



REPUBLIC OF KENYA



In re Estate of Raphael Omondi Opuodho (Deceased) (Succession Cause 300 of 2005) [2025] KEHC 14952 (KLR) (24 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14952 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 300 OF 2005
A MABEYA, J
OCTOBER 24, 2025**

BETWEEN

BERNADETTE AKINYI OMONDI 1ST PETITIONER

ELIZABETH ANYANGO OMONDI 2ND PETITIONER

JOHN PAUL OMONDI 3RD PETITIONER

AND

MARY AKINYI OMONDI RESPONDENT

AND

DAN OBUNDO PROPOSED INTERESTED PARTY

KAPSARA TEA FACTORY COMPANY LTD PROPOSED INTERESTED PARTY

RULING

1. This ruling determines two applications both of which seek to stay execution of or set aside the decision by Aburili J. made on the 25/1/2025 (“the said decision”).
2. The first application is dated 13/2/2025 brought forth by Mary Akinyi Omondi by way of a Motion on Notice in which she seeks stay of execution of the said decision. It is brought pursuant to the provisions of Article 159 of the *Constitution*, sections 1A, B, 3A & 3 (E) of the *Civil Procedure Act* and Order 42 rule 6 and Order 9 rule 9 of the *Civil Procedure Rules*.
3. She contended that she intended to prefer an appeal against the said decision because, having obtained the grant over the deceased’s estate on 9/8/1993 she proceeded to dispose of some assets of the deceased’s estate to individuals who took possession and occupation of the same.
4. That following the said decision that revoked the grant issued to her and further cancelled the transfers that she had undertaken, the purchasers who had purchased land from her stood to suffer substantial



loss from the said cancellation of their titles failure to which her intended appeal shall be rendered nugatory.

5. That the respondents would not suffer prejudice if the orders of stay were granted as they had never been interested in the said properties and further that it was in the interest of justice that the orders sought be granted.
6. In response, the respondents filed Grounds of Opposition dated 17/3/2025 and a replying affidavit sworn on the 20/3/2025 by the 1st respondent on her own behalf and that of the other respondents.
7. The respondents averred that the application was an attempt by the applicant to delay them the right to enjoy the fruits of their judgment. That the applicant had not offered any form of security towards stay of execution of the decree and generally that the applicant had failed to fulfill the pre-conditions for grant of stay of execution. That conversely, they stood to suffer loss as by grant of the orders of stay, they would be denied the benefit of the deceased's estate.
8. I have considered the record and the history of this case as well as the submissions on record as at the time of writing this ruling.
9. The provision governing issuance of stay of execution orders in succession matters is Rule 49 of the [Probate and Administration Rules](#). It provides that: -

“A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these [Rules](#) shall file a summons supported, if necessary, by affidavit.”

10. Additionally, the court can draw upon the powers under section 47 and Rule 73 of the [Probate and Administration Rules](#) in order to meet the ends of justice.
11. Stay of execution is a discretionary power which must be exercised on defined principles and facts. The court exercises its discretion in granting of stay of execution pending appeal. In [Butt v Rent Restriction Tribunal](#) (1982) KLR, it was held that: -

1. 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.
2. 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.
3. 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.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the [Civil Procedure Rules](#), can order security upon application by either party or on its



own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

12. The main objective of stay is to prevent substantial loss which ideally, would serve the purpose of preventing the appeal from being rendered nugatory. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, it was held that: -

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

13. As this is a succession matter, the applicants are not in a position to offer security as a condition of stay. The main determinant would be the substantial loss that would be occasioned if the orders sought are not granted.

14. In *Machira t/a Machira & Co. Advocates v East African Standard (No 2)* (2002) KLR 63, the Court of appeal considered as to what amounts to substantial loss and held that: -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

15. Rather than establishing substantial loss to herself, the applicants' arguments reveal a preference to protect the alleged interest of the 2nd proposed interested party. In the said decision, the court held that the transaction of the deceased's estate to the 2nd proposed interested party amounted to intermeddling and further was based on a fraudulently obtained grant and was thus void *ab initio*.

16. In any case, the applicant is a beneficiary of the deceased's estate and would still get her share of the deceased's estate as directed in the said decision.

17. Therefore, having failed to establish substantial loss on her part, the prayer for stay of execution lacks merits.

18. Turning to the summons dated 25/3/2025 by the 2nd proposed interested party, the proposed 2nd interested party, Kapsara Tea Factory sought to stay or set aside the said decision in so far as it related to the cancellation of title number Trans Nzoia/Kosprin/79 and consequently suspend the eviction orders issued on the 26/2/2025.

19. The said Summons was brought pursuant to section 93 of the Law of Succession Act, section 152 (E) of the Land Act and rule 49 of the Probate and Administration Rules.

