



**In re Estate of Simon Ndungu Kihonge (Deceased) (Succession Cause  
1638 of 1993) [2025] KEHC 15237 (KLR) (Family) (30 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15237 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**SUCCESSION CAUSE 1638 OF 1993**

**HK CHEMITEI, J**

**OCTOBER 30, 2025**

**IN THE MATTER THE ESTATE OF SIMON NDUNGU KIHONGE (DECEASED)**

**BETWEEN**

**LUCY NYAMBURA NDUNGU ..... APPLICANT**

**AND**

**BEATRICE WANGARI NDUNGU ..... 1<sup>ST</sup> RESPONDENT**

**JANE NYAMBURA NDUNGU ..... 2<sup>ND</sup> RESPONDENT**

**TABITHA WAIRIMU NDUNGU ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling relates to the applications dated 3<sup>rd</sup> April, 2024, 11<sup>th</sup> September, 2024 and 24<sup>th</sup> September, 2024.
2. The application dated 3<sup>rd</sup> April, 2024, filed by the 1<sup>st</sup> and 2<sup>nd</sup> Administratives/Applicants – Beatrice Wangari Ndungu and Jane Nyambura Ndungu; seeks for orders that:-
  1. Spent.
  2. The 1<sup>st</sup> and 2<sup>nd</sup> Administratrix/Applicants be granted leave to file an appeal against the ruling of Hon. Justice H.K. Chemitei delivered on 21<sup>st</sup> March, 2024.
  3. The orders of Hon. Justice H.K. Chemitei be stayed pending filing, hearing and determination of the aforesaid appeal.
  4. The costs hereof be provided for.



3. The application is based on the grounds on its face thereof and supported by affidavit sworn by Winnie Chepng'etich on 3<sup>rd</sup> April, 2024.
4. She avers inter alia that she is an advocate practicing in the law firm of Messrs. Njeru Nyaga & Co. Advocates LLP, the firm currently on record for the 1<sup>st</sup> and 2<sup>nd</sup> Administratrixes in this matter.
5. She states that Hon. Justice H. K. Chemitei delivered a ruling on 21<sup>st</sup> March, 2024, which essentially sought to implement the decree issued by the Court of Appeal in Nairobi Civil Appeal Nos. 305 and 306 of 2018. However, the said decree is the subject of a pending application for review dated 26<sup>th</sup> March, 2021, which remains undetermined.
6. She further deposes that Nairobi CMCC (O.S.) No. E8660 of 2021, a matter relating to the estate of the deceased, is scheduled for hearing on 19<sup>th</sup> November, 2024, while Naivasha CMCC ELC No. E088 of 2022 is also pending hearing and final determination.
7. She adds that the 3<sup>rd</sup> and 4<sup>th</sup> Administratrixes were married to the deceased in 1982 and 1989 respectively, at a time when the deceased's estate was still intact. Their current haste to distribute the estate - contrary to the mode of distribution mutually agreed upon on 13<sup>th</sup> May, 2005 by the four households is, in her view, motivated by malice and a sense of undue entitlement. Despite the Applicant's willingness to pursue a mediated settlement, the Respondents have declined to participate and instead appear intent on unjustly enriching themselves at the expense of other beneficiaries of the deceased's estate, many of whom contributed to the acquisition or development of the said properties.
8. She avers that unless the orders sought herein are granted, the Applicants and other rightful beneficiaries stand to suffer irreparable loss and prejudice, which would undermine the equitable administration of the deceased's estate.
9. The application is opposed vide replying affidavit sworn by Cornelius Buluti Litunda on 24<sup>th</sup> June, 2024.
10. He avers inter alia that he is the advocate on record for the 4<sup>th</sup> Administratrix/Respondent. He states that the Applicants are vexatious and habitual litigants whose actions are intended to frustrate the Respondent and prevent her from enjoying the fruits of the confirmed grant dated 10<sup>th</sup> June, 2016, as amended on 8<sup>th</sup> November, 2021.
11. He avers that the application is frivolous, vexatious and an abuse of the court process, as it raises no new facts or evidence capable of justifying the orders of stay pending appeal. The application is in any event overtaken by events, since the transmission documents have already been executed by the Registrar and lodged at the Naivasha Land Registry in accordance with the confirmed grant.
12. He further asserts that the application is a disguised attempt to obtain stay orders against a decision of the Court of Appeal through the back door, yet the ruling delivered on 21<sup>st</sup> March, 2024 merely sought to implement that appellate court decision. This court, he maintains, lacks jurisdiction to stay or vary the judgment of a superior court.
13. He refers to the annexure marked "WC1", being an email correspondence dated 3<sup>rd</sup> November, 2021 from the Court of Appeal, directing the Applicants to file and serve their written submissions within fourteen (14) days - directions which they have failed to comply with for over two years. He contends that such inordinate delay offends the equitable principles that equity aids the vigilant and not the indolent and that delay defeats equity. It is therefore evident that the Applicants main objective is to prolong litigation and obstruct the implementation of the Court's decision.



