



**Morisin v Koskei (Civil Appeal E012 of 2023) [2023] KEHC 18808 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18808 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL APPEAL E012 OF 2023**

**JK SERGON, J**

**JUNE 15, 2023**

**BETWEEN**

**GRACE CHEPNGETICH MORISIN ..... APPELLANT**

**AND**

**GEOFFREY KOSKEI ..... RESPONDENT**

*(An application for stay of execution of the Judgment and/or Decree delivered on April 5, 2023 by Hon. B.R. Kipyegon (PM) vide Kericho Chief Magistrate Court Succession Cause No E094 of 2020.)*

**RULING**

1. The Applicant herein is aggrieved with the decision of the trial magistrate in Kericho Chief Magistrate Court Succession Cause No E094 of 2020 which decision is now due for enforcement/execution.
2. The Application coming up for the courts determination is a summons dated April 25, 2023, for the following orders;
  - i. Spent.
  - ii. That M/s Enock Anyona Miruka & Co. Advocates be granted leave to come on record for the appellant in this matter.
  - iii. Spent.
  - iv. That pending the hearing and determination of this appeal; the honourable court be pleased to grant an order for stay of execution /enforcement of the Judgment in Kericho Chief Magistrate Court Succession Cause No E094 of 2020.
  - v. that costs of this summons be provided for.



3. The Application is supported by grounds on the face of it and the supporting affidavit of Grace Chepngetich Morisin, the Applicant herein.
4. The Applicant avers that she is aggrieved by the decision of Honourable B.K. Rugut PM in Kericho Chief Magistrate Court Succession Cause No E094 of 2020, annexed and marked as “GM 1” is a copy of the judgment and that she has preferred an appeal.
5. The Applicant avers that she has sought typed proceedings for purposes of preparing the record of appeal.
6. The Applicant further avers that she filed the appeal without unreasonable delay, that she will suffer substantial loss if the judgment is not stayed as she would be displaced from her homestead in the event of execution whereas the respondent would not be prejudiced.
7. The Applicant avers she is ready and willing to furnish security, that the appeal has high chances of success and if stay is not granted the appeal would be rendered nugatory and the very essence of the preservation of the estate, the subject matter of the suit.
8. The Respondent filed a replying affidavit in opposition to the application for stay of execution, the said affidavit was sworn by Geoffrey Koskei the Respondent herein.
9. The Respondent avers that application was inept, incompetent, unmerited and designed to deny him and other beneficiaries a chance to have a share of the deceased’s estate, hence was ripe for dismissal.
10. The Respondent avers that the instant application is premised on the wrong provisions of law, the applicant relied on section 47 and 50 of the Law of Succession Act, Cap 160 Laws of Kenya, which sections have nothing to do with stay of execution.
11. The Respondent avers that the instant application lacks substance and ought to be dismissed for it falls short of the legal threshold for stay of execution pursuant to order 42 rule 6 (2) of the Civil Procedure Rules, 2010.
12. The Respondent avers that the applicant resides in Njoro, Nakuru County and has no house or shelter in the estate of the deceased which is situated in Roret within Kericho County, this is in contrast with the applicant’s assertions that she would be displaced from her homestead.
13. The Respondent avers that after having looked at the grounds of appeal filed on 27<sup>th</sup> April, 2023, there is nothing substantial that warrants scrutiny of this court as the estate was divided equally and equitably amongst all the beneficiaries of the deceased and thus there was no arguable case.
14. The Respondent cited instances whereby the applicant herein had misled the court during the succession proceedings in an attempt to get a larger share of the estate at the expense of all other beneficiaries.
15. The Respondent avers that the applicant is desirous of frustrating them from enjoying the fruits of the judgment, which favours all beneficiaries of the deceased including the applicant and it is therefore in the interest of fairness and justice that this matter comes to a conclusion to allow all beneficiaries to utilize their share in the estate.
16. The Respondent avers that the application should be dismissed with costs as the applicant has demonstrated that she does not have an arguable appeal nor able to provide security.
17. I have considered the summons, supporting affidavit and the replying affidavit in opposition to the application for stay. The applicant herein has cited section 47 and 50 of the Law of Succession,



CAP 160 Laws of Kenya in support of the application for stay, section 47 empowers this court with jurisdiction to entertain any application and determine any dispute under the Law of Succession and to pronounce such decrees and make such orders therein as may be expedient whereas section 50 states that an appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final. The respondent on his part argues that that application is inept, incompetent, unmerited and that the instant application is premised on the wrong provisions of law.

18. In proceedings under the *Law of Succession Act*, the provisions of the *Civil Procedure Act* and *Civil Procedure Rules* do not apply as the *Law of Succession Act* is sui generis with its own unique and special procedures which regulate proceedings in probate matters.
19. The only provisions of the *Civil Procedure Rules* which apply to succession proceedings are provided under Rule 63 (1) of the *Probate and Administration Rules*. See *Josephine Wambui Wanyoike v Margaret Wanjiru Kamau & Another* [2013] eKLR they are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attendance of witnesses, affidavits, review and computation of time. As such, it is clear that pursuant to the express provisions of the Probate and Administration Rules Order 42 of the *Civil Procedure Rules* does not apply to succession matters.
20. However, pursuant to the provisions of section 47 of the *Law of Succession Act*, this court has jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may be expedient. Further, rule 73 of the *Probate and Administrative Rules* preserves the inherent jurisdiction of this court while dealing with matters succession.
21. It is my view that notwithstanding Order 42 of the *Civil Procedure Rules* not being one of those orders imported by Rule 63(1) of the *Probate and Administration Rules*, this court has jurisdiction to grant orders of stay of execution while invoking its inherent powers under Rule 73 and make orders in the interest of justice.
22. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for this court to order stay of execution are provided for under Order 42 rule 6 (2) *Civil Procedure Rules*. Basically, the applicant must satisfy the court;- (a) substantial loss will result to applicant if stay is not granted; and
  - (b) Security is given by the Applicant for the due performance of any decree as may eventually become binding on the appellant upon determination of the appeal; and
  - (c) The application has been brought without unreasonable delay.
23. The application herein partially meets the legal threshold set out in Order 42 Rule 6 of the *Civil Procedure Rules*, on one hand, the applicant has not ably demonstrated that she will suffer substantial loss, however, this court is duty bound to protect and preserve the estate of the deceased awaiting distribution moreso now that there is an appeal on the mode of distribution. On the other hand, the applicant is ready and willing to furnish security and the application for stay was made without and unreasonable delay, judgment in the trial Court was delivered on 5<sup>th</sup> April 2023 and the instant application was brought on 25<sup>th</sup> April 2023.



24. I have taken cognizance of the notice of appointment of the firm of M/S Enoch Anyona Miruka & Co. Advocates to come on record and represent the applicant herein in the appeal, leave is hereby granted to the said firm to come on record for the applicant in the appeal.
25. Accordingly, I allow the application for stay of execution and order as follows;
- i. An order for stay of execution of the Judgment and/or Decree delivered on April 5, 2023 by Hon. B.R. Kipyegon (PM) vide Kericho Chief Magistrate Court Succession Cause No E094 of 2020 pending hearing and determination of the appeal is granted.
  - ii. Costs of the application shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED THIS 15<sup>TH</sup> DAY OF JUNE, 2023.**

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**J.K. SERGON**

**JUDGE**

**In the presence of:**

C/Assistant- Rutoh

Miruka for the Appellant

Kirui holding brief for Mitey for the Respondent

