



**In re Estate of Nyathira Muthuma (Deceased) (Family Appeal
E016 of 2024) [2024] KEHC 15683 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15683 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL E016 OF 2024
FN MUCHEMI, J
DECEMBER 5, 2024**

BETWEEN

SIMON MUTHUMA NG'ANG'A APPELLANT

AND

HANNAH WAMBUI NJUGUNA 1ST RESPONDENT

MARGARET MAGIRI MUCHUKU 2ND RESPONDENT

ELIZABETH WANJIKU GITAU 3RD RESPONDENT

RULING

Brief Facts

1. The application dated 3rd June 2024 seeks for orders of stay of proceedings in Ruiru CM Succession Cause No. E017 of 2024 pending hearing and determination of the appeal.
2. In opposition to the application, the respondents filed a Replying Affidavit dated 24th June 2024.

Appellant's/Applicant's Case

3. The applicant states that he is a son of the deceased and that the deceased died on 17th May 2022 having filed an application dated 29th February 2024 seeking for orders for stay of proceedings on the basis that there was a related matter pending before the High Court at Nairobi in Succession Cause No. 795 of 1989. The applicant further states that in the said application he raised an issue of the court's jurisdiction for the reason that in the High Court Succession Cause No. 795 of 1989, he had filed an application dated 12th February 2024 seeking review of a ruling delivered on 7/1/2019 annulling the grant. The application before the High Court Nairobi relates to the same estate asset, the subject of the proceedings for administration before the lower court and the case before the High Court was scheduled for hearing of the said application on 17/7/2024 before Justice Chemitei.



4. The applicant states that the lower court heard his application and dismissed it on 16/5/2024. Being aggrieved with the said decision, the applicant states that he lodged this appeal which raises arguable issues such as the jurisdiction of the lower court to hear the matter. The applicant further questions whether the trial court despite being informed of the proceedings before a superior court exercised judicial discretion properly in declining to stay the proceedings. The applicant argues that he has raised arguable points of appeal which the court is called upon to evaluate while hearing the appeal.
5. The applicant is apprehensive that if the orders sought are not granted, his appeal will be rendered nugatory as the pertinent issues of jurisdiction and judicial discretion may be determined long after the proceedings have progressed substantially. Further, the lower court may proceed and issue a grant once the cause is gazetted and revoking the grant would prove to be an arduous task if the appeal is allowed.
6. The applicant states that the deceased died on 17/5/2022 and the cause was filed in the year 2024 hence no prejudice is likely to be suffered by the respondents.

The Respondents' Case

7. The respondents state that the deceased died on 17th May 2022 at Juja Farm and thus the matter is well within the jurisdiction of Ruiru Senior Principal Magistrates Court. The respondents state that they filed their replying affidavit dated 25th March 2024 where they adequately addressed the applicant's issues raised in his application for stay of proceedings in the lower court, through which they proved the issue of jurisdiction and disproved all the applicant's unfounded allegations.
8. The respondents aver that the estate in question is not in dispute as the same was settled 29 years ago, before the impugned ruling, through the applicant's Chamber Summons dated 27/6/1995 where he relinquished his share of the estate and that of their late brother to vest fully in their late mother, the deceased herein.
9. The respondents argue that the applicant hurried to the High Court and Ruiru Court to file the frivolous applications upon hearing that they intended to administer the estate of their late mother. The respondents further argue that it is inexplicably outrageous and irrational why the applicant would wait for all those years to approach the court, raising matters that have long been settled.
10. The respondents state that the appeal does not raise any arguable issues as they have all been adequately addressed vide their responses and the lower court's ruling dated 16/5/2024.
11. The respondents state that the applicant is being dishonest in claiming that he was not aware of the ruling rectifying the grant or any proceedings relating to the rectification as he was served with the application leading to the rectification of the grant and an affidavit of service dated 17/7/2017 filed in court by one James Ndirangu.
12. The respondents argue that the applicant is a beneficiary in the deceased's estate despite his refusal to sign the consent. Thus, should the applicant have any disputes, the applicant can raise them using the right procedure and forum being the Magistrate's Court.
13. The respondents state that the application filed by the applicant in High Court at Nairobi is defective, malicious and a waste of the court's precious time as there is no substance in the application, the applicant having relinquished his share and the court having affirmed that by rectifying the grant to reflect that position.
14. The respondents argue that the prayer for stay of proceedings is unsupported, founded on untrue allegations which have been disproved and is sought by a party approaching the court with unclean hands and thus should not be aided. The respondents further argue that granting the application will