14. He further observes that the Applicants have not filed a notice or memorandum of appeal, nor placed any such document before this court to enable it to assess the arguability or viability of the intended appeal, which is a prerequisite for consideration of an application for stay. The application, he adds, fails to demonstrate that the intended appeal would be rendered nugatory if stay is denied. Moreover, even if the appeal were to succeed, the Court of Appeal possesses sufficient powers to issue appropriate directions and remedies to address any prejudice that may arise.
15. He dismisses as baseless and unsubstantiated the Applicants claim that they or the other beneficiaries would suffer irreparable harm if stay is not granted. On the contrary, the continued pendency of this application deprives the rightful beneficiaries of their ability to enjoy the fruits of the judgment and ruling already rendered by this Honourable Court.
16. He further points out that the Applicants have not offered or demonstrated the provision of any security, nor shown how the estate would meet such a requirement, yet security is a mandatory condition for the grant of stay. Being administrators privy to the estate's financial status, the Applicants are well aware that the estate lacks the capacity to provide such security.
17. In view of the foregoing, he urges that it is fair and just that no stay orders be granted and that the ruling of this Honourable Court be implemented without further delay. He reiterates that the Registrar has already executed all necessary transmission documents and that the implementation of the ruling will ensure that all beneficiaries finally enjoy the benefits due to them under the confirmed grant dated 10<sup>th</sup> June, 2016, as amended on 8<sup>th</sup> November, 2021, in the interest of justice and finality.
18. The Applicants have filed written submissions dated 11<sup>th</sup> September, 2024.
19. The 4<sup>th</sup> Administratrix/Respondent has filed written submissions dated 13<sup>th</sup> September, 2024 placing reliance among others on the following:
  - a. Samuel Kamau Macharia & another vs Kenya Commercial bank Limited & 2 others [2012] eKLR where it was stated as follows: "A court's jurisdiction flows from either the constitution of legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings."
  - b. Benedict Ojou Juma & 10 Others vs A. J. Pereira & Sons Ltd [2016] eKLR where the court held as follows: "... 24. The Applicant must first satisfy the court that appeal or intended appeal is not frivolous, that is to say, it has an arguable appeal. 25. Second, the court must be satisfied that if stay is denied, and the appeal is successful, the result would be rendered nugatory. 26. The court of appeal emphasized in order that the Applicant may succeed, he must demonstrate both limbs. Demonstrating one limb, and failing in demonstrating the other would lead to failure of the application... 30. The draft memorandum of appeal serves to establish if there is an arguable appeal. The Applicant has the right of appeal. In order to stay execution pending the exercise of that right however, the court seized of the judgment must be satisfied the principles laid down in the case of Rosebell Wambui Muthee are all satisfied. It must be satisfied there is an arguable appeal. There is no way of assessing of there is an arguable appeal, without the court having the benefit of a draft memorandum of appeal... 31. Even barring the attachment of a draft memorandum of appeal, there are no grounds stated in the affidavits filed by the Respondent, which would enable the court to say there is an arguable



appeal. A notice of appeal does not assist in assessing whether the right of appeal is sought to be exercised reasonably. There is not a single paragraph, dedicated to showing there is an arguable appeal...”

