



REPUBLIC OF KENYA



**In re Estate of Ngunda Murage (Deceased) (Succession Cause
16 of 2017) [2023] KEHC 22420 (KLR) (18 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22420 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
SUCCESSION CAUSE 16 OF 2017
RM MWONGO, J
SEPTEMBER 18, 2023**

BETWEEN

SUSAN WAMBUI NGUNDA PETITIONER

AND

STANLEY MURAGE MWANGI 1ST PROTESTOR

JOSEPH MUTHIKE 2ND PROTESTOR

RULING

1. On November 5, 2020, this court rendered judgment in favour of the protestors and gave orders for distribution of the estate.
2. Dissatisfied, the petitioner filed the summons dated November 19, 2020 seeking the following orders:
 1. Spent.
 2. Spent.
 3. That the honourable court be pleased to order for stay of execution of the judgment delivered on November 5, 2020 in Kerugoya Succession Cause Number 16 of 2017 pending the hearing and determination of the intended Appeal.
3. The petitioner also applied for copies of the proceedings by a letter to the Executive Officer dated November 9, 2020, and filed a Notice of Appeal dated November 11, 2020 notifying the Court of her intention to appeal in the Court of Appeal.
4. The application is opposed by the respondents on the grounds that the appeal will be an exercise in futility. They argue that the court had merely confirmed what the deceased had done during his lifetime in terms of distributing his estate being Parcel No Mutira/ Kangai/194 into three equal portions.



5. Further, and more substantively, the respondent argues that the decision of the High Court is final, as it constituted an appeal from the subordinate court.

Parties' Submissions

6. The applicant's argument is that if stay is not granted the appeal will be rendered nugatory and she will suffer loss, that the appeal has substantial chances of success; and that the application was brought without unreasonable delay.
7. In particular, she submits that substantial loss may result if the estate was to be distributed as the other beneficiaries would fail to get what they consider as their rightful share of the estate because the Respondents may dispose the property to other third parties.
8. She further argues that the application was brought without unreasonable delay, and that she is ready and willing to abide by any condition that the honourable court may grant.
9. The applicant relies on the following authorities:
Re Estate of Kipchumba Toroitich Kiptengwa (Deceased) [2020] eKLR where the court granted the petitioner stay of execution pending appeal in a succession cause pending appeal in the High Court;
Beatrice Ndungori Mwai & Anor v Sicily Wawira Titus & Another [2020] eKLR where this court considered a similar application for stay after the decision of the lower court. This court however pointed out that section 50(1) of the LSA afforded the applicant the only chance of appeal in the High Court. As such, the authority is ultimately unhelpful to the applicant in the circumstances of this case.
10. The respondent submits that this matter was commenced as Succession Cause No 111/2001 before the subordinate Court at Kerugoya. A certificate of Confirmation of Grant was issued on February 25, 2003. Being dissatisfied by that decision, she moved to the High Court at Nyeri vide HCP Appeal No 6 of 2004. That matter was later transferred to Kerugoya vide the current Succession Cause. This court found the determination of the lower court to have been based on sound principles of law.
11. The respondent further argues that the applicant having appealed against the decision of the lower court, is now statute barred from moving to the Court of Appeal on further appeal as Section 50(1) of the *Law of Succession Act* prohibits further appeal. The section provides:

' 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 shall be final.'
12. The only issue for determination is whether stay of execution of the judgment should be granted pending appeal to the Court of Appeal.
Analysis and Determination
Whether section 50(1) is applicable herein
13. In my view it is first significant to determine what is the effect herein of Section 50(1) of the *Law of Succession Act*, if applicable. Unfortunately, the parties have not made any substantive submissions as to the effect thereof, nor have they provided any authorities that are helpful in dealing with the provision.
14. In *Hafswa Omar Abdalla Taib & 2 Others v Swaleh Abdalla Taib [2015]eKLR*, the Court of Appeal stated as follows:

