



**In re Estate of Sospeter Gathuka Petrol Gathigi alias Sospeter Gathuka Gathigi (Deceased)
(Succession Cause 78 of 2017) [2023] KEHC 20336 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20336 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 78 OF 2017**

**A MSHILA, J
JULY 14, 2023**

BETWEEN

AGNES WAITHERA GATHUKA APPLICANT

AND

HENRY KARIUKI GICHURU 1ST RESPONDENT

MOSES MUTURI GICHURU 2ND RESPONDENT

BEATRICE MUMBI GATHUKA 3RD RESPONDENT

RULING

1. Before court are two applications one dated 30th September, 2022 and another dated 9th November, 2022.
2. The first application by way of summons dated 30th September, 2022 was filed under Section 47 of the [Law of Succession Act](#) and Rule 49 & 73 of the Probate & Administration Rules. The Applicant sought for orders;-
 - a. SPENT
 - b. THAT this Honourable court be pleased to grant leave to the Applicant to file an appeal against the Judgment of this court dated 22/09/2022 and that the Notice of Appeal dated 23/09/2022 filed herewith be deemed to have been duly filed and served with such leave.
 - c. THAT pending the hearing of this application inter partes, an order be and is hereby issued staying the execution of this court's judgment of 22/09/2022 and/or staying further proceedings in this matter.
 - d. THAT in the alternative, this Honourable Court be pleased to order status quo to preserve the estate pending the hearing of this application inter partes.



- e. THAT pending the hearing and determination of this application and/or the intended appeal an order be and is hereby issued staying the execution of this court's judgment of 22/09/2022 and/or stay further proceedings in this matter.
3. The application is based on the grounds that the Applicant herein is dissatisfied with the judgment of 22/09/2022 and intends to appeal the same at the Court Appeal as such this court should grant leave and stay execution of the said judgment.
4. Agnes Waithera Gathuka filed her supporting affidavit where she deposed that she is a co-administrator of the estate herein. That on 22/09/2022 a judgment was delivered distributing the assets of the estate herein. That being dissatisfied with the said judgment, she intends to file an appeal as such leave should be granted and execution stayed. That the estate should be preserved to avoid resettlement to avoid the appeal being rendered nugatory. That together with other beneficiaries, she stands to suffer loss. The intended appeal was said to be arguable hence should be considered by the court in any case the instant application has been filed without delay and no prejudice will be suffered if the estate is preserved.
5. Moses Muturi Gichuru opposed the application by filing his Replying Affidavit filed on 3/11/2022. He deposed that the appeal does not raise serious issues. He illustrated the facts as in the succession cause and urged the court not to stay execution as no loss will be suffered if the judgment is implemented.
6. In the second application dated 9th November , 2022 the Applicant sought for orders;-
- a. Spent
- b. THAT upon hearing the parties paragraph 29 of this Court's Judgment dated 22nd September, 2022 is amended to correct that portion that reads;-
- “.....This is evidenced by a handwritten agreement between the deceased and the purchaser, which although undated is signed by both the deceased and the purchaser.....”
- To read
- “...This is evidenced by a handwritten agreement between the deceased and the purchaser, which is dated as made on the 21st September 1995 and is signed by both the deceased and the purchaser....”
- c. THAT upon hearing the parties paragraph 29 of this Court's judgment is amended to correct that portion that reads;-
- “... It also acknowledged that the purchaser had paid deceased Kshs.910,000 and remained with a balance of Kshs.990,000 which was to be paid once a title was issued in the name of the purchaser. That agreement permitted the purchaser to henceforth take possession of the land purchased. ...”
- to read
- “”...It also acknowledged that the purchaser had paid the deceased Kshs.910,000 and remained with a balance of Kshs.990,000 which was to be paid once a title was issued in the name of the purchaser. That agreement permitted the purchaser to henceforth take



possession of the land purchased. The purchaser took possession of the land and paid the balance of the purchase price over time but had not been issued with title in the name of the purchaser...”