20. The application dated 11<sup>th</sup> September, 2024 filed by Cornelius Litunda seeks for orders that:-
  1. Spent.
  2. This honourable court be pleased to make orders to withdraw the caution against L.R. Mwichiringiri Block 4/311 created on 16<sup>th</sup> April, 2024 by the 2<sup>nd</sup> Administratrix, Jane Nyambura Ndungu, and her son, Andrew Nganga.
  3. The court does make orders that may meet the ends of justice in this matter.
  4. Costs of this application be in the cause.
21. The application is based on the grounds on the face thereof and supported by affidavit sworn by Cornelius Litunda on 11<sup>th</sup> September, 2024.
22. He avers inter alia that he is the advocate on record for the 4<sup>th</sup> Administratrix. Pursuant to the orders of this Honourable Court issued on 26<sup>th</sup> March, 2024, transmission documents were duly executed in favour of the Applicant and her beneficiaries and presented to the Land Registry for issuance of title deeds as directed by the Court. However, in a blatant disregard of the said orders, the 2<sup>nd</sup> Administratrix, Jane Nyambura Ndungu, unlawfully registered a caution over one of the estate properties earmarked for distribution - L.R. No. Mwichiringiri Block 4/311 - on 16<sup>th</sup> April, 2024, after the court’s directions and orders of 24<sup>th</sup> March, 2024.
23. This caution is illegal, irregular and contrary to the express orders of this Honourable Court. It frustrates the implementation of the court’s decision, undermines the rights of the lawful beneficiaries and defeats the ends of justice. Despite the advocate’s efforts to have the caution lifted by the Land Registrar, no action has been taken, rendering the Registrar unable to complete the transfer of the property to the rightful beneficiaries.
24. In view of the foregoing, he urges this Honourable Court to issue an order for the removal of the caution under Section 73 of the [Land Registration Act](#), 2012, as the application is well-founded and deserving of the Court’s intervention.
25. The application is opposed vide grounds of opposition dated 28<sup>th</sup> November, 2024. The grounds of opposition are based on the grounds that:
  1. The supporting affidavit by Cornelius Litunda should be struck out as he is not competent to swear an affidavit on contentious matters.
  2. It is incompetent and defective.
  3. Orders and distribution of property can only be made in the estate of the deceased person whose property is sought to be distributed and not a different estate as sought in the said application.
26. The 4<sup>th</sup> Administratrix has filed written submissions dated 17<sup>th</sup> January, 2025 placing reliance among others on the following:
  - a. Milimani Commercial Court Civil Case No. 532 of 2004: Ahmednassir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited (2) East African law Reports (2006) 2 EA where it was stated as follows: “In my reading of that rule, it does not give rise to an automatic bar



to affidavits being sworn by advocates who then also appear before the court for the hearing of matters in which the affidavits are adduced in evidence. The rule allows advocates to swear affidavits on “formal or non – contentious matter of fact, in any matter. In this case, the matter before the court is an application for review. The application is therefore not a formal one, in any sense of that word, as it is contested. But at the same time, until and unless the affidavit in support of the application were contested, by way of a replying affidavit, there was no way that the court could say that the facts deponed to, were contentious.”

- b. Tabitha Kavenge Matolo vs Rhoda Ndululu Sengete & Another [2016] eKLR where the court stated as follows: “The Applicant relied on the cases of Court of Appeal of Kenya at Nairobi Case No. 354 of 2004 Pathi vs Ali & Others east African Law reports (2005) EA (CAK) where it was held by the court of appeal that there is no prohibition against an advocate who is of his own knowledge can prove some facts to state them in an affidavit on behalf of his client. The Applicant also cited Milimani Commercial Court of Kenya at Nairobi Case No. 532 of 2004 Ahmednassir Abdikadir & Co. Advocates vs National Bank of Kenya Limited (2) East African Law Reports (2006) 2 EA, where the court held that if one party had made statements on matters of fact, and the other party did not respond thereto, there would be no basis for the said matters being termed as being contentious. The court further held that Rule 9 of the Advocates Practice Rules does not give rise to an automatic bar to affidavits being sworn by Advocates who then also appear before the court for the hearing of matters in which the affidavits are adduced in evidence. The rule allows advocates to swear affidavits on “formal or non – contentious matters of any fact in any matter.”
27. The application dated 24<sup>th</sup> September, 2024 filed by Cornelius Litunda, seeks for orders that:-
    1. Spent.
    2. This honourable court be pleased to review its judgment dated 10<sup>th</sup> June, 2016 and make orders to amend the certificate of confirmation of grant dated 10<sup>th</sup> June, 2016 further amended on 8<sup>th</sup> November, 2021 to include property L.R. No. 1144/543 in the schedule of properties for the deceased.
    3. Property L.R. No. 1144/543 be distributed and transmitted to the Administrators of the Estate of Simon Njenga Rubi.
    4. The court does make other orders that may meet the ends of justice in this matter.
    5. Costs of this application be in the cause.
  28. The application is based on the grounds thereof and supported by affidavits sworn by Cornelius Litunda and Tabitha Wairimu Ndung’u on 27<sup>th</sup> September, 2024 and 16<sup>th</sup> October, 2024.
  29. Cornelius avers inter alia that he is the advocate on record for the 4<sup>th</sup> Administratrix. He states that L.R. No. 1144/543, registered in the deceased’s name, was inadvertently omitted from the certificate of confirmation of grant dated 10<sup>th</sup> June, 2016, and amended on 8<sup>th</sup> November, 2021, despite the fact that the said property had been sold by the late Simon Ndungu Kihonge to Simon Njenga Rubia (deceased) before his death.
  30. That the deceased purchaser and his estate have been in uninterrupted possession of the property for over 39 years. The Administrators of Simon Ndungu Kihonge’s estate, through a consent and letter of no objection dated 17<sup>th</sup> September, 2024, have confirmed their agreement to the inclusion of L.R. No. 1144/543 in the list of the deceased’s properties. They have also undertaken to sign all transmission



documents necessary to facilitate the transfer of the property to the administrators of the estate of Simon Njenga Rubia (deceased).

