

**IN THE COURT OF
APPEAL AT ELDORET**

**(CORAM: WARSAME, MATIVO & GACHOKA,
JJ.A.)**

CIVIL APPLICATION NO. E 091 OF 2024

BETWEEN

**JAMES MUSA TAPOYO
JOHN PKIYACH TAPOYO.....APPLICANTS**

AND

JOYCE KIMWOMWOR TAPOYO.....RESPONDENT

(Being an application for stay of proceedings pending appeal from the ruling of Nakuru High Court (H.M Nyaga J.) dated 25th July 2024

in
Succession Cause No. 194 of 2004)

RULING OF THE COURT

1. The application before us dated 13th December 2024, revolves around a sibling dispute over plot LR No. Pokot/Siyoi 'A'/4244 (the suit property), which was inherited from the estate of their deceased father , Tapoya Amuruk Silaure.
2. It is important to note at the outset that the estate of the deceased has two administrators: the applicant, James Musa Tapoyo who is a child of the first house and John Pkiyach Tapoyo is a child of the second house (as is the respondent

Joyce Kimomwor Tapoyo).

The two administrators were jointly appointed vide Letters of Administration issued on 30th January 2003.

3. The deceased was polygamous and had two wives whom he settled separately on two separate parcels of land. The first wife was settled on parcel L.R. No. West Pokot/Keringet 'A'/2428, which parcel was distributed in September 2011 among the children of the first house. There is no dispute in respect of the distribution of that parcel.
4. The second wife, Chebii James was settled on the suit property, L.R. No. West Pokot/Siyoi 'A'/4244. The second house had five children: Joyce Kimomwor Tapoyo (the respondent), Jackson Lokitari Tapoyo, Stellan Chebei Kasiuiai, Geoffrey Arimuk Tapoyo, and John Pkiyach Tapoyo (one of the administrators). The dispute in these proceedings concerns only the distribution of the suit property among the children of the second house.
5. Following a confirmation of grant, the suit property was distributed on 23rd July 2020 as follows:

a. Chebii Cheposingemi James	1 Acre
b. Jackson Lokitari Tapoyo	3 Acres
c. Stellan Chebei Kasiuiai	2.5 Acres

d. Geoffrey Arimuk Tapoyo

3 Acres

e. John Pkiyach Tapoyo

3 Acres

6. The respondent filed a summons for revocation of grant contending she was disinherited despite being one of the five children in the second house. The summons for revocation was allowed by the court and the applicants, as administrators, filed a fresh Summons for Confirmation of Grant dated 12th October, 2021 proposing distribution as follows:

<i>a. Chebii Cheposingemi James</i>	1 Acre
<i>b. Joyce Kimomwor Tapoyo</i>	0.5 Acre
<i>c. Jackson Lokitari Tapoyo</i>	3 Acres
<i>d. Stellan. Chebet Kasiui</i>	2.5 Acres
<i>e. Geoffrey Arimuk Tapoyo</i>	3 Acres
<i>f. John Pkiyach Tapoyo</i>	3 Acres

7. In support of their proposed distribution, the applicants maintained that the deceased did not consider the respondent because she was married and that his intentions and wishes regarding the property were clearly outlined in a copy of the family meeting minutes dated 8th January 1995.

8. In a judgment dated 17th May 2023, the Court (Mrima J.) scrutinized the minutes of the family meeting dated 8th January 1995 which the applicants had relied upon to support the

contention that the deceased had distributed the property during

his lifetime. The Court identified several critical deficiencies in the minutes: they were not certified as true copies in compliance with Section 68 of the Evidence Act; the plot numbers referenced differed from the subject property without adequate description or explanation; persons whose connection to the second house was not established attended the meeting; and the minutes were silent on whether the deceased intended to grant mere licences or transfer ownership. Moreover, despite the respondent's denial, no compelling evidence was adduced to confirm that the meeting was held or that the minutes were authentic.

9. On the basis of these findings, the Court held that the minutes did not attain the evidential threshold of probative value and consequently found that there was no evidence that the deceased distributed the property during his lifetime. The Court further held that, being a daughter of the deceased, the respondent ought to be equally treated with the rest of the children of the deceased. Consequently, the court distributed the property as follows:

- a. Chebii Cheposingemi James 1 Acre**
- b. Joyce Kimomwor Tapoyo 2.5 Acre**

c. Jackson Lokitari Tapoyo 2.5 Acres
d. Stellan. Chebet Kasiuai 2.5 Acres

e. Geoffrey Arimuk Tapoyo 2.5 Acres
f. John Pkiyach Tapoyo 2.5 Acres

10. Aggrieved by this judgment, one of the administrators, John Pkiyach Tapoyo filed an application for review following his discovery of the original minutes of the family meeting held in 1995. The review was dismissed vide a ruling of 25th July 2024.
11. Following the dismissal of the review application, the applicants, having filed the instant application now seek the following orders: That:
- a. the honourable court be pleased to stay execution of the order of the High Court at Kitale by Hon. Justice A.C Mrima, on the 25th July 2024 pending the hearing and determination of the appeal filed against the said order.***
 - b. this Honourable court be pleased to stay further proceedings in succession cause 194 of 2004 pending the hearing and determination of the appeal filed against the ruling of order of the Hon. Justice A.C Mrima, issued on 25th July 2024***
12. The grounds of the application, as stated on the face of the application and supported by the supporting affidavit of James Musa Tapoyo dated 13th December 2024, is that the respondent has accessed the land where she has started the process of

transferring the estate, where she is clearing the compound by cutting down trees and fencing the land which has occasioned irreparable loss to the applicants.