- d. THAT the final disposition at paragraph 36 of the judgment is amended to exclude the order “(c)” that, “The balance of the purchase price shall be paid by Halima Abdullah Mwenesi and the same shall be shared equally among the five houses.”
- e. THAT the final disposition at paragraph 36 of the judgment is amended in the schedule of distribution of land parcels in order “a” regarding land parcel Muguga/Gitaru/133 to read:-

	House of Zipporah Wanjiku Gathuka	Gathoni Peter Gathigi	House of Agnes Waithera Gathuka	House of Beatrice Mumbi Gathuka	House of Leah Wairimu Gathuka	Halima Abdullah Mwenesi
Muguga/Gitaru/133	1 acre	1 acre	1½ acre	1 cre	1 acre	3 acres

7. The application is based on the grounds that the judgment delivered on 22/09/2022 had errors apparent and slips leading to an incorrect final disposition and incorrect certificate of confirmation of grant as such should be amended.
8. STEPHEN M. MWENESI filed his supporting affidavit as the advocate in conduct of this matter. He contended that it is just and proper that the application for correction and amendment of judgment and certificate of confirmation of grant be allowed so as to reflect the correct and just acreage of the land parcel Muguga/Gitaru/133.
9. MOSES MUTURI GICHURU filed a further affidavit in support of the application for review and correct the judgment delivered on 22/09/2022. That appropriate provision should be made for access to the subdivisions that will occur.
10. AGNES WAITHERA GATHUKA filed her grounds of opposition to the application dated 9/11/2022. She stated that the application is an abuse of the court process as a review cannot lie where there is an intended appeal as such the same should be rejected. That the errors do not fall under the purview of Section 99 of the *Civil Procedure Act* and Section 100 is inapplicable as judgment has already been delivered. It was stated that the court was being invited to sit on appeal against its own decision.
11. The court directed that both applications be canvassed by way of written submissions.
12. The Applicant submitted that the draft Memorandum of Appeal raises serious issues that needs court’s consideration. Reliance was placed on the case of Josephine Koki Raymond vs Philomena Kanini Maingi (personal representative of Maingi Musila Mutava (deceased) & another (2018) eKLR. It was submitted that the Respondents will not suffer prejudice and in any case the appeal is arguable as such the application for leave should be allowed. Reliance was placed in the case in Re estate of Joel Thaara Ruria (deceased) (2022) eKLR. Further it was submitted that there was need to order for stay of execution so as to preserve the estate to avoid chaos should the appeal succeed. The Applicant submitted that in any case any prejudice suffered can be compensated by way of costs. Reliance was placed in the case of Josephine Koki Raymond vs Philomena Kanini Maingi (personal representative of Maingi Musila Mutava (deceased) & another (supra). The power of the court to grant stay orders was



said to be discretionary and the same should be exercised in a way not to prevent an appeal. Reliance was placed in the case in re estate of Solomon Mungura Mathia (deceased) (2021) eKLR.

13. In regard to the application dated 9/11/2022, the Applicant herein submitted that the application for review fails the requisite test as a Notice of Appeal has been filed. To support this proposition the case of Multichoice (Kenya) Ltd vs Wananchi Group (Kenya) Limited & 2 others (2020) eKLR was quoted. It was submitted that the Applicant seeks to have the court rewrite its own judgment to suit the wants of the Applicant and arrive at a different determination. In any case, there are no errors apparent on the face of the record. Reliance was placed in the case of Multichoice (Kenya) Ltd vs Wananchi Group (Kenya) Limited & 2 others (supra).
14. The 2nd Respondent submitted that the right for leave to appeal out of time is not automatic as made out by the Applicant. Reliance was placed on among others the case of Rhoda Wairimu Karanja vs Mary Wangui Karanja (2014) eKLR. The Applicant was said to be seeking the court to find the already filed Notice of Appeal filed without leave as duly filed therefore act retrospectively. It was submitted that the intended appeal does not raise serious issues to warrant any more judicial time. In regard to the order for stay, the same was said to be granted only when there is a valid Notice of Appeal. The case of Re estate of Siwanyang Ngilotich (2022) eKLR was relied upon.
15. In regard to the application dated 9/11/2022, the 2nd respondent submits that the court has inherent jurisdiction to make such orders as may be necessary for the ends of justice and to prevent abuse of the court process. Reliance was placed on among other cases the case of Shanzu Investments Ltd vs Commissioner of Lands (1993) eKLR. It was further submitted that the errors are patent and the application is limited to the interpretation and correction of the judgment to give sensible meaning to the judgment. In rejoinder, it was submitted that review and appeal can simultaneously go on and to bar an application for review the appeal must have been preferred or ongoing and in the case herein no leave has been granted.

ISSUES FOR DETERMINATION

16. Having considered the prayers sought by both parties, the affidavits and the arguments by the parties in their submissions. The issues framed for determination are;-
 - a. Whether the Applicant should be granted leave to file appeal out of time and the Notice of Appeal be deemed as filed;
 - b. Whether an order of stay of execution is merited.
 - c. Whether this court should review the judgment delivered on 22/09/2022.

