respondent states that the applicants shall not be rendered homeless as they have been provided for in the will. It is evident that the will provided for the applicants that the respondent as the administrator of the estate has already distributed the estate as provided for in the will. Additionally, the applicants have contended that the appeal shall be rendered nugatory if the orders sought are not granted. It is my considered view that the succession proceedings herein are testate and are based on the deceased's will dated 12th June 1985. The respondent has distributed the



said estate in strict sense according to the will and as such, the chances of the appeal being successful are limited in that the will was not challenged. The applicants ought to relocate their homes to the land parcels allocated to them. It is correct that the applicants did not challenge the will. The only thing they unsuccessfully challenged is the respondents appointment as the administrator/executor of the will. The current appeal is against this court's ruling dismissing the application on appointment of the administrator. In my considered view, the applicants have not demonstrated that they will suffer substantial loss.

30. Without delving into the merits of the appeal, it is evident that the appeal has limited chances of success. There is a valid will in place and the respondent as administrator of the estate followed it to the letter in distributing the estate. Additionally, the applicants were well aware of the succession proceedings herein as the 1st applicant filed his affidavit of protest on 2/12/2002 whereas the executor of the will died on 15/10/2007. If the 1st applicant was serious with opposing the actions of the respondent, he would have moved the court to hear and determine the said protest instead of abandoning it. The said affidavit of protest was filed five (5) years after the court made orders of appointing the respondent as the administrator in the will.
31. The instant application was filed on 31st January 2023 and the impugned ruling was delivered on 22nd September 2022, which is a period of about four (4) months. It is also noted that the instant application was filed three (3) months from the date of filing the Notice of Appeal in the Court of Appeal. The applicants have not explained why it took them four months to file the said application. The applicants stated in their submissions that the delay is attributed to seeking alternative legal representation at the appellate stage. The record shows that the Notice of Appeal was filed timeously by the same firm of advocates who filed the instant application. As such it is not correct that the applicants were still searching for an advocate to represent them. It is my considered view that delay of 4 months is inordinate and has not been explained.
32. On the issue of security, it is trite law that security is discretionary and it is upon the court to determine the same. The applicants have not offered any terms of security to warrant grant of the orders sought. They state that they are elderly and are therefore unable to provide security but they are amenable to abide by the terms and conditions the court may order in granting the prayers sought.
33. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”
34. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue is whether there is just cause for depriving the respondent his right of enjoying the benefits of the grant of probate. The succession cause herein was instituted in 1987, which is about thirty six (36) years ago. The grant was confirmed on 24th July 2009 and the applicants applied for its revocation on



20th February 2017, which was after about eight (8) years. Notably, the 1st applicant came into these proceedings on 2/12/2002 when he filed his affidavit of protest to the will but never prosecuted it.

35. Regarding the application for stay of execution dated 31/12/2022, the applicants have failed to satisfy this court on any of the conditions set out under Order 42 Rules 6. For those reasons, I find the application without merit.
36. On the application dated 7th October 2009 seeking for orders to authorise the Deputy Registrar to execute the transmission documents on behalf of the respondents, I am convinced that the grant confirmed on 24th July 2009 ought to be executed. Granting the said orders will facilitate the parties to take their inheritance as per the will of the deceased and enjoy the fruits of the grant. This application in my considered view is merited and ought to be allowed.
37. Consequently, the application dated 31st December 2023 stands dismissed while the one dated 7th October 2009 is allowed in terms of prayer 1.
38. Each party shall meet own costs of the two applications.
39. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 4TH DAY OF MAY, 2023.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEOLINK THIS 4TH DAY OF MAY, 2023

