



**In re Estate of Stanley M'Mugambi (Deceased) (Civil Appeal
E137 of 2022) [2023] KEHC 23657 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23657 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E137 OF 2022**

LW GITARI, J

OCTOBER 17, 2023

**IN THE MATTER OF THE ESTATE OF STANLEY M'MUGAMBI
(DECEASED)**

BETWEEN

NAOMI MWARI STANLEY 1ST APPELLANT

ZIPPORAH KINANU MUGAMBI 2ND APPELLANT

JOHN MUTHURI MUGAMBI 3RD APPELLANT

AND

PATRICK MWIRIGI MUGAMBI RESPONDENT

RULING

1. These proceedings relate to the estate of Stanley M'Mugambi (Deceased). *vide* an application dated 16th May, 2021 and filed on 17th May, 2021, in Githongo Succession Cause No. 115 of 2019, the applicants herein had sought for review orders of the will of the deceased in this cause with a view that the court makes a reasonable provision for the daughters of the deceased.
2. The said application was opposed by the Respondent and the same was heard by way of *viva voce* evidence. *Vide* an order delivered on 12th September, 2022, the subordinate court dismissed the application. Aggrieved by the decision of the learned magistrate, the Applicants instituted the present appeal.
3. Before this court is the application dated 22nd February, 2023 that is brought under the provisions of Order 42 Rule 6(1)(2)(4) of the [Civil Procedure Rules](#). The application seeks for the following substantive orders:-
 - i. Spent.



- ii. That there be a stay of proceedings in Githongo Succession Cause No. 115 of 2019 pending the hearing interpartes of this application or pending further order of this court.
 - iii. That there be stay of proceedings in Githongo Succession Cause No. 115 of 2019 pending the hearing and determination of this appeal.
 - iv. That this Honourable Court be pleased to call for the file in Githongo Succession Cause No. 115 of 2019 for purposes of this application and appeal.
 - v. Costs.
4. The application is premised on the grounds That:
- i. The applicant is aggrieved by the order/ruling of the court in Githongo Succession Cause No. 115 of 2019 and has appealed in this court being High Court at Meru Civil Appeal No. 137 of 2022.
 - ii. The applicants shall suffer substantial loss if the proceedings in Githongo Succession Cause No. 115 of 2019 are let to run as she will lose the house which her parents now deceased let her occupy in their lifetime.
 - iii. This application is brought in the interests of justice and fairness.
 - iv. If the proceedings are let to run this appeal shall be rendered nugatory.
5. The application is supported by the affidavit of Naomi Mwari Stanley sworn on 22nd February, 2023 in which she reiterates the grounds on the face of the application. She avers that the hearing of an application for confirmation of grant in the subordinate court was scheduled on 24th February, 2023 and as such, this appeal will be rendered nugatory if the proceedings before the subordinate court are let to run. Further, that the appeal has an overwhelming chance of success and that the hearing of the application for confirmation of grant in the subordinate court would occasion the applicants great prejudice as they will allegedly suffer substantial loss because they will not be adequately catered for in the subject estate.
6. The application is opposed by the Replying Affidavit sworn by the Respondent on 25th April, 2023. He deposes that the Applicants' appeal lacks merit and is only tailored to buy time for the applicants to continue enjoying the estate which they forcibly took possession of. The Respondent avers that the Applicants ought to file a protest to distribution before the subordinate court if they are not satisfied with the Respondent's application for confirmation of grant as per the will of the deceased. Further, that the Applicants' appeal was filed on 10th November, 2022 and there has been no attempt to prosecute the same to date and that allowing the orders in the present application would be prejudicial to the estate of the deceased and the other beneficiaries of the deceased.
7. The application was canvassed by way of written submissions.
8. The Applicants submitted that they are exercising their right of appeal to this court. That they are aggrieved by the impugned order of the subordinate court and they have therefore invoked the supervisory powers of this court. Further, that the proceedings that gave rise to the present appeal are based on the Applicants' application for reasonable provision in the deceased's will and that if the proceedings in the subordinate court are finalized, this appeal will be rendered useless and they would suffer irreparable loss. The Applicants relied on the cases of *In Re Estate of the Nathaniel Kio Itinga (Deceased)* (Succession Cause E002 of 2021) [2022] KEHC 11638 (KLR) (22 July 2022) and *In Re Estate of Ezekiel Mabeya Kegoro (Deceased)* 2019 eKLR to buttress their submissions.