20. The 2nd proposed interested party contended that it was a bona fide purchaser for value having acquired Trans Nzoia/Kosprin/79 from the applicant who after due diligence was confirmed to be the duly



- registered owner of the property and that she never disclosed that there were ongoing court proceedings over the said parcel.
21. That following the cancellation of the titles of the parcel vide the said decision, it stands to be evicted from the said parcel on which exists a tea factory that serves more than 3000 tea farmers.
 22. The Summons was opposed by the respondents vide Grounds of Opposition dated 5/5/2025 and a replying affidavit sworn on the 6/5/2025 by one Bernadette Akinyi Omondi, on her behalf and that of the other respondents.
 23. It was contended by the respondents that the 2nd proposed interested party had no *locus standi* to come on record. That the application was grounded on section 93 of the *Law of Succession Act* which provision cannot be invoked to legitimize an illegality. That the claim by the 2nd proposed interested party can only be satisfied by the applicant with respect to her share of the deceased's estate.
 24. I have considered the record as well as the submissions filed in respect to the Summons dated 25/3/2025. I do note that the 2nd proposed interested party in any of its pleadings and submissions failed to address this court on the matter of stay of execution and instead focused on addressing the issue of setting aside of the judgment of 27/1/2025 particularly in regard to the cancellation of title no. Trans Nzoia/Kosprin/79.
 25. Consequently, the first question for consideration is whether the 2nd proposed interested party has *locus standi* in this succession cause. It was argued by the 2nd proposed interested party that it has *locus standi* to file the instant summons by virtue of being a purchaser for value and registered owner of Trans Nzoia/Kosprin/79 who was affected by the judgment of the 27/1/2025.
 26. Conversely, it was argued by the respondents that it was late in the day to join the 2nd proposed interested party in the instant proceedings given that the applicant had failed to enjoin them before and further, any claim it has can only be against an individual, specifically, the applicant herein.
 27. The term 'Locus Standi' is a Latin phrase which literally means "place of standing". It refers to the right of a party to litigate in a particular matter.
 28. In any succession cause, the parties who would have proper *locus standi* are the genuine heirs/beneficiaries to the estate. However, this court is also cognizant of the fact that the applicant has moved this court on the strength of Rule 49 of the *Probate and Administration Rules* which provides: -

“A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these *Rules* shall file a summons supported if necessary, by affidavit.”
 29. Further, Section 47 of the *Law of Succession Act* and Rule 73 of the *Probate & Administration Rules* gives the High Court discretion to determine any matter before it in the interest of justice. (see also the cases of *In re Estate of Simon Kiprop Cheruiyot (Deceased)* [2021] eKLR and *In Re Estate of the Late Kubuta Kamara Nguuro alias Pharis Njegegu (Deceased)* [2021] eKLR).
 30. The 2nd proposed interest party alleges to be a purchaser for value and based on the guidance above I find that the 2nd proposed interested party has *locus standi* to move this Court.
 31. The next issue is whether the 2nd proposed interested party merits grant of orders to stay or set aside the judgment delivered on the 27/1/2025 in so far as it relates to the cancellation of title number Trans Nzoia/Kosprin/79



32. The 2nd proposed interested party alleges and has submitted extensively that it is the owner of title number Trans Nzoia/Kosprin/79 and that based on being a bona fide purchaser for value, this Court ought to set aside the judgment delivered on 27/1/2025.
33. The status of title number Trans Nzoia/Kosprin/79 was considered fully and determined by Aburili J in her judgment of 27/1/2025. She found that the applicant had illegally sold the said parcel to the 2nd proposed interested party, in essence intermeddling with the deceased's estate and proceeded to nullify the same. Accordingly, the 2nd proposed interested party's claim that it was an innocent purchaser for value without notice is not tenable in law. It must first overturn that finding and not before this Court but a higher court.
34. This decision has not been overturned on appeal and thus engaging in merits of the same would be in violation of the doctrine of *res judicata*.
35. For all the above reasons, I find and hold that the Family Court had jurisdiction to nullify the titles which were illegally registered in the name of the applicant and any subsequent transfers were null and void as the registration by the applicant was devoid of consent from the beneficiaries of the estate or the Court. Therefore, there is no valid legal ground upon which this court is to set aside the nullification order issued on 27/1/2025.
36. The upshot of the above is that I find both the applications dated 13/2/2025 and 25/3/2025 to be without merit and are hereby dismissed with costs of Kshs. 15,000/- for each of them to the respondents.
37. Each party shall bear their own costs.

It is hereby so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF OCTOBER, 2025.

A. MABEYA, FCI Arb

JUDGE