ANALYSIS

Whether the Applicant should be granted leave to file appeal out of time and the Notice of Appeal be deemed as filed..

17. Order 43 (2) of the Civil Procedure Rules 2010 provides:

“(2) An Appeal shall lie with leave of the Court from any other order made under these Rules”.



18. Order 43 (3) of the Civil Procedure Rules 2010 provides:

“An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the Court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order”.

19. In the instant case, the judgment intended to be appealed against was delivered on 22nd September, 2022 while the instant application was filed on 3rd October, 2022. The Applicant has attached a Notice of Appeal filed on 26/09/2022 and a draft Memorandum of Appeal. The Notice of Appeal was therefore filed on time being five days after the delivery of the impugned judgment.

20. In the circumstances and considering that the judgment intended to be appealed against deals with the distribution of the estate of the deceased and further, a perusal of the Memorandum of Appeal shows that the grounds of appeal indicated therein are arguable.

21. An arguable appeal is one that need not succeed but one that warrants the court’s consideration bearing in mind both parties arguments. It is this courts considered view that issues involving distribution of the estate of the deceased person herein are definitely arguable.

Whether an order of stay of execution is merited.

22. On the issue of stay of execution Order 42 Rule 6(2) of the Civil Procedure Rules provides:

- “(2) No order for stay of execution shall be made under subrule (1) unless—
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

23. Refer to the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 where in giving guidance on how discretion should be exercised in grant of an order for stay of execution the court of appeal held that;-

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- 2. 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 that appeal court reverse the judge’s discretion.
- 3. 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. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there



was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. 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 for costs as ordered will cause the order for stay of execution to lapse.”
24. The judgment sought to be stayed is in regard to the distribution of the estate herein. The Notice of Appeal has been deemed as filed therefore in the circumstances, and in the interest of justice, this court is satisfied that the loss that would be suffered would be substantial if the estate is not preserved in the event the appeal succeeds in the Court of Appeal.

Whether this court should review the judgment delivered on 22/09/2022.

25. With regard to the application for review, the law on review of court judgements or orders is found in Section 80 of the *Civil Procedure Act* and Order 45 Civil Procedure Rules 2010.
26. The grounds upon which a court can review its judgement under Order 45 of the Civil Procedure Rules are:-
 - i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or order made or
 - ii) Some mistake or error apparent on the face of the record
 - iii) Or any other sufficient reason.
27. In the application herein the ground upon which the application for review was brought was that there was an error apparent on the face of the record. The said errors are well indicated in the grounds the basis of the application and in the supporting affidavit.
28. The Courts defined and interpreted what ‘mistake or error apparent on the face of the record’ means. Reference is made to the case of *Moses Kipkolum Kogo vs Nyamogo & Nyamogo Advocates [2000] eKLR* where the court held that;-

“There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions a clear case of error apparent on the face of the record would be made out. An error which requires to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.”
29. A mistake or an error apparent on the face of the record means a mistake or an error which is prima-facie visible and does not require an elaborate argument or more than one opinion.
30. The errors as enumerated by the Respondent are too detailed and requires thorough examination. An error contemplated under Order 45 Rule 1(b) must be such which is apparent on the face of the record and not an error which has to be searched so as to be clear.
31. An error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment is correct or not as in the case herein.



32. In the case herein, the court is being invited to study the paragraphs as cited and review the same. In essence the court is being invited to sit on its own judgment.
33. In the circumstances therefore, this court finds that the application for review does not meet the desired threshold and is devoid of merit.

FINDINGS AND DETERMINATION

34. In the light of the forgoing above this court makes the following findings and determinations;
 - i. This court finds that this is a suitable case in which to exercise its discretion to enlarge the time in which to file the Appeal;
 - ii. The application dated 30th September, 2022 is found to have merit and it is hereby allowed;
 - iii. The Applicant is hereby granted leave to file an appeal against the Judgment of this court dated 22/09/2022 and that the Notice of Appeal dated 23/09/2022 filed herewith be and is hereby deemed to have been duly filed and served.
 - iv. Pending the hearing and determination of the intended appeal an order be and is hereby issued staying the execution of this court's judgment of 22/09/2022;
 - v. The application for review is found to be devoid of merit and it is hereby dismissed.
 - vi. The Applicants in the application dated 30th September, 2022 to bear the costs of this application.

Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 14TH DAY OF JULY, 2023.

HON.A.MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Mwenesi – for the Applicant for Review

Irungu Mwangi – for 2nd house

Oreng'e h/b for Nganga – for the Administrator (Agnes)

