



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION APPEAL NO. E035 OF 2025

**IN THE MATTER OF THE ESTATE OF MUGANGA MATAYO
WASIKE (DECEASED)**

BETWEEN

LILIAN NALIAKA WASIKE 1ST
APPELLANT/APPLICANT

ROSE WASIKE MUKANDA 2ND
APPELLANT/APPLICANT

AND

FLORA WASIKE 1ST
RESPONDENT

FESTUS WASIKE 2ND
RESPONDENT

RULING

1. The Appellants/Applicants seeks an order staying subdivision of the L.R. No. SOUTH KABRAS/SHAMBERERE/1754 pursuant to Certificate of Confirmation of Grant issued in Butali PM's