



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Jacobus Petrus Nicolaas Vander Goes (Deceased) (Succession Cause 5 of 2017) [2023] KEHC 23599 (KLR) (13 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23599 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 5 OF 2017  
G MUTAI, J  
OCTOBER 13, 2023**

**BETWEEN**

**AGNES NANJALA WILLIAM ..... 1<sup>ST</sup> OBJECTOR**

**DEMI-ANN VANDER GOES ..... 2<sup>ND</sup> OBJECTOR**

**AND**

**INGRID ANNA MARGARETHA ..... 1<sup>ST</sup> PETITIONER**

**VANDER GOES ..... 2<sup>ND</sup> PETITIONER**

**RENE PETRUS ADRIANUS BROUWER ..... 3<sup>RD</sup> PETITIONER**

**RULING**

1. This Court (per Onyiego, J) delivered a ruling on 31<sup>st</sup> August 2021 vide which it was ordered that a grant of probate be issued to the petitioners/respondents jointly and that the same be confirmed 30 days thereafter. The objectors/applicants were granted liberty to apply for reasonable provisions out of the estate.
2. The objectors/applicants were aggrieved by the said decision and filed an appeal at the Court of Appeal, being Court of Appeal Civil Appeal No. E053 of 2023. The said appeal is pending determination by the said Court as of the date of this ruling.
3. In the meantime, this Court issued a grant of probate of the written will of the deceased person on the 25<sup>th</sup> day of April 2023. Pursuant to the aforementioned ruling of this Court, the said grant was due for confirmation within 30 days thereafter. The grant wasn't confirmed as the objectors/applicants filed the notice of motion dated 8<sup>th</sup> June 2023. The application seeks the following orders:-
  - a. Spent;



- b. That this honourable court be pleased to stay the confirmation of the grant of probate to the respondents pending the hearing and determination of this application and appeal;
  - c. That this honourable court be pleased to order the maintenance of the status quo of the estate of the deceased, Jacobus Petrus Nicolaas Vander Goes pending the hearing and determination of this application and appeal; and
  - d. That the costs of this application be provided for.
4. The application is premised on nine grounds that have been set out in the body of the application and also on the supporting affidavit of the 1<sup>st</sup> applicant sworn on 8<sup>th</sup> June 2023. The applicants submit that directions have been issued by the Court of Appeal and that it is therefore necessary to stay the confirmation of the grant so that the appeal is not rendered nugatory.
  5. The 1<sup>st</sup> applicant stated that the 2<sup>nd</sup> applicant is the only child born out of the marriage with the deceased herein and, therefore, a legitimate dependant and beneficiary of the deceased's estate.
  6. She averred that they were dissatisfied with the aforementioned ruling. Consequently, they filed a Notice of Appeal dated 13<sup>th</sup> September 2021. They later filed a record of appeal dated 12<sup>th</sup> April 2023. The appeal was mentioned on 6<sup>th</sup> June 2023 for the case management conference.
  7. She stated that despite the existence of the appeal, the respondents applied for the issuance of a grant of probate in respect of the estate of the deceased and the same was issued. She was apprehensive that the respondents would apply for confirmation of the grant after 30 days, which would render the application and the appeal nugatory.
  8. She further stated that they stand to suffer irreparable damage if the grant is confirmed. That the respondents will suffer no prejudice. She thus prayed that the court be pleased to allow the application.
  9. The applicants filed a supplementary affidavit sworn by the 1<sup>st</sup> applicant. She reiterated the averments in her supporting affidavit and stated that confirmation of the grant would mean that the respondents would be at liberty to deal with the estate as they wish. She was apprehensive the respondents would dispose of the estate of the deceased in particular Plot No 8832/1/MN (Original 1263/1/MN), Nyali Mombasa, in which she has a 55% share.
  10. She stated that the application was brought without delay. The application does not deny or delay the respondents' enjoyment of the estate as they are renting out and receiving rent from the deceased's estate. She is willing to provide any security that this court may deem just.
  11. In response, the respondents filed a replying affidavit sworn by the 1<sup>st</sup> respondent on 4<sup>th</sup> July 2023.
  12. He stated that the applicants have not made a case to warrant issuance of the orders sought. The application is only meant to deny and delay the enjoyment of the estate by the beneficiaries and granting of stay shall greatly prejudice the beneficiaries. The estate would continue to waste as both parties reside out of the country.
  13. He further stated that the applicants had not tendered any security and should the appeal be dismissed, then the applicants would have benefitted unfairly. He argued that there is no substantial loss to be suffered by the applicants. He further argued that that the applicants had not proved that the respondents would be unable to compensate them if the appeal succeeds. The applicants have no arguable appeal with probability of success. He urged the court to dismiss the application.
  14. The applicants, through their advocates Kiragu Wathuta & Company Advocates, filed their skeletal submissions dated 25<sup>th</sup> July 2023.