9. The Respondent, on the other hand, submitted that the deceased made his last will and testament and shared his estate as he so wished. Further, that the Applicants ought to file a protest to the distribution of the estate in the subordinate court if they are not satisfied with the Respondent's application for confirmation of grant in accordance with the will of the deceased.

Analysis

10. I have considered the application dated 22nd February, 2023, the affidavits in support and in opposition of the application as well as the submissions by the parties. The issues arising for determination by this Court are:
- i. Whether the present application before the court is should be allowed.
 - ii. If answer in (i) above is in the affirmative, what conditions to be imposed in grant of orders sought?
 - iii. What is the order as to costs?
11. Order 42 Rule 6(1)(2) of the *Civil Procedure Rules* provides as follows:
- “(1) 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 order set aside.
- (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.”

12. From the above provisions, it follows that the burden was on the Applicants herein to demonstrate that substantial loss may result unless the order is made; the application has been made without unreasonable delay; such security as the court orders for the due performance of the decree has been given by the applicants.

13. In this case, the subordinate court dismissed the Appellants' application for reasonable provision under the will. The ruling sought to be appealed against was delivered on 12th September, 2022. This appeal was filed on 11th October, 2022, a month after the impugned ruling, while the present application was filed on 22nd February, 2023, a period a period of more than 4 months after institution of the appeal. The reasons for delay in filing the application have not been explained. However, in my view of the Applicants should be availed a chance for a fair hearing under the provisions of Article 50 of



the Constitution and have the appeal determined on merits and not on technicalities, Article 159(2) (d) refers.

This is succession matter. An appeal lies in the High Court. Section 50(1) of the Law of Succession Act. It provides 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.”

As such High Court has jurisdiction to entertain an appeal in succession matters arising from any order or decree of the Magistrate’s Court. The court should therefore lean on giving the applicant the opportunity to pursue the appeal. The order sought is necessary in this regard to ensure an appeal is not rendered nugatory. I do not see any prejudice that the respondent is likely to suffer. The appeal which has already been filed may be heard expeditiously for the parties to know their fate. The applicant relies on Re-Estate of Ezekiel Mabeya Kegoro (deceased) (2019) eKLR and has urged the court to find that the appeal has high chances of success.

14. That said, I note the Respondent’s argument that the Appellants ought to file a protest to his application for confirmation of grant in accordance with the will of the deceased if they are not satisfied with the same. I also note that the subordinate court pronounced itself on the issue of whether the Appellants were entitled to reasonable provision. In the circumstances, it is my view that filing of a protest as proposed by the Respondent would mean that the issue of whether the Appellants are entitled to reasonable provision in the will of the deceased will be *res judicata* and therefore not be viable for the Appellants. For this reason, I opine that the Applicants herein have demonstrated that they stand to suffer substantial loss if the proceedings in the subordinate court are not stayed to await the outcome of the appeal herein.

Conclusion

15. The upshot of the above, is that the application dated 22nd February, 2023 is merited.

I therefore order as follows:-

1. There shall be stay of proceedings in Githongo Succession Cause No.115/2019 pending the hearing and determination of the appeal herein.
2. The applicants shall deposit Ksh.50,000/- in court as security within 21 days.
3. Costs shall be in the cause and to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 17TH DAY OF OCTOBER 2023.

L.W. GITARI

JUDGE

