

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

(CORAM: R. MWONGO, J.)

CIVIL APPEAL NO. E066 OF 2025

AGNES GICUKI NYAGA.....1ST APPELLANT/APPLICANT

PHILIS WANJIKU NYAGA.....2ND APPELLANT/APPLICANT

-VERSUS-

AUGUSTA NGINDA KINYUA.....RESPONDENT/OBJECTOR

R U L I N G

Background

1. The applicants filed a notice of motion dated 05th August 2025 seeking stay of execution of confirmation of grant issued on 16th May 2024 in Runyenjes MC Succession Cause no. E146 of 2023, pending hearing and determination of the appeal. They also prayed for costs of the application.
2. The application was founded on grounds that some of the beneficiaries had already been given property by the deceased during his lifetime but these gifts were not considered during distribution. Thus, they asserted, it was important that execution of the order be stayed until the appeal is determined as the outcome of the appeal may change the distribution. The applicants were apprehensive that if stay is not granted, the appeal will be rendered nugatory.

Preliminary Objection

3. The respondent/objector filed a preliminary objection dated 14th August 2025 on grounds that:
 - 1) The appeal offends the mandatory provision of Section 79G of the Civil Procedure Act; and
 - 2) This Honourable Court lacks statutory jurisdiction to hear and determine the matter.

Parties' Submissions on the Preliminary Objection

4. The preliminary objection was canvassed by way of written submissions.
5. The respondent/objector relied on the provisions of section 79G of the Civil Procedure Act and the cases of **Joho & another v Shahbal & 2 others**

[2014] KESC 34 (KLR), Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696 and Independent Electoral & Boundaries Commission v Cheperenger & 2 others [2015] KESC 2 (KLR).

6. The objector argued that the appeal was filed 1 year and 4 months late and without leave of court as required under section 79G of the Civil Procedure Act. Further reliance was placed on the case of **Munene v King'ara & 2 others [2014] KESC 37 (KLR), Salat v Independent Electoral and Boundaries Commission & 7 others [2015] KESC 31 (KLR), County Executive of Kisumu v County Government of Kisumu & 8 others [2017] KESC 16 (KLR) and Willis J. Ochieng & another v Samwel Abongo Asembo [2020] eKLR.**
7. On their part, the applicant's submitted that Section 79G of the Civil Procedure Act was not applicable in Succession cases. They referred to Rule 63 of the Probate and Administration Rules and argued that section 79G of the Civil Procedure Act is not one of the provisions imported into succession proceedings. They relied on the case of **In re Estate of Esther Wanjiru Ng'ang'a (Deceased) (Succession Appeal 23 of 2023) [2024] KEHC 9197 (KLR).**

Issue for Determination

8. The only issue for determination is whether the preliminary objection has merit.

Analysis and Determination

9. It is trite that a preliminary objection is raised based purely on issues of law. Additionally, the determination of those legal issues should have the overall effect of determining the primary suit if the preliminary objection succeeds. This was the position taken by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (supra)** where it was held thus:

"...So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit....A preliminary objection is in the nature of a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct."

10. The issue raised by the objector is that the appeal is severely time barred since the impugned certificate of confirmation of grant was issued on 20th May 2024 yet the

memorandum of appeal and stay application were both filed on 05th August 2025. This is more than one year later. The question that arises is whether section 79G of the Civil Procedure Act applies to succession cases as to extension of time to appeal. The Law of Succession Act provides for appeals but gives no guidance on the procedure to be taken in lodging such appeals. As a result, courts have interpreted this scenario in different ways.

