



**Ndonga v Kanyi (Miscellaneous Succession Cause E011 of 2022)  
[2023] KEHC 18900 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18900 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
MISCELLANEOUS SUCCESSION CAUSE E011 OF 2022  
FN MUCHEMI, J  
JUNE 15, 2023**

**BETWEEN**

**ISAAC MACHARIA NDONGA ..... APPELLANT**

**AND**

**EUSEBIA WAGITIE KANYI ..... RESPONDENT**

**RULING**

1. This application is dated April 27, 2022 brought under section 47 of the *Law of Succession Act*, rules 49, 63 and 73 of the *Probate and Administration Rules* and order 42 rule 6 of the *Civil Procedure Rules* seeks for orders of stay of proceedings in Othaya PM Succession Cause No. 29 of 2018 pending the hearing and determination of the appeal in Nyeri ELC Appeal No. 44 of 2021.
2. In opposition of the said application, the respondent filed a Replying Affidavit dated June 10, 2022.

**The Applicant's Case**

3. The applicant states that he is the administrator of the estate of Ndonga s/o Charambu having been issued with the grant of letters of administration intestate on August 23, 2010 in Othaya PM Succession Cause No. 29 of 2018. He avers that on July 13, 2017, he applied for confirmation of grant detailing the mode of distribution of the estate L.R No. Othaya/Itemeni/413. The respondent opposed the summons claiming a trust on the said parcel of land. Consequently, the court stayed the succession cause pending the hearing and determination of the trust in the environmental court Othaya PM RLC Case No. 4 of 2019.
4. Judgment in PM. ELC Case No. 4 of 2019 was delivered on 15<sup>th</sup> October 2021 and being dissatisfied with the judgment, the applicant deposes that he filed an appeal in the Environment and Land Court Nyeri ELC Appeal No. 44 of 2021. The applicant avers that he has filed a record of appeal and the appeal came up for directions on May 11, 2022.



5. The applicant states that he had filed an application for stay of proceedings in the magistrate's Court Succession Cause, but it was dismissed on 9<sup>th</sup> February 2022. The applicant further states that the said succession cause is coming up for hearing on 29<sup>th</sup> April 2022 and he is apprehensive that if the proceedings are not stayed, the hearing and distribution of the estate will commence and the appeal in the Environment and Land Court will be rendered nugatory.
6. The applicant avers that the respondent has never been in occupation of the suit property and will not be prejudiced in any way by the grant of the orders sought. The applicant further avers that his appeal raises triable issues and the same has high chances of success.

### **The Respondent's Case**

7. The respondent avers that the judgment in PM ELC No. 4 of 2019 was delivered on October 15, 2021 and the applicant filed the current application on May 4, 2022, which is seven (7) months after judgment was delivered. The respondent thus argues that there was unreasonable delay in filing the current application and yet the applicant has not offered any plausible explanation for the delay.
8. The respondent further avers that the orders granted in PM ELC No. 4 of 2019 are not capable of being executed as they are in the nature of a negative order and thus are incapable of being stayed.
9. The respondent argues that no prejudice shall be suffered by the applicant as the court declared that L.R No. Othaya/Itemeini/413 was held by Ndonga s/o Charambu in trust for Gachogu Charambu to the extent of half a share. As such, the respondent states that the application is unmeritorious and ought to be dismissed with costs.
10. Parties put in written submissions disposing of the application. The respondent failed to put in written submissions despite being given more time on three (3) occasions.

### **The Applicant's Submissions**

11. The applicant relies on the case of Global Tours & Travel Limited (Nairobi) H.C Winding Up Cause No. 43 of 2000 quoted with approval in Kenya Commercial Bank Limited v Kenya Pipeline Company Limited [2017] eKLR and submits that it is in the interests of justice that the honourable court exercises its discretion and grants stay of proceedings. The applicant argues that he has already filed his record of appeal and that he has an arguable appeal. He further argues that the issues raised are weighty and he ought to be given an opportunity to pursue the appeal because if the proceedings of the trial court are not stayed, the appeal shall be rendered nugatory.
12. The applicant submits that the right to be heard is a principle of fair trial which is one of the rights under *the constitution* which cannot be limited under article 25.
13. The applicant further submits that he filed the current application expeditiously and the respondent shall not suffer any prejudice if the orders sought are granted. He further submits that he shall prosecute his appeal expeditiously in order not to cause any delay in the lower court cause. As such, he prays that the orders sought be granted.

### **The Law**

14. Order 42 rule 6 of the *Civil Procedure Rules* stipulates:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 orders set aside.

15. Before delving into the requirements of order 42 rule 6, I wish to interrogate the facts of this application and the law with a view of determining whether the application is properly before the court.
16. It is not in dispute that the applicant has preferred an appeal in the Environment and Land Court being ELC Appeal No. 44 of 2021 which is pending hearing and disposal. The appeal emanates from the decision of the trial court Othaya PM ELC Case No. 4 of 2019 whereby the court made a declaration that Land Parcel No. Othaya/itemeini/413 was registered in the name of Ndonga s/o Charambu in trust for Gachogu Charambu to the extent of half share thereof. Although the applicant lodged his appeal in the Environment and Land court, he has brought the present application in this court by way of a Miscellaneous application. It is apparent from the reading of order 42 rule 6(1) of the Civil Procedure Rules that one may file an application for stay in the trial court or the appellate court. In this case, the applicant filed an application for stay of proceedings in the trial court in PM Succession Cause No. 29 of 2018 whereby the magistrate's court dismissed his application on the grounds that the applicant had not satisfied the conditions set out for stay of proceedings.
17. The applicant then filed this Misc. Application seeking stay of proceedings in the Othaya PM Succession Cause No. 29 of 2018. In my view, the applicant ought to have filed an appeal against the Othaya ruling in this court instead of filing this miscellaneous application. It is noted that there being no appeal before this court, an application brought under order 42 rule 6 cannot stand. firstly, order 42 deals with applications for stay pending appeal. Orders for stay pending appeal will be granted to prevent the appeal being rendered nugatory. Secondly, any orders for stay of proceedings that could be given herein would be floating orders since nothing else is pending determination before this court.
18. The applicant has filed an appeal against Othaya PM ELC case No. 4 of 2019 in the ELC court which is a court of equal status with the High Court. In my view, the applicant ought to have filed an appeal before the High court or approached the ELC Court in Appeal No. 44 of 2021 for orders for stay of proceedings in the Othaya Court for preservation of the subject of appeal pending hearing and determination of the appeal.
19. As for the orders issued by the magistrate court Othaya in the land case, I am in agreement with the respondent that the orders in the judgement were negative. None of the parties was ordered to do anything or restrained from doing any act in that the case were dismissed. As the parties await the hearing and determination of the appeal, none of them is likely to offend the other by any act. Half share of the land in question is held by a third party in trust for another person.
20. Consequently, I find this application misconceived and incompetent and it is hereby struck out with no order as to costs.
21. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 15TH DAY OF JUNE, 2023.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video link this 15th day of June 2023.**