'Unfortunately for the parties and despite their industry in ventilating the issue of goodwill, the determination of the appeal will disappoint them as it turns on the question of



jurisdiction; that is, whether this court has jurisdiction to entertain this appeal in the first place. We appreciate that it is an issue that was not raised by any of the parties. However, it is an issue of law that has long been settled and the parties and indeed their teams are deemed to know. Accordingly, this court can suo moto raise and determine the same. Time and again it has been stated that jurisdiction is everything and if a court has no such jurisdiction, it must down its tools immediately. The Supreme court has held in several of its authorities that a court's jurisdiction flows from the *Constitution*, statute, precedent or both. Such jurisdiction cannot be assumed or donated by the parties or by the fiat of the court. In this case, the appellate jurisdiction in respect of succession causes has been donated by Section 50 (1) of the Laws of Succession Act. From this provision, it is clear that decisions from the magistrate's courts in succession causes are appellable to the High Court; whose decision on such an appeal is final.'

15. Clearly therefore, if there is no right of appeal, the issue of stay does not arise, and the matter ends there.
16. It is not expressly disputed that this matter emanated from the subordinate court and then went to the High Court. I have perused the judgment of this court which is sought to be appealed. It is stated in the judgment, which I take to be the factual position, as follows:

' A petition for letters of administration was filed by petitioner Susan Wambui Ngunda who is the wife of the deceased. The petition was filed in Succession Cause No 111/2001 in the Principal Magistrate's Court Kerugoya.....A grant of letters of administration was confirmed on August 16, 2004.....

The petitioner filed an appeal in the High Court to challenge the decision of the lower court. The High Court ordered that the grant be struck out as the lower court lacked pecuniary jurisdiction to hear and determine the matter. However, in a ruling of the High Court Nyeri P&A No 6 of 2004, the ruling striking out the petition was reviewed and set aside. An order was issued by Justice Wakiaga in a ruling dated March 15, 2015 at Nyeri High Court transferring the Succession Cause to the High Court at Kerugoya for the hearing of an application dated March 22, 2017 for confirmation of grant and the protest...'

17. Thus, the matter of distribution was never determined by the subordinate court on account of the file being transferred for hearing of confirmation of grant and protest in the High Court.
18. It is the decision on the confirmation and protest applications heard by this Court and determined by Gitari J on November 5, 2020, that is the subject of the application herein. That judgment is a first instance judgment of this court and is not statute barred from being appealed from.
19. Accordingly, I determine that section 50(1) LSA does not apply to the said decision of the High Court as it did not emanate from an appeal against a subordinate's determination on the issue of confirmation of grant and distribution which is the subject of appeal herein.

Whether the applicant has met the threshold for stay and for appeal

20. The summons application of November 19, 2020, is stated to have been made "Under section 47 of the *Law of Succession Act*, Rule 59 and Rule 73 of the *Probate and Administration Rules*, and all other



enabling provisions of the law”. By invoking Rule 73, the applicant in effect invoked the inherent powers of the court to make such orders as may meet the ends of justice. The Rule provides:

' 73: Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'

21. By invoking Rule 59 Probate and Administration Rules, the applicant in effect sought some level of discretion of the court in the form of proceedings to be filed.
22. The courts have traditionally placed reliance on Order 42 Rule 6 of the CPR to give stay of execution orders. This is seen for example in the case of Beatrice Ndunguri Mwai & another v Sicily Wawira Titus & another cited by the applicant, where it was stated as follows:

For stay of execution pending appeal, the procedure is provided under Order 42 of the *Civil Procedure Rules*. Though this is not one of the orders referred to under Rule 63 (1) of the P & A Rules, the practice in this court has leaned on the reliance of the Order 42 when dealing with stay of execution in succession matters. This is on the basis of Rule 73 P& A Rules which provides:

'Nothing in this rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'

23. Although the applicant did not cite Order 42 of the CPR, this Court would not dismiss the application for stay for want of form. The applicant also relied on Re Estate of Kipchumba Toroitich Kiptengwa (Deceased) [2020] eKLR where the court adopted the finding of Ouko,J (as he then was) in Re: Estate of George M'Mboroki where the learned Judge stated:

' The *Law of Succession Act*, like section 3A of the *Civil Procedure Act* has a saving provision as to the court's jurisdiction under section 47 which is affirmed by rule 73 of the Probate and Administration Rules. It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.'