31. In view of these facts, he prays that this Honourable Court orders the inclusion of L.R. No. 1144/543 in the schedule of the deceased's assets and directs that it be transmitted to the Administrators of the estate of Simon Njenga Rubia (deceased).
32. Tabitha avers inter alia that she is the 3<sup>rd</sup> Administratrix of the deceased's estate. She confirms that L.R. No. 1144/543 was sold by her late husband, the deceased herein, to Simon Njenga Rubia (deceased) during their lifetime. Because the transaction had already taken place before the deaths of both parties, the four widows did not include the property among the assets of the estate. However, since the transfer of L.R. No. 1144/543 was never formally completed, the family of Simon Njenga Rubia (deceased) now seeks to have the property registered in the name of his estate. She affirms that she has duly signed the consent and letter of no objection to facilitate the transfer of L.R. No. 1144/543 from Simon Ndungu Kihonge (deceased) to the estate of Simon Njenga Rubia (deceased).
33. The application is opposed vide grounds of opposition dated 28<sup>th</sup> November, 2024. The grounds of opposition is based on the grounds that:-
  1. The supporting affidavit by Cornelius Litunda should be struck out as he is not competent to swear an affidavit on contentious matters.
  2. It is incompetent and defective.
  3. Orders and distribution of property can only be made in the estate of the deceased person whose property is sought to be distributed and not a different estate as sought in the said application.
34. The 4<sup>th</sup> administratrix has filed written submissions dated 17<sup>th</sup> January, 2025 placing reliance on the following:-
  - a. *Tabitha Kavenge Matolo vs Rhoda Ndululu Sengete & Another* [2016] eKLR where the court stated as follows: "The Applicant relied on the cases of Court of Appeal of Kenya at Nairobi Case No. 354 of 2004 *Pathi vs Ali & Others* east African Law reports (2005) EA (CAK) where it was held by the court of appeal that there is no prohibition against an advocate who is of his own knowledge can prove some facts to state them in an affidavit on behalf of his client. The Applicant also cited *Milimani Commercial Court of Kenya at Nairobi Case No. 532 of 2004 Ahmednassir Abdikadir & Co. Advocates vs National Bank of Kenya Limited (2)* East African Law Reports (2006) 2 EA, where the court held that if one party had made statements on matters of fact, and the other party did not respond thereto, there would be no basis for the said matters being termed as being contentious. The court further held that Rule 9 of the Advocates Practice Rules does not give rise to an automatic bar to affidavits being sworn by Advocates who then also appear before the court for the hearing of matters in which the affidavits are adduced in evidence. The rule allows advocates to swear affidavits on "formal or non – contentious matters of any fact in any matter... There is nothing contentious in any statements contained in the affidavit sworn on 13<sup>th</sup> July, 2015. The Respondents have not in support of ground 2 of the grounds of objection provided and/ or expounded on the incompetence, misconceived or law which would guide the court in finding that the application is bad in law."
  - b. *Wachira Karani vs Bildad Wachira* [2016] eKLR where the court held as follows: "Counsel for the Respondent agrees that Mr. Kingori has sworn the affidavit instead of his client. I am fully aware of the circumstances where an advocate cannot put himself in the position of a party deposing on matters which should be sworn by the parties. But a close look at thee



contents of the affidavit reveals that the matters contained in the affidavit are matters within the knowledge of the advocate and not the Applicant. Specifically, the matters deposed to relate to the alleged service. These are matters the Applicant cannot swear. I find that Mr. Kingori advocate properly swore the affidavit.”

35. The 1<sup>st</sup> and 2<sup>nd</sup> administratrix have filed written submissions dated 3<sup>rd</sup> February, 2025 placing reliance on *Gerphas Alphonse Odhiambo vs Felix Adiego* [2006] KECA 193 (KLR) where the court stated as follows: “Ordinarily, an affidavit should not be sworn by an advocate on behalf of his client or clerk when those persons are available to swear and prove the facts of their own knowledge. In appropriate cases such affidavits may be struck out or given little or no weight at all and...”