13. In opposition to the application, the respondent has filed a replying affidavit dated 30th January 2025 opposing the application on the following grounds:

- a. That the applicant herein, James Musa Tapoyo, was not a party to the review application which gave rise to the impugned ruling of 25th July 2024, and therefore has no locus standi to file the instant application.*
- b. That the ruling sought to be stayed is a negative order which dismissed the review application, and as such there is nothing to be executed or stayed.*
- c. That the estate has already been fully distributed and title deed issued to the respondent pursuant to the judgment of 17th May 2023, which judgment was never appealed against.*

14. When the matter came up before us, the applicant, James Musa appeared in person while Mr. Onyancha appeared for the respondent. Both parties adopted their written submissions and gave brief highlights of the same.

15. The applicant emphasised that he was the administrator for both houses, that the respondent without notice had brought surveyors to the land to cut out her portion of the land and in so doing had taken a portion of his late mothers land. Furthermore the beneficiaries were not notified of the subdivision and no transfer has been done to the beneficiaries. The applicant contended that if the ruling is not stayed, the substratum of the appeal will be lost, given that the respondent invaded the land with view of selling it claiming she has a title deed despite knowing that there was a pending appeal.
16. In response, Mr. Onyancha contended that the main judgment of 17th May 2023 was never appealed from. He submitted that the applicant opted to review the decision through one of the co- administrators (John Pkiyach Tapoyo) and consequently cannot seek to stay a ruling that merely dismissed that review application. Mr. Onyancha further submitted that the ruling sought to be stayed is a negative order which dismissed the review application, and as such there is nothing to be executed or stayed. He contended that the estate has already

been fully distributed and a title deed has been issued to the respondent pursuant to

the judgment of 17th May 2023, which judgment was never appealed against.

17. The principles that govern the grant of orders under Rule 5(2) (b) are well known. The applicant must satisfy the twin principles, that the intended appeal is arguable and that unless the Court grants the orders sought, the intended appeal if successful will be rendered nugatory (See **Jaribu Holdings Ltd v Kenya Commercial Bank Ltd. CA No. 314 of 2007.**)
18. Before considering whether the applicant has met these conditions, we must first consider the nature of the order intended to be stayed and whether the decree has been satisfied. Having perused the court record, it is obvious that the ruling of 25th July 2024 dismissed the review application filed by John Pkiyach Tapoyo. The ruling, in essence, is a negative order and incapable of execution. Notably, this court cannot grant stay of such a ruling.
19. This principle was enunciated by this Court in **Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya) [2015] eKLR** where the court held as follows:

***"An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay
- called a positive order - either an order that has not been complied with or has partly been complied with."***

20. This Court reiterated this position in **Lake Victoria South Water Service Board v Seline Akoth Oyiengo [2020] eKLR**, as follows:

"We note that the applicant filed an application to set aside a default judgment entered against it, which application was dismissed by the court. There was no positive order made against the applicant capable of execution, hence there can be no stay of execution of such an order. This is not an order capable of being stayed. The refusal simply meant that the applicant stays in the situation it was in before coming to court and therefore the issues of substantial loss that it is likely to suffer and or the appeal being

rendered nugatory does not arise."

21. In **Charles Gichina Mwangi v Henry Mukora Mwangi [2000] eKLR** the order sought to be stayed had been complied with in that subdivision and transfer of land the subject of litigation had taken place. The court held:

“... In the circumstances there is nothing to stay. That being the position, the application for stay must be, as it hereby is, dismissed with costs ...”

22. Relying on the foregoing authorities, it is clear that the ruling of 25th July 2024 is a negative order which did not compel any of the parties to do anything or restrain them from doing anything and is therefore incapable of execution. The ruling did not grant any relief to the respondent. It did not vary or modify the distribution of the estate. It simply declined to disturb the earlier judgment of 17th May 2023. More fundamentally, the judgment of 17th May 2023 has already been fully executed. The court record shows that the respondent was registered as the absolute proprietor of her portion of the estate on 11th December 2023 under Title Deed No. WEST POKOT/SIYOI 'A'/7453, more than a year before this

application was filed. In effect, there is nothing to execute and therefore nothing to stay.

23. For all the foregoing reasons, this application cannot succeed and is dismissed with costs to the respondent.

Dated and delivered at Eldoret this 28th day of November 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA C. Arb, FCI Arb.

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JUDGE OF APPEAL

*I certify that this is a
True copy of the original
Signed*

DEPUTY REGISTRAR