



In re Estate of Ndegwa Warui (Deceased) (Succession Cause 347 of 2013) [2024] KEHC 13888 (KLR) (6 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13888 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
SUCCESSION CAUSE 347 OF 2013
RM MWONGO, J
NOVEMBER 6, 2024
IN THE MATTER OF THE ESTATE OF NDEGWA WARUI (DECEASED)**

BETWEEN

MICHAEL MUTHIKE NDEGWA PETITIONER

AND

ALFRED WARUI NDEGWA RESPONDENT

AND

JOHN KAMAU MWANGI INTERESTED PARTY

KIRINYAGA COUNTY GOVERNMENT INTERESTED PARTY

JOSEPH MWANIKI MUCHIRA INTERESTED PARTY

ZABLON MAINA NGIRIA INTERESTED PARTY

JAMIA MOSQUE COMMITTEE INTERESTED PARTY

BARNABAS NDONGA INTERESTED PARTY

CATHOLIC DIOCESE OF MURANG'A INTERESTED PARTY

TABITHA MUMBI NJOGU INTERESTED PARTY

ALICE WANJIKU THIONGO INTERESTED PARTY

ANN NYAGUTHII NGICHIRI INTERESTED PARTY

HASSAN KIMANI INTERESTED PARTY

REUBEN GIKONYO INTERESTED PARTY

MUSA NDERITU INTERESTED PARTY

FAITH WAMBUI INTERESTED PARTY

TISANO COSMAS MUGO INTERESTED PARTY



RULING

1. By a Chamber Summons dated 8th February, 2024 the applicant seeks the following orders:
 1. That this Honourable Court be pleased to grant leave to the 2nd and 7th interested parties to file an appeal against the Judgment and Decree of this Honourable Court delivered on 1st February, 2024.
 2. That this Honourable Court be pleased to grant Stay of execution of the Judgment and Decree issued on 1st February, 2024 pending the hearing and determination of this Application.
 3. That this Honourable Court be pleased to grant Stay of execution of the Judgment and Decree issued on 1st February, 2024 pending the hearing and determination of the intended appeal.
 4. That this Honourable Court be pleased to give any other relief that this Honourable court deems fit to meet the ends of justice;
 5. That the costs of this application be provided for.
2. The application is supported by the grounds on the face of the application and the supporting affidavit of Carolyne Kinyua which contains avers essentially that:
 1. This Honourable Court on 1st February, 2024 issued a judgment declaring that Ndeawa Warui (Deceased) was the proprietor of the property known as Mwea/Tebere/B/199 and it forms part of his estate and therefore available for inclusion in the schedule for distribution.
 2. That the 2nd interested party is dissatisfied with the said decision and intends to appeal to the Court of Appeal against the whole of the said Judgment and Decree of Lady Justice L. Gitari delivered on 1st February, 2024 and has since filed a Notice of Appeal to that effect.
 3. That as it stands succession with respect to the estate of the late Ndegwa Warui is underway and the matter has been scheduled for Mention for directions as to confirmation of grant on 14th February, 2024.
 4. That we are informed by our advocates on record that leave is necessary before appealing against a decision of the high court in succession matters in exercise of its original jurisdiction as in the instant matter.
 5. That the subject property Mwea/Tebere/B/199 was compulsorily acquired by the defunct Kirinyaga County Council and is now public property allotted to different groups for public utility.
 6. That the question of jurisdiction of this Court to pronounce itself on ownership of the subject property, whether the subject property was compulsorily acquired by the defunct Kirinyaga County Council whether the 2nd Interested party presented sufficient evidence to demonstrate the compulsory acquisition and whether the powers of the Commissioner for Lands to compulsorily acquire private property for public use could be delegated are serious grounds which merit serious judicial consideration by the Court of Appeal.
 7. That unless this Honourable Court grants the 2nd Interested party leave to appeal against this Honourable Court's Judgment and Decree of 1st February, 2024 and stays execution of the



said Judgment and Decree pending the hearing and determination of the intended appeal, the interested parties shall be greatly prejudiced.