15. Counsel submitted that the applicant had raised arguable issues in the Memorandum of Appeal, and thus they have an arguable appeal.
16. On substantial loss, counsel reiterated the applicants' position in their supporting affidavit and supplementary affidavit and submitted that recovery of an already distributed estate, if the appeal succeeds, will most likely be unsuccessful and costly process, thus it would be prudent that the appeal is dealt with first on merit. It was submitted that is the duty of this court to protect the estate of the deceased awaiting distribution.
17. On unreasonable delay, counsel submitted that the application was brought immediately the applicants noted that a grant of probate was issued to the respondents.
18. On security counsel submitted that the applicants are willing and ready to provide security that the honourable court may deem fit and just for the due performance of its orders.
19. In conclusion, counsel submitted that the applicants had met all conditions necessary to warrant a stay of confirmation of grant. Counsel urged the court to allow the application as prayed.
20. When the matter came for hearing on 26<sup>th</sup> July 2023, Mr. Kiragu counsel for the applicants, reiterated the applicants' position in their supporting affidavit, supplementary affidavit and submissions and urged the court to allow the application as prayed.
21. Ms Osino, learned counsel for the respondents, on the other hand, opposed the application and submitted that the ruling sought to be stayed was delivered on 31<sup>st</sup> August 2021, two years down the line, and no explanation had been given for the two years' delay and that the applicants have not tendered any security.
22. Counsel further submitted that the applicants did not prove that they would suffer substantial loss. The orders issued by the court are incapable of execution thus the application is premature. She urged that the respondents are people of means.
23. Counsel submitted that the allegations in paragraphs 10,11 and 12 of the supplementary affidavit are new allegations and urged the court to expunge the same.
24. Counsel submitted that the application has no merit, the appeal is not arguable and urged the court to dismiss the application.
25. In rejoinder Mr. Kiragu, learned counsel for the applicants, submitted the grant was issued this year. The issue of security was addressed in the supplementary affidavit. The applicants' affidavit should not be expunged as it was responding to matters raised by the Respondents. Counsel urged the court to allow the application.
26. I have considered the application, the response therein and the rival submissions by both counsels. I must now make my determination on the basis of the facts and the law applicable to stay applications.
27. The application herein has been brought under sections 45 and 47 of the *Law of Succession Act* and rule 73 of the *Probate and Administration Rules*. In their submissions, both parties have based their arguments on order 42 rule 6 of the *Civil Procedure Rules*.
28. The court in the case of *In re Estate of Henry Mwithimbu Karigu (Deceased)* [2020] eKLR stated:-

“Stay of execution pending appeal is at the discretion of the court. However, the discretion is exercised upon defined principles of law. Under order 42 of the *Civil Procedure Rules*, the applicant should show sufficient cause why the right of immediate realization and



enjoyment of the fruits of judgment should be interfered with by the court. But, as that remains the predominant consideration, the court must be guided by the following;

