Wahome v Mosoti (Succession Appeal E004 of 2025)
[2025] KEHC 15717 (KLR) (5 November 2025) (Ruling)

Neutral citation: [2025] KEHC 15717 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION APPEAL E004 OF 2025

WM MUSYOKA, J

NOVEMBER 5, 2025

BETWEEN

TABITHA WANJIRU WAHOME .... APPELLANT

AND

EVALINE NYABOKE MOSOTI .... RESPONDENT

(Appeal from the ruling and order, of Hon. RO Odenyo, Senior Principal Magistrate, SPM, of 2nd April 2025, in Busia CMCSC No. E115 of 2020)

RULING

1. I am called upon to determine an application, dated 10th June 2025. It seeks stay of proceedings, in Busia CMCSC No. 115 of 2020, pending hearing and determination of the appeal herein, and in particular stay of execution of orders made in a ruling delivered on 2nd April 2025.

2. The principal argument, as I can gauge from the supporting affidavit, is that the order of 2nd April 2025, was for revocation of grant, and revocation would leave the estate without an administrator, yet the estate had tenants who had to pay rents. The applicant argues that she has no other income, other than the said rentals from the property of the estate. She avers that she has children in college, who require funds for their education. She further avers that there was a probate suit, seeking to stop a bank from disposing of estate assets, over a loan it claims is unpaid. She argues that the suit would be in limbo, should the estate remain without an administrator.

3. The respondent has reacted, to that application, by way of grounds of opposition, dated 2nd July 2025. It raises several issues:

    a. That the stay sought is of a ruling, yet there is nothing to stay once a ruling is delivered;

    b. That the application falls short of the threshold for stay, under Order 42 rule 6 of the Civil Procedure Rules, for that provision deals with appeals, it sets out circumstances under which

a court exercises discretion, and the facts and the circumstances of this case do not meet the threshold;

c. That it has not been demonstrated that the appellant has an arguable appeal;

d. That it has not been demonstrated whether the said appeal would be rendered nugatory;

e. That it has not been demonstrated that the appellant would suffer substantial loss, should stay not be granted;

f. That it is not demonstrated how the beneficiaries left out of the succession process would be taken care of should the application be allowed;

g. Among others.

4. The respondent has also filed an affidavit, sworn on 9th July 2025. She asserts to be a co-widow of the appellant, having been a spouse of the deceased. She has children with the deceased, named in the affidavit. Her case is that the appellant sought representation to the estate, in which process she excluded her and her children. She avers that she served her revocation application, but the same was not responded to, hence the orders were granted. She asserts that she and her children were key stakeholders in the estate.

5. I also see a replying affidavit by Margaret Wangoi Ng'ang'a, sworn on 1st July 2025, who was a 2nd respondent in the matter before the trial court, but has not been named as one in these appellate proceedings. I have not seen any proceedings, which have made her a party herein, and I shall, therefore, not pay any regard to that affidavit.

6. Directions were taken, on 3rd July 2025, for disposal of the application, by way of written submissions. I have seen submissions by the respondent, which I have read through and noted the arguments made.

7. The application herein arises from orders that were made on 2nd April 2025, which revoked a grant that had been issued to the appellant. The appellant challenges the ruling where the revocation orders were made. She has not attached a copy of the impugned ruling to her affidavit, and the trial court records have not been availed. The appellant has not filed a record of appeal. In the absence of a copy of the impugned ruling, I do not have the benefit of understanding the circumstances under, and the reasons for, which the said grant was revoked. All I have before me is the formal order extracted from that ruling. The formal order was filed by the respondent, and not the appellant. The formal order only captures the formal final orders. It does not capture what was taken into account, before the decision to revoke was arrived at.

8. It is critical, in applications for stay of a decree or order, pending appeal, that a copy of the decree or order be exhibited, as proof that the decree or order appealed against does in fact exists, so that the court does not act in vain, on a non-existent decree or order, for the court should not act blindly. Secondly, a copy of the judgement or ruling, which gives rise to the decree or order is critical. A stay order will not be granted merely because the decree was passed or the order was made. The stay order is discretionary. For the purpose of exercise of that discretion, it is critical that the court understands the background to the making or passing of the impugned order or decree, and the legal reasoning and logic of the trial court, leading up to the final order.

