

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**SUCCESSION CAUSE NO. 100 OF 2002**

**IN THE MATTER OF THE ESTATE OF JORAM NJUYA WAMBIYA  
(DECEASED)**

**MWANA IDI NEKESA .....**

**APPLICANT**

**VERSUS**

**FRED MALOBA MATETE**

**.....PETITIONER/RESPONDENT**

**RULING**

**1.** The Notice of Motion before this court, dated 23/4/2024, is brought under Article 159(2)(a), (b), (d), and (e) of the Constitution, section 47 of the Law of Succession Act, Cap. 160 Laws of Kenya, Rule 73 of the Probate and Administration Rules, Rule 5(2)(b), 39(b), and 47(1) of the Court of Appeal Rules, 2010.

The applicant seeks the following orders:

- c. That this honourable court be pleased to stay the execution of the ruling dated 9<sup>th</sup> April, 2025, pending appeal; or*
- d. That this honourable court be pleased to grant leave to the Applicant to file an appeal against the ruling of this honourable court dated 9<sup>th</sup> April, 2025.*
- e. That upon grant of prayer number (d) herein above, this honourable court be pleased to admit the annexed Notice of Appeal herein dated 23<sup>rd</sup> April, 2025 be as duly filed and properly on record.*

**2.** The appeal is founded on the grounds that the applicant was dissatisfied with the ruling delivered on 9/4/2025 and subsequently filed a Notice of Appeal dated 23/4/2025. However, since this is a probate and administration matter, there is no automatic right of appeal from the High Court to the Court of Appeal; therefore, obtaining leave prior to filing the appeal is mandatory.

**3.** According to the applicant, he has an arguable appeal that raises significant and triable issues. The impugned ruling dismissed a fundamental issue, namely, the proper interpretation of what constitutes remarrying. The appeal also raises the important issue of the status of children over whom the deceased had assumed parental responsibility. Therefore, it is in the interest of justice that he be granted leave to appeal against the decision.

**4.** The applicant also annexed a Notice of Appeal, which he seeks leave to have properly admitted and filed. The applicant asserts that there is reasonable apprehension that the Respondent, emboldened by the impugned decision, will proceed to execute the Ruling dated 9th April, 2025, in the absence of stay orders pending the hearing and determination of the intended appeal. Therefore, the appeal may become nugatory if a stay of the ruling is not granted. The respondent will suffer no prejudice if the stay is granted. Conversely, the applicant stands to suffer substantial prejudice if execution proceeds, as it could result in his disinheritance from the estate. He averred that he is

ready to comply with any conditions the court may set regarding the stay.

**5.** The application has been made timeously, and an order of stay pending appeal should be granted.

**6.** The application was contested. The respondent claimed that the application was made in bad faith, is fundamentally flawed, and is intended to delay proceedings. According to the respondent, the applicant did not provide any reason for failing to file the intended appeal within the required time. The applicant has no genuine interest in appealing because she did not submit a letter to the deputy registrar requesting typed proceedings nor served the same to the respondent within 30 days of the judgment's delivery, as mandated by law. It was also stated that she did not attach a draft memorandum of appeal to inform the court of the issues she wishes to appeal. The applicant appears solely intent on hindering the respondent from enjoying the benefits of his successful litigation.

**7.** It was further argued that the orders the applicant seeks to appeal against are negative orders that cannot be stayed. She also failed to specify the substantial loss that would occur if a stay of execution is not granted. Therefore, she has not satisfied the principles guiding applicants for a stay of execution pending appeal. Article 50 of the Constitution of Kenya guarantees the right to a fair hearing, which includes the right to have a trial concluded without unreasonable delay. Furthermore, the

principles of natural justice require that litigation must, at some point, come to an end.

### **ANALYSIS AND DETERMINATION**

8. The principles that the court must consider to grant an application for stay of execution pending appeal are set out in the case of **Global Tours and Travels Limited, Nairobi Winding Up Cause No. 43 of 2000, cited in Kenya Power & Lighting Company Ltd V Esther Wanjiru Wokabi 2014 eKLR**, where Ringera J (as he then was) stated as follows:

*“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 justice.. the sole question is whether it is the interest of justice to order a stay of proceedings and if it is, 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”.*

9. The decision to grant or refuse an application for a stay of execution pending appeal is within the court’s discretion. In

exercising this discretion, the court must ensure a fair balance between the appellant's right to appeal and the respondent's right to the benefits of the judgment.

**10.** The applicant in her application dated 20.4.2023 had sought revocation or annulment of the grant, and the ruling of this court dismissed her application. Essentially, the orders sought to be stayed are negative orders and unenforceable. Therefore, they leave the applicant in the same position as before, so concerns of significant loss or rendering the appeal nugatory do not arise. In **Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others [2016] eKLR**, the Court of Appeal expounded on the stay of execution, stating:

*"In **Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah [2008] eKLR** the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:*

*The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.*

*The same reasoning was applied in the case of **Raymond M. Omboga vs Austine Pyan Maranga (supra)** that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-*

*The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...." [Emphasis added].*

**11.** Consequently, the order for stay of execution pending appeal is denied. The applicant is granted leave to file an appeal within **30 days**, and the Notice of Appeal dated 23/4/2025 is considered duly filed. There shall be no orders as to costs.

**Dated, Signed and Delivered at BUNGOMA this 13<sup>th</sup> day of November 2025**

**R.E. OUGO  
JUDGE**

**In the presence of:**

**Mr. Otieno  
Respondent  
Wilkister**

**-For the Applicant  
- Absent  
-C/A**

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