### **Analysis And Determination**

36. I have read the applications before this court, the responses thereto and the rival submissions.
37. The issues for determination, as crafted by the parties are as follows:
- a. Whether this court is clothed with the jurisdiction to grant the orders prayed for by the Applicant?
  - b. Whether the prayers seeking stay of proceedings and leave to file appeal are merited?
  - c. Whether this court has jurisdiction to hear and determine the application dated 11<sup>th</sup> September, 2024?
  - d. Whether the prayers sought in the application dated 11<sup>th</sup> September, 2024 should be granted?
  - e. Whether this honourable court has jurisdiction to make orders on matters pending before the court of appeal?
  - f. Whether the supporting affidavit sworn by the Applicant’s counsel is proper and valid?
  - g. Whether the prayers sought by the application dated 24<sup>th</sup> September, 2024 should be granted?
  - h. Whether the supporting affidavit by Cornelius Litunda should be struck out as he is not competent to swear an affidavit on contentious matters?
  - i. Whether the orders and distribution of property should only be made in the estate of the deceased person whose property is sought to be distributed and not a different estate as sought in the said application.
38. In regard to the first application dated 3<sup>rd</sup> April 2024 I think it is fair to allow the Applicants seek further redress at the appellate court. This is a constitutional right which this court cannot deny them.
39. However, on the second limb of the application I do not find any plausible reason to allow the same as that would essentially be countermanding the decision of the Court of Appeal. What was before this court was essentially effecting the Court of Appeal decision and nothing more.
40. The issues which the Applicants are raising had already been determined and this court cannot sit as an appellate court.
41. If the Applicant feels aggrieved then the best place to seek stay will obviously be the said appellate court.
42. As regards the application dated 11<sup>th</sup> September 2024, I find that placing the caution on land parcel number Mwichiringiri Block 4/311 was malicious on the part of the Respondent and her son. The



grant having been confirmed and in line with the court of appeals finding which are still subsisting to date renders the caution a futile exercise in the circumstances.

43. The whole agenda in my view was to simply frustrate the efforts made by the administrators/ executors to complete the transmission exercise.
44. That application must succeed otherwise the Respondent shall continue frustrating the transmission efforts which this court cannot countenance.
45. As regards the application dated 24<sup>th</sup> September 2024, I find that it is in the interest of both estates to have the grant rectified so as to bring on board land parcel number LR 1144/543 which had been omitted.
46. Both the vendor and the purchaser are in agreement that the deceased persons did not finalize the process hence the need to do so vide this cause.
47. Although there was an objection on the part of the Respondent on the ground that the above parcel belonged to a deceased person and therefore should not be dealt with in the manner suggested by the Applicant, I find that the said parcel is not being transmitted to any of the parties at the moment. Simply put, all the executors are doing in my understanding is collecting what belonged to the estate. The other issues of transfer must follow the usual due process of conveyancing.
48. The Respondent has raised issues to do with the jurisdiction of this court over the matter. I hold that to the extent that this matter revolves around the estate herein, this court is clothed with the requisite jurisdiction.
49. This court will not comment on other matters the parties are litigating in other courts as it has no jurisdiction to do so. If there are such orders then let the parties fight within the said arena.
50. Suffice to state that it is in the interest of the court and the parties that this estate is brought to foreclosure having been in these corridors for close to 30 years.
51. Finally, the issue of whether the Cornelius Litunda advocate and I suggest Irene Chepkwony had capacity to swear the affidavits in support of the applications must be discussed.
52. I have perused the two counsels said affidavits and I find that the issues they have deponed are factual and readily available on record. There is nothing which has been deponed and which I find outside their knowledge or at all.
53. I find that the line of argument taken by the Respondent does not stand for the reason stated above.
54. Consequently, and in respect to the three applications I direct as hereunder:-
  - (a) Leave is hereby granted to the Applicants, the 1<sup>st</sup> and 2<sup>nd</sup> Administratrix to file an appeal against the ruling of this court dated 21<sup>st</sup> March 2024.
  - (b) The Land Registrar with requisite jurisdiction is hereby directed to immediately lift and or withdraw the caution placed by Jane Nyambura Ndungu and Andrew Nganga or any other person on land parcel number Mwachiringiri Block 4/311.
  - (c) The certificate of confirmation of grant amended on 8<sup>th</sup> November, 2021 be further amended to incorporate land parcel Number LR 1144/543 in the schedule of properties and be transmitted to the administrators of the estate of the late Simon Njenga Rubi.
  - (d) Costs of the applications in the cause.



DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 30<sup>TH</sup> DAY OF OCTOBER 2025.

H K CHEMITEI

JUDGE