24. I readily adopt the position in George M'Mboroki's case as stated.
25. The principles upon which the court may grant stay of execution pending appeal are well-settled, and are captured in Order 42 Rule 6 of the Civil Procedure Rules which requires an applicant seeking a stay of execution pending appeal to demonstrate that –
 - (a) Substantial loss may result to the applicant unless the order was made;
 - (b)The application was made without unreasonable delay; and
 - (c) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant.



26. The purpose of stay of execution is to preserve the status quo pending the hearing of the appeal, as observed in *RWW v EKW [2019] eKLR*, that:

' The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.'

27. I find and hold that this court can therefore grant stay in appropriate cases in succession appeals.

Whether the application has been brought without unreasonable delay

28. On this point, the application herein was filed on December 8, 2020 judgment having been delivered on November 5, 2020. The Notice of appeal was filed on November 25, 2020. The application was brought without any unreasonable delay and the same will not occasion any prejudice to the respondents if it is allowed.

Whether substantial loss may result to the applicant

29. On this issue, the applicant submits that substantial loss may result if the estate was to be distributed as the other beneficiaries may fail to get what they consider as their rightful share of the estate; and that the Respondents may dispose the property to other third parties. If the stay of execution is not granted, the subject matter of the appeal might be subdivided and title deeds may be issued which will render the appeal nugatory and the titles may have to be cancelled in the event the Court of Appeal overturns the decision of this court.

30. The respondents only response to this was that this present application is simply meant to stall the process of the other members of the family from enjoying the fruits of their judgment.

31. In *Machira t/a Machira & Co Advocates v East African Standard (No 2) (2002) KLR 63* the Court of appeal considered as to what amounts to substantial loss and held that:

' No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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.'

32. I do not see any reason for holding that substantial loss will not befall the applicant or that any prejudice would befall the respondent.

Security for the Appeal

33. The applicant submitted that she is ready and willing to abide by any condition that the honourable court may grant. The respondent did not oppose this claim.



34. In Beatrice Ndunguri Mwai's case (supra) Gitari J held:

' On the issue of security, it is noted that it is the court which can order security upon application by either party or on its own motion. In this case the respondent has not argued the court to order the applicant to provide security. However, the court has discretion to order the applicant to provide security.'

35. In this case, I do not have any information that would enable me to place a reasonable condition for security, other than a nominal condition. However, I think it is apt to impose strict conditions on the prosecution of the appeal.

Disposition

36. In the result, the orders I deem appropriate in this case, and which I hereby make are as follows:

- a. The applicant is granted leave to appeal upon deposit into court of Kshs 30,000/= as security for the expeditious proceeding on appeal;
- b. The appeal shall be filed within forty (40) days of the date of this ruling;
- c. Stay of execution is granted subject to compliance with the orders herein;
- d. Should there be failure to comply execution to proceed.
- e. Each party to bear its own costs.

37. Orders accordingly.

Dated and delivered at Kerugoya this 18th day of September 2023

R. MWONGO

JUDGE

In the presence of:

SUBPARA 1.

Kanga holding brief for Makworo for Petitioner/Applicant

SUBPARA 2.

Nduku for the 1st & 2nd Protesters

SUBPARA 3.

Court Assistant, Murage

HC Succ No 16 of 2017 In the Estate of Ngunda Murage Ruling R. Mwongo, J. Page 7 of 7