8. That allowing the estate of Ndegwa Warui (Deceased) to include the subject property in their schedule of assets for distribution will not only amount to unlawful occupation of public property but will also prejudice parties that have a rightful claim over the said property having been duly allocated a portion of the said property by the defunct county council.
 9. That execution of the Honourable Courts Judgment and Decree issued on 1st February, 2024 will in effect cause the destruction and displacement of hundreds of families and public utilities which have been in existence since the 1970's. This will in turn occasion rude and irreparable disruption of life.
3. Through their replying affidavit dated 21st May 2024, the respondent made the following major averments:
1. That there has been a long protracted litigation between the family members over our father's land this matter has been settled vide a judgement of the court.
 2. That the current moves by the interested parties are just antagonizing our family and is a further prolong of the court process which needs to come to an end.
 3. That has become necessary for this court to interrogate whether the said interested parties have any locus in law to seek the orders before this court.
 4. Parties filed submissions as directed by the court

2nd & 7th Interested Parties Submissions

5. These parties raised two issues.

a) Whether this Honourable Court should grant leave to file an appeal with the Court of appeal

6. The 2nd and 7th Interested parties submit that despite Section 50 of the [Law of Succession Act](#) being silent on appeals where the High Court has exercised jurisdiction, Section 73 of the [Law of Succession Act](#) endows this Honourable Court with unfettered discretion to make any orders that it may deem necessary to meet the ends of justice.
7. They urge that the Court of Appeal in the case of Peter Wahome Kimotho v Josphine Mwiyeria Mwanu (2014) eKLR held as follows:

“...[the Constitution](#) of Kenya 2010 gives the Court of Appeal jurisdiction to hear Appeals from the High Court and any other Court or tribunal as prescribed by an Act of Parliament. Under [the Constitution](#), all matters from the High Court are appealable to the Court of Appeal.”

8. Further reliance is placed on the case of Rhoda Wairimu Karania & Another v Maru Wangui Karanja & Another (2014) eKLR where the Court of Appeal in setting out the considerations that this Honourable Court should take into account in granting or refusing leave to appeal held as follows:

“...in view of these and given the adversarial nature of litigation in our system of justice, it would be unconscionable to allow as final the decision of a single judge, and limit the right of Appeal to the Court of Appeal, especially now when the Court hierarchy has been opened by the creation of the Supreme Court as the apex Court.



We think we should have said enough to demonstrate that under the *Law of Succession Act*, there is no automatic right of Appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where an application for leave is refused with leave of this Court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial considerations.

9. Casual perusal of the Draft Memorandum of Appeal annexed to the 2nd Interested Party's Further Affidavit demonstrates that the intended Appeal raises weighty and triable issues that warrant serious consideration by the Court of Appeal.
10. This Honourable Court in its Judgment delivered on 1st February, 2024 declared that land parcel number Mwea/Tebere/B/199 forms part of the estate of Ndegwa Warui (Deceased) and as such available for inclusion in the schedule for distribution of assets of the Deceased. This holding failed, inter alia, to consider the fact that the said parcel had been exchanged with land parcel number Mwea/Marurumo/90 and Kirinyaga/Gathigiriri/300 which in fact the Petitioner had already included in the schedule for distribution.
11. The Honourable Judge also failed to consider that the said exchange took place during the lifetime of the Deceased, and that the interested parties were in occupation of the subject property way before the demise of the late Ndegwa Warui.

b) Whether this Honourable Court should grant stay of execution of the Judgment and Decree

12. This Honourable Court on 1st February, 2024 rendered a decision declaring that land parcel number Mwea/Tebere/B/199 formed part of the estate of Ndegwa Warui (Deceased) and as such was available for inclusion in the schedule of distribution of the assets of The Deceased's estate.
13. Following the said determination and given that succession with regards to the estate of Ndegwa Warui was already ongoing it follows therefore that confirmation of grant with regards to the said estate is without a doubt imminent. The confirmation of the said grant will doubtlessly render the intended Appeal nugatory and as such curtail the interested parties' right to be heard on their Appeal and deny them the right to exhaustion of judicial remedies.
14. They submit that whereas transfer of a property can easily be revoked in the event that an appeal is successful, that may not be the case in the present instance. For 49 years, the interested parties have known the subject property as home and do not have any other alternative abode. Unlike the Petitioner who already have the parcels of land (Mwea/Marurumo/90 and Kirinyaga Gathigiriri/300) given in exchange for the subject property Mwea/Tebere/B/199 by the County Council of Kirinyaga and which they continue to enjoy possession and have in fact included it in the schedule for distribution, the interested parties do not have such luxury.
15. It was held in *James Wangalwa & Another s Agness Naliaka Cheseto*(2012) eKLR that:

“...Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
16. They submit that the subject property is the only abode of the interested parties for over 49 years, the only source of livelihood for thousands of families in Mwea, the investments worth millions of shillings by the Muslim Community (5 interested party) and the Catholic Diocese (7 Interested party) is what substantial loss looks like in the present case.



5th and 13th Interested parties' submissions

17. The applicants made submissions along the following lines

a) Have the Applicants met the threshold for granting of leave to appeal to the Court of Appeal?

18. The provisions of Section 50 of the [Law of Succession Act](#) which deals with appeals does not address appeals to the Court of Appeal. The provision provides;

“ 50: Appeals to the High Court

1. 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.
2. An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim, and with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.”

19. While considering the exercise of discretionary powers there are many factors which are normally considered as was explained in the case of *Fakir Mohammed v Joseph Mugambi & 2 Others* [2005] eKLR where the court rendered itself thus;

“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path.....As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor.”

20. The applicants urge the Honourable Court to exercise its discretion in favour of the Applicants premised on the following reasons and/or grounds;

(i) The Applicants timeously filed the application before court

The Judgment of this court was delivered on 1/2/2024 and the Applicants filed their notice of appeal on 6/2/2024 and served it immediately and filed the instant application on 14/2/2024. As such there was no delay in filing of the application.

(ii) Arguable grounds of Intended Appeal

Annexure B-4 in the Supporting Affidavit to the instant application the Applicants has annexed a draft Memorandum of Appeal for filing to the Court of Appeal. Some of the ground to be relied upon is failure be the trial court to take judicial notice of a Taskforce Report commissioned by the then Central Province Provincial Commissioner Victor Musoga titled “A Report by the Taskforce Appointed to Streamline matters in Kirinyaga District, August/ September 1994 which gave a historical background of the endemic problem of acquired and compensated properties in Kirinyaga District.

(iii) Prejudice



Amongst the Interested Parties the 5th and the 13th Interested Parties, the proper party as sued is Ismail Bakiti (5th Interested Party/Applicant) who is the Chairman of Wanguru Muslim Community. The Muslim Community was allocated the land by the County Council of Kirinyaga 5 acres of land in the suit property wherein there is a Mosque standing thereon since early 1980's (first as a mud structure) as confirmed in the Part Development Plan (PDP annexed in the Applicants Further Affidavit. Later on a permanent Mosque structure was built and a Muslim Village comprising 40 households settled with permanent structures.

They submit that a Mosque is a sacred sanctuary revered by Muslims and as per court record, the investments put by the Muslim community on the ground are over Kshs.50 million. They stand to be greatly prejudiced and exposed to execution of court decree if the leave and orders of stay of execution pending Intended Appeal are not granted, it is therefore imperative the court exercises its discretion in favour of the Applicants.

Should the Honourable Court grant stay of its orders of 1/2/2024 pending the Intended Appeal?

21. They submit that it is trite law for an application for stay of execution pending appeal to succeed, the Intended Appellant must demonstrate that the Intended Appeal is arguable and will be rendered nugatory (redundant) if the stay is not granted.
22. It is argued that the authorities are clear that an arguable appeal need not be one that necessarily succeeds but one that is not frivolous; and that it is not for the court requested to grant leave to make definitive findings as to whether the appeal would be successful
23. The Applicants reiterate as submitted above that they have raised several arguable grounds of appeal amongst them as provided in Clause 13 (b) above.

(c) Should the Honourable Court condemn the Applicants to pay security of costs?

24. Order 26 Rule 1 of the Civil Procedure Rules, 2010 is the necessary law underpinning an order for provision of security for costs. It provides;

“In any suit the court may order that security for the whole or any part of costs of any Defendant or third or subsequent party be given by any other party.”

25. In High Court Civil Case 79 of 2013, Saudi Arabian Airlines Corporation vs Scan Express Services Ltd, Gikonyo J stated;

“It is obviously court's absolute judicial discretion to call for security of costs. Where the Plaintiff is a foreign company, as opposed to a natural person, the courts have always insisted on security as was stated in Shah vs Shah [1982] KLR 95 that:

“The general rule is that security is normally required from Plaintiff resident outside jurisdiction but as was agreed in the court below a court has discretion, to be exercised reasonably and judicially to refuse to order that security to be given.”

Respondent submissions

26. The respondents' submissions as to whether there is merit in the motions presented are that the motions put forth by the interested parties resemble the desperate flailing of a dying horse. In truth, the interested parties are acutely aware that their position became untenable the moment they failed to substantiate their claim of title through evidentiary means.



27. On section 50 of the *Law of Succession Act* the court's attention was drawn to the mischief Section 50 of Cap160 endeavors to rectify. A purposive interpretation of this statute reveals a clear intent on the part of its drafters to bring an expeditious conclusion to litigation, particularly within the realm of probate and family law matters.
28. The respondent submits that the Waruis have patiently awaited resolution for over a decade, endeavoring to reclaim their family land from encroachers and trespassers. It is incumbent upon this court to honor the wishes and aspirations of the deceased, facilitating the peaceful division of assets acquired on behalf of the Waruis.
29. It was argued that the interested parties are undeserving of equitable relief from this esteemed court. Their lack of bona fide interest capable of withstanding scrutiny in the Court of Appeal necessitates their acceptance of the present circumstances. Moreover, alternative remedies afforded by law remain at their disposal.

Issues for Determination

30. The following issues arise for determination:
 - a. Whether this Honourable Court should grant leave to file an appeal with the Court of appeal.
 - b. Should the Honourable Court grant stay of its orders of 1/2/2024 pending the Intended Appeal.

Analysis and Determination

31. This Honourable Court on 1st February, 2024 issued a judgment declaring that Ndegwa Warui (Deceased) was the proprietor of the property known as Mwe/Tebere/B/199 and it forms part of his estate and therefore available for inclusion in the schedule for distribution.
32. The 2nd interested party is dissatisfied with the said decision and intends to appeal to the Court of Appeal against the whole of the said Judgment and Decree of Gitari, J. delivered on 1st February, 2024 and has since filed a Notice of Appeal to that effect.
33. That as matters stand succession with respect to the estate of the late Ndegwa Warui is underway and the matter has been scheduled for Mention for directions as to confirmation of grant.
34. Thus, they seek leave to appeal and stay of execution pending appeal.

Whether this Honourable Court should grant leave to file an appeal with the Court of Appeal

35. The provisions of Section 50 of the *Law of Succession Act* which deals with appeals makes decisions on appeals from the subordinate courts final. The provision is as follows:

“ 50: Appeals to the High Court

1. 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.
2. An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a



deceased Muslim, and with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.”

36. They submit that despite Section 50 of the *Law of Succession Act* being silent on appeals where the High Court has exercised original jurisdiction. Section 73 of the *Law of Succession Act* endows this Honourable Court with unfettered discretion to make any orders that it may deem necessary to meet the ends of justice.
37. The Court of Appeal in the case of Peter Wahome Kimotho v Josphine Mwiyeria Mwanu(2014) eKLR held as follows;
- “...*the Constitution* of Kenya 2010 gives the Court of Appeal jurisdiction to hear Appeals from the High Court and any other Court or tribunal as prescribed by an Act of Parliament. Under *the Constitution*, all matters from the High Court are appealable to the Court of Appeal.”
38. In this court’s view, the above position overrides all other positions, and should certainly prevail in all cases where there is doubt as to whether or not an appeal to the Court of Appeal should be allowed.

Arguable appeal

39. The Judgment of this court was delivered on 1/2/2024 and the Applicants filed their notice of appeal on 6/2/2024 and served it immediately and filed the instant application on 14/2/2024. As such there was no delay in filing of the application.
40. The question is whether it raises is an arguable appeal.
41. This issue was dealt with by the Court of Appeal in *Kenafric Matches Ltd v Match Masters Ltd and Anti Counterfeit Agency Nairobi Civil Application No. E092 of 2001*(Musinga, Nambuye, J. Mohammed JJA) where they cited with approval the Court’s earlier decision in *Stanley Kangethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR in respect of an arguable appeal as follows:
- “VII) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court, one which is not frivolous.
- VIII) In considering an application brought under Rule 5(2)(b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”
42. A casual perusal of the Draft Memorandum of Appeal annexed to the 2nd Interested Party’s Further Affidavit demonstrates that the intended Appeal raises extremely weighty and triable issues that warrant serious consideration by the Court of Appeal.

Irreparable loss

43. The applicants depose that execution of the Honourable Court’s Judgment and Decree issued on 1st February 2024 will in effect cause the displacement of hundreds of families in possession presently and the destruction of public utilities which have been in existence since the 1970’s. This will in turn occasion untold loss and irreparable disruption of life.
44. The respondent opposes the application by deposing that the current moves by the interested parties are intended merely to antagonize the deceased’s family, and is a further prolongation of the court process which needs to come to an end.



45. Ultimately, this court should exercise its discretion in favour of allowing the appeal as it raises serious triable issues on ownership of the suit land, and dislocation of numerous families.

Whether this Honourable Court should grant stay of execution of the Judgment and Decree

46. The parties submit that given that succession with regards to the estate of Ndegwa Warui was already ongoing it follows therefore that confirmation of grant to the said estate is without a doubt imminent and will render the appeal nugatory. This is a position the court is empathetic to.
47. It was submitted that whereas transfer of a property can easily be revoked if an appeal is successful, that may not be the case in the present instance. Here, it is in evidence that for 49 years, the interested parties have known the subject property as home and do not have any other alternative abode.
48. It was held in *James Wangalwa & Another v Agness Naliaka Cheseto*(2012) eKLR that;
- “...Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
49. The respondent submits that the estate of Ndegwa Warui and his family have patiently awaited resolution of this matter for over a decade, endeavoring to reclaim their family land from encroachers and trespassers. As such, they argue that it is incumbent upon this court to honor the wishes and aspirations of the deceased, by facilitating the peaceful division of assets acquired on behalf of the Waruis.
50. Whilst that position is definitely true and worthy of consideration, the court cannot be blind to the weighty issues that must be attended to with finality arising from the Judgment of this court. This court considers that a further evaluation thereof by a Superior Court would give finality to the parties’ claims.
51. This court has witnessed the numerous people who have attended the court proceedings herein anxiously following the case to know their fate. I think they have a right, just like the estate and families of the deceased, to have their day in court on an appeal in the Court of Appeal.

Disposition

52. Accordingly, and in light of the foregoing discussion, the appropriate orders in this matter are as follows:
- a. The application is allowed to the extent that the applicants are granted leave to file an appeal.
 - b. Stay is hereby granted against implementation of the judgment of 1st February 2024 and to the effect that the estate is prohibited from further transactions effecting the grant pending appeal.
 - c. On the request that security for costs, be given in the event stay is ordered, no order for security is granted given the numerous parties involved and the general public nature of these proceedings.
 - d. In light of the huge public interest evident in this matter and it being one concerning an estate, no order as to costs is given herein.
53. Orders accordingly

DATED AT KERUGOYA THIS 6TH DAY OF NOVEMBER, 2024.

R. MWONGO



JUDGE

***Delivered in the presence of:**

1. Amar - holding brief for Ali for 5th & 11th Interested Parties
2. Muchiri - for 1st 3rd 4th 8th 9th & 10th Interested Parties
3. Kivuti - for Respondent Alfred Warui
4. Small - holding brief for Wanyonyi for 2nd & 7th Interested Parties
5. Kisiamo Mugo - for 15th Interested Party in Person
6. Muinde - for Estate of Ndegwa Warui Respondent