9. The appellate court should not just rely on the averments in the supporting affidavit, that some order had been made. The court should see the order made, and it should be exposed to the whole environment under which the order was made. Urgency may not allow the applicant to apply for and obtain a certified typed copy of the ruling or the judgement. However, these days a copy of the ruling or judgement would have been uploaded on the CTS. The applicant has access to that. If technology

presents a challenge, as it often does, the applicant would still have the easy option of obtaining the handwritten copy of the ruling or a typed uncertified copy of the same, from the physical court file. The appellate court should have access to that material. It is critical. Without it, the court would be leaping into the darkness.

10. The respondent has made a lot of play about the fact that the Motion is seeking to stay a ruling, rather than an order. She has a point. It is not practical to stay a ruling, for a ruling is not executable. What can be stayed are the orders, made in the ruling, for it is the orders that are executed or implemented, and not the ruling itself. "Order" and "Ruling" do not mean or refer to the same thing. They are not one and the same.

11. The "Ruling" is the opinion of the court on an application. It is a collective of very many things. It covers the recitals of the substance of the application, the affidavits in support, the responses, and the submissions made by the parties, whether orally or in writing. It includes the analyses of all those, and the decision or conclusion of the court, followed by the final order. That is what is referred to as the "Ruling." The order, in the ruling, could comprise of only 1 short sentence, in a ruling running in to several pages. Once a ruling is delivered, or shared with parties, or made public, it would be gone, out of the way of the court. It would not be available to recall, for the purposes of being stayed.

12. An order for stay of a ruling can only refer to an order to stay delivery of a ruling, prior to the same being delivered, a situation often technically referred to as arrest of a ruling or judgement. Once it has been delivered, the issue of it being stayed cannot possibly arise, for delivery has happened. It would be out of the hands of the court. It would have literally bolted out of the stable.

13. The "Order" is what can be executed, as stated above. If it is an injunction order, it would be about barring the doing of something, and stay would be about suspending the bar. If it is an order to re-open premises, it would be executed by the opening of whatever had been closed or locked up, and a stay order would be stopping the re-opening. An order would be about something being done or not being done.

14. To the extent that the Motion seeks a stay of a ruling, it is misconceived. It is founded on a misunderstanding or misapprehension of the concept of "Ruling." It invites me to do the impossible. The ruling was delivered. The act was done. It cannot be undone. The application herein is an abuse of process.

15. The other thing is that not all orders are executable. An order dismissing a suit, for instance, is not for execution. For it merely pronounces that the suit is dismissed. The executable order is one which requires the parties to take some action or to refrain from doing something. A dismissal order does not require the parties to do anything or to refrain from doing anything. It merely denies or dismisses the application or the suit or claim. It does not direct any action or inaction. It is an act by the court, where the court merely states a position with finality, without requiring any action.

16. The order, revoking a grant, falls in that category of an order that does not require any action from the parties. It does not direct them to do anything, or to take any step. It is a mere declaration or pronouncement that the grant is revoked. That declaration is an act of the court, upon which the parties are not required to take any steps, to actuate or execute it. It is not executable. Once the order was made herein, revoking the grant, that was the end. The grant was revoked. That order is not capable of recall for stay purposes, for it is not available for execution. An application, for stay of such an order, is futile.

17. I believe that I have said enough, to demonstrate that the Motion, dated 10th June 2025, is hopelessly misconceived. It exists for the sole purpose of being dismissed. I hereby dismiss it. As this is a family matter, I shall not award costs.

18. Perhaps, I should add that, if the concern is that the estate will be in limbo, without an administrator, the solution lies in, not stay of the order of 2nd April 2025, but in the parties agreeing on the appointment of interim administrators, to take care of the estate, pending the hearing and disposal of the appeal, by the making of a grant pendente lite, under paragraph 10 of the Fifth Schedule to the *Law of Succession Act*, Cap 160, Laws of Kenya.

19. To move this appeal matter forward, let the Deputy Registrar call for the original trial court records. The appellant shall file record of appeal in 30 days. The matter shall be mentioned, on 15th December 2025, for directions, on the disposal of the appeal. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 5TH DAY OF NOVEMBER 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the appellant.

Mr. Mogi, instructed by Manwari & Company, Advocates for the 1st respondent.

Mr. Gatundu, instructed by Gatundu & Company, Advocates for Margaret Wangoi Ng'ang'a.