11. In their submissions, the applicants cited the case of **In re Estate of Esther Wanjiru Ng'ang'a (Deceased) (supra)** where the court relied on a decision in the case of **Julius Kamau Kithaka v Waruguru Kithaka Nyaga, Rosemary Njoki Ngari & Grace Munene [2013] KECA 236 (KLR)**. In that case the High Court had dismissed the applicant's appeal where the trial court had dismissed their summons for revocation. J. Otieno Odek, JA focused on that particular issue and held:

“I have anxiously considered the application, the affidavits on record and submissions by counsel and the law. I am of the view that it is crucial to consider at this juncture whether the applicant was required to have obtained leave to appeal from the High Court under Section 50 of the Law of Succession Act; and if so what is the consequence of the failure to obtain such leave..... There is no provision in the Law of Succession Act which required the applicant herein to obtain leave to appeal against the decision of the High Court dismissing the application for revocation. It is trite law that where any proceedings are governed by a Special Act of Parliament, like in this case, the Law of Succession Act must be strictly construed and applied. Therefore, what is in the Law of Succession Act is what was intended to be therein in the manner and extent it is there. What is not therein expressly is what was intended not to be there by the Legislature. I find that the applicant in this case was not required to seek leave to appeal from the High Court.”

12. It appears that the Court of Appeal decision was limited to appeals where the subject matter was revocation of grant. In the present case, the contention is confirmation of a grant. Moreover, **In re Estate of Esther Wanjiru Ng'ang'a (Deceased) (supra)** the court was faced with an application for leave to lodge an appeal at the Court of Appeal as provided under section 50(1) of the Law of

Succession Act. The Case is not persuasive in addressing the present question of whether section 79G of the Civil Procedure Act applies to succession cases.

13. The issue was considered by the court in the case of **In re Estate of Kiarri Kahinga (Deceased) [2025] KEHC 2126 (KLR)** where it was held thus:

“The Applicants have gone the extra mile to demonstrate that Rule 63 of the Probate of Administration Rules does not mention Order 9, Rule 9 of the Civil Procedure Rules, and Section 79G of the Civil Procedure Act. However, he fails to appreciate that, the Succession appeals are considered to be civil appeals under, section 79G of the Civil Procedure Act. The Law of Succession Act does not provide specific timelines for filing appeals from the lower Court to the Superior court. Therefore, it cannot be that one should wait forever before filing an appeal. The answer lies, thus in the import of Rule 67 of the Probate and Administration Rules. In the case of Nyindha-v-Nyidha & Another (succession Appeal E012 Of 2023) (2024) KEHC 2715 (KLR) (19 March 2024) Ruling, the Court stated as follows: -

“10 The Law of Succession Act does not provide specific timelines for filing appeals from decisions of the Lower to the High Court. However, as Succession Appeals are considered to be Civil Appeals, the provisions of section 79G of the Civil Procedure Act are applicable.

11 Under Section 79G of the Civil Procedure Act, the time for filing an appeal from judgment or decree of the subordinate Court to the High Court is thirty days.” [Emphasis added]

Conclusion and Disposition

14. Similarly, this case being a civil appeal, the applicants were bound to bring their appeal and application for stay of execution within the time frames provided for under the Civil Procedure Act. In any event, Rule 67 of the Probate and Administration Rules leaves the door open for the applicants to seek extension of time from the court. There is also lee way for the applicants to make any application relevant towards the ends of justice while invoking the High Court’s jurisdiction under Section 47 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules. The envisioned ends of justice include averting any unreasonable delays.

15. Here, the applicant's application for stay of execution and the appeal itself have been brought after a long and unexplained delay. In the eyes of equity, they have been indolent and it defeats justice itself to assume that the respondent would wait endlessly for the applicants to move a higher court at their convenience. This delay also offends the rules of natural justice since justice delayed is in essence equivalent to justice denied.
16. Inevitably, I am bound to reach the finding that the appeal is time barred in light of the provisions of section 79G of the Civil Procedure Act, which applies in this case.
17. In the result, the preliminary objection has merit and is hereby allowed. The court hereby orders the striking out the notice of motion dated 05th August 2025 and memorandum of appeal dated 04th August 2025.
18. Orders accordingly.

Delivered electronically, dated and signed at Embu High Court this 19th day of November, 2025, pursuant to notices issued on 10th November and 12th November, 2025 as to electronic delivery.

**R. MWONGO
JUDGE**