- amount to delaying the succession of the deceased's estate with an end goal to disinherit them for the second time.
15. The applicant filed a Further Affidavit dated 26th June 2024 and states the deceased has never been a resident of Juja Farm but she lived in Kinale. Thus the succession cause ought to have been filed at the Chief Magistrates Court in Limuru as the case value is within the pecuniary jurisdiction of the court.
 16. The applicant states that the respondent resides in Juja and she may have orchestrated the issuance of the Death Certificate reflecting that the deceased was a resident of Juja Farm. The applicant argues that even if that was the case, the proper court should have been the Chief Magistrates court at Thika and not Ruiru.
 17. The applicant argues that the issue of jurisdiction is pertinent and it goes to the root of the matter yet the lower court failed to make a determination of it. Further, the lower court failed to pronounce itself on the pertinent issues precipitating the instant appeal which also addresses other questions of fact.
 18. The applicant states that the respondents have not availed the ruling delivered 29 years ago and thus no order of substitution was/has ever been made in respect of the estate of his deceased brother.
 19. The applicant states that he has no intention to disinherit his siblings but he has an equal right to access justice and to be heard. The applicant states that he was unaware of the ruling delivered on 7/1/2019 which he has challenged before the High Court at Nairobi Succession Cause No. 924 of 1989.
 20. The applicant further states that he failed to sign the consent forms as he was never involved or made aware of the processes leading to the defective succession proceedings before a court lacking jurisdiction. Further, the applicant avers that he was never served with ruling dated 7/1/2019 by Justice Farah Amin.
 21. The applicant argues that the respondents cannot vilify him for challenging the ruling which gave rise to the succession proceedings before the lower court of the appeal as he has an equal right to commence proceedings. The applicant further argues that it is only fair that the court grants stay of proceedings to avert parallel proceedings. In the event the court upholds or allows the appeal, the appeal will render the proceedings before the lower court academic and a waste of the court's judicial time.
 22. The applicant states that on 22/5/2024, the lower court issued a grant in the names of the 1st and 2nd respondents and he is apprehensive that if stay is not granted, the grant shall be confirmed once 6 months lapse which is on 6/11/2024.
 23. Parties put in written submissions.

The Applicant's Submissions

24. The applicant relies on the cases of *Global Tours & Travel Limited* Nairobi HC Winding Up Cause No. 43 of 2000 and *Christopher Ndolo Mutuku vs CFC Stanbic Limited* [2015] eKLR and submits that he has met the threshold for grant of stay of proceedings pending appeal.
25. Relying on the case of *Stanley Kinyanjui vs Tony Ketter & 5 Others* (2013) eKLR, the applicant submits that his memorandum of appeal raises issues of law and fact with overwhelming chances of success and if the court does not stay the proceedings in the trial court, the appeal will be rendered nugatory. The applicant further submits that the issues for determination on appeal go to the core of the trial court matter as it touches on whether the lower court had both territorial and geographical jurisdiction to hear the matter, whether the lower court despite being informed of the proceedings before a superior court exercised judicial discretion properly in declining to stay the proceedings and whether it was



proper for a lower court to proceed with a matter despite being informed of a pending case in a superior court.

26. The applicant submits that the High Court being a superior court to the trial court, the lower court proceedings in Succession Cause No. E107 of 2024 at Ruiru Senior Principal Magistrates Court ought to be stayed as the decision of the high court shall be binding on the lower court.
27. The applicant relies on the case of *Wachira Karani vs Bildad Wachira* (2016) eKLR and submits that courts are called upon to make sure that matters are heard on merit and not to render an appeal nugatory.
28. The applicant submits that he filed the application timeously as the impugned ruling was delivered on 16/5/2024 whilst the current application was filed on 3/6/2024, only 16 days after the ruling.
29. The applicant relies on the cases of *BML vs WM* [2020] eKLR and The *Hon Attorney General vs the Law Society of Kenya & Another*, Civil Appeal (Application) No. 133 of 2011 and submits that he has demonstrated sufficient cause to satisfy the court that in the interests of justice, the orders ought to be granted.

The Respondents' Submissions

30. The respondents rely on Section 48 and 49 of the *Law of Succession Act* and submits that the lower court has jurisdiction to determine the matter as the deceased died at Juja Farm where she had been living with one of her daughters for a period of more than 6 months preceding her death. The respondents further state that the deceased died in her sleep in the house and her death was reported to the Juja Farm Police Station where the burial permit was issued. Pursuant to Section 48 and 49 of the *Law of Succession Act*, the last known residence of the deceased prior to her death was Juja Farm which falls within the jurisdiction of Ruiru Law Courts.
31. The respondents rely on the cases of *Daniel Walter Rasugu* Nbi HCCC No. 15 of 2006; *Global Tours & Travel Limited* Nairobi HC Winding Up Cause No. 43 of 2000; *Kenya Power & Lighting Company Limited vs Esther Wanjiru Wokabi* [2014] eKLR and *Lucy Waitthera Kimanga & 2 Others vs John Waiganjo Gichuri* [2015] eKLR and submit that the applicant has not met the threshold for grant of stay of proceedings.
32. The respondents argue that the applicant failed to disclose that he relinquished his claim in the estate. The High Court ruling of Justice Farah S. Amin together with the rectified certificate of confirmation of grant captured the same together with their pleadings and further retrieved court records produced before the court. The respondents state that the applicant has blatantly refused to respond to the same and instead he continues to argue that he is the sole beneficiary of the estate even after relinquishing his claim leading the court to vest the whole of the property in their mother.
33. The respondents submit that the applicant's averment that since the death of their brother, his co-administrator, there was no substitution for his role in the administration of the estate, is bad in law as provided in Section 81 of the *Law of Succession Act*. Thus, the applicant coming after three decades later to be declared a sole beneficiary of the father's estate at the detriment of the other siblings can only be termed as a selfish absurd, baseless and malicious assertion.
34. The respondents argue that the order of stay of proceedings does not serve the interests of justice as the applicant has not justified why the proceedings administering the estate vested in their mother should be stayed so that he can maliciously and without valid reasons other than wasting the court's precious time and resources can be allowed to revisit the decision arising out of his own doing in their father's estate. The respondents submit that the issues being raised by the applicant can competently



be determined in the mother's estate where the applicant is listed as a beneficiary without necessarily going back to their father's estate.

35. The respondents rely on the case of *Bai Lin (K) Ltd & 2 Others vs Zingo Investments Limited & Another* [2014] eKLR and submit that the applicant has failed to demonstrate what loss he stands to suffer as the administration of the deceased's estate covers all the beneficiaries of the estate.
36. Relying on the cases of *Republic vs The Commissioner for Investigations & Enforcement ex parte Wananchi Group Kenya Limited* [2014] eKLR and *Kenya Wildlife Service vs James Mutembei* (2019) eKLR and urges the court to exercise its discretion judiciously and find no justification in granting the orders sought. The respondents further submit that the appeal, the current application and the application for review in the High Court are frivolous and a waste of the court's time being hinged on no substantive argument. Thus, the applicant should not be allowed to continue wasting more of the court's time.

The Law

Whether the applicant has met the conditions for grant of stay of proceedings pending appeal.

37. It is trite law that whether or not to issue an order for stay of proceedings is a matter of the court's discretion exercised after due consideration of the merits of the case and the likely effect on the ends of justice. The exercise of that discretion should be premised on conscientious and judicious decision based on defined principles which were expounded by Ringera J in *Global Tours & Travels Limited*, Nairobi HC Winding Up Cause No. 43 of 2000:-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justicethe sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

38. Similarly the threshold for stay of proceedings has been illuminated in the passages in *Halsbury's Law of England*, 4th Edition, Vol. 37 page 330 and 332 that:-

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show merely that the plaintiff might



not, or probably would not, succeed but that he could not possible succeed on the basis of the pleading and the facts of the case.”

39. In that regard, for an order of stay of proceedings to issue the following points of consideration ought to be adhered to:-
- a. Whether the applicant has established that he has a prima facie arguable case;
 - b. Whether the application was filed expeditiously; and
 - c. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

Whether the applicant has established that he has a prima facie arguable case

40. Cognizant of the fact that an arguable appeal needs only raise a single bona fide point worthy of consideration by the Judge who will hear the appeal and it need not be one that must necessarily succeed. *Cooperative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya)* [2015] eKLR.
41. I have keenly perused the memorandum of appeal, the trial court’s ruling and the court’s reasoning. It is a matter of fact that the succession cause at Nairobi Family Division E 924 of 1989 of Njoroge Muiruri is difference from the one before the magistrate at Ruiru which is of the estate of Nyathira Muthuma. It is doubtful whether the magistrate at Ruiru had jurisdiction to stay the proceedings of the High Court or had any basis, legal or factual to do so. I am of the considered view that the issue in the Ruiru and Nairobi case are independent of each other. This observation convince this court that this appeal has minimal chances of success, without, of course pre-empting the same. The applicant in my view has not established a prima facie case.

Whether the application was filed expeditiously

42. The ruling was delivered on 16th May 2024 and the applicant filed the instant application on 5th June 2024. The application having been filed twenty (20) days after the ruling has been filed timeously.

Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought

43. In an application to stay proceedings the court is required to exercise judicial discretion in the interest of justice. This has been demonstrated in the case of *Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited* (2015) eKLR the court observed that:-
- “.....what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”
44. The applicant argues that the proceedings in the lower court ought to be stayed to avoid parallel proceedings and rendering the appeal nugatory. The applicant argues that since he has raised a question on jurisdiction, if the proceedings in the trial court are not stayed, the trial court will issue a grant which will render the appeal nugatory. From the record in Ruiru Senior Principal Magistrates Court Succession Cause No. E017 OF 2024, the respondents who are the petitioners in the cause have listed the applicant, their brother as a beneficiary of the estate of the deceased. The respondents further provided a history of the suit property forming the deceased’s estate. Although the applicant states that he was not served with the documents, the respondents maintain that they served him with the same but he refused to sign. In any event, the applicant has not denied that he is aware of the proceedings



in the Magistrate's court. Furthermore, the record shows that the suit property was bequeathed to the deceased herein in Nairobi High Court Succession Cause No. 924 of 1989. Despite the applicant being silent on the issue of him relinquishing his right to a share of the property, the record is clear that he filed an affidavit on 27th June 1995 seeking rectification of the grant so that the share of 1/3 that was to vest in his late brother to vest with the deceased and he confirmed that he relinquished his own 1/3 share. Therefore, it would be in the interests of justice to have the issues raised by the applicant on the suit property determined in the lower court in the succession cause as he is listed as a beneficiary. The Magistrate's court is well placed and has the jurisdiction to determine the succession cause pending before it in my view.

45. Bearing in mind that the succession cause before the Magistrate is yet to be heard and determined; that other issues may arise at the determination of the case; that any of the parties may prefer an appeal on the final judgment, it is my considered view that there is no sound or sufficient basis of staying proceedings before the Magistrate Court. Depending on the outcome of the said case, the applicant or any other party will have the right of appeal.

Conclusion

46. Having considered all the issues at hand, I find that the application dated 3rd June 2024, has no merit and is hereby dismissed.
47. The applicant is at liberty to withdraw this appeal as he waits for the outcome of the Ruiru Succession Cause No. E 017 of 2024.
48. Being a family matter, there shall be no order as to costs in this application.
49. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 5TH DAY OF DECEMBER 2024.

F. MUCHEMI

JUDGE