- (1) whether substantial loss would ensue unless a stay is granted;
- (2) whether the application was made without unreasonable delay; and
- (3) the need for appropriate security where necessary. Order 42 rule 6(1) and (2) provides:-
  - a. 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 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.
  - b. No order of stay shall be made under sub rule (1) unless-
    - i. The court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and
    - ii. 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

29. *Butt v Rent Restriction Tribunal* (Civil App No. NAI 6 of 1979, the Court of Appeal stated that:-

- “a. 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:-
  - i. 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;
  - ii. 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;
  - iii. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”



30. In his ruling Onyiego, J considered the issues that had been raised, in particular, whether the will was valid, whether the objectors/applicants herein are dependants and or beneficiaries of the state of the deceased, which party(ies) was entitled to grant of representation and whether there was intermeddling of the estate by the petitioners. In his ruling, the learned Judge found the will to be valid and that the objectors were dependants of the deceased. He directed that the grant of probate be issued to the petitioners/respondents. He also found the ground of intermeddling to be misplaced.
31. The applicants have argued that there was no delay in filing the application. The application was brought immediately after they learned that the grant of probate had been issued to the respondents. They have also submitted that if a stay is not granted they will suffer substantial loss as they will not be able to recover their share of the estate, in the result that they will have nothing to inherit. Further, if stay is not granted the appeal will be rendered nugatory.
32. On the other hand, the respondents argued that the application was meant to deny them the fruits of a ruling in their favour and to delay the distribution of the assets of the estate to the beneficiaries.
33. The court in the case of *In re Estate of Henry Mwithimbu Karigu (Deceased)* (*supra*) faced with a similar situation of having to balance the rights and interests of the parties stated:-

“I am aware that both parties have rights. On one hand; the applicant has right of appeal which includes legitimate expectation that his appeal will not be rendered otiose, and, on the other; the respondents have the right to immediate realization of fruits of judgment which should not be postponed or interfered with by the court unless for sufficient reason. In balancing these competing rights and interests, the court relies on ever-assuring and established judicial method, which rests on the singular dependability of the fact-base, and which vindicates the principles of fairness, objectivity and legitimacy – to entertain the account from the other side; and thereafter, to weigh, check and balance the two streams of evidence, in order to arrive at a valid, fair and just result.”

34. I note that the applicants filed the appeal without undue delay. Directions have been given on how the said appeal shall proceed. I am certain, given the efficiency with which the Court of Appeal hears matters before it, that the appeal will be determined without delay. In the circumstances, I am inclined to exercise my discretion in favour of allowing the prayer for stay of confirmation of grant so that the appeal is not rendered nugatory and or academic.
35. I exercise this discretion reluctantly as the applicants ought reasonably to have known that an appeal does not operate as a stay. They should therefore have filed the necessary application within a reasonable time after the delivery of the impugned ruling. Not doing so early enough was imprudent.
36. The respondents have not petitioned the Court for confirmation of the grant of probate of the written will of the deceased. In the circumstances it is prudent for this honourable court to issue a stay of any further proceedings in this matter until the appeal is heard and determined. I am guided by the case of *In re Estate of Henry Mwithimbu Karigu(Deceased)* (*supra*):-

“As the major contention is on this property, I order a stay of distribution of this property until the appeal herein is heard and determined. However, status quo shall be maintained on this property, and specifically, Mary Muthoni will continue to occupy whatever side of the property she is currently occupying as the appeal is pursued. I should add, however that the Court of Appeal is still in operation and the applicant should fast-track his appeal so that he does not use his indolence in prosecuting the appeal to the detriment of the other parties.”



37. The upshot of the above is that the application has merit, and it's hereby allowed as prayed. I make no orders as to costs, given the nature of the matter.

**DELIVERED, DATED AND SIGNED THIS 13<sup>TH</sup> DAY OF OCTOBER 2023 AT MOMBASA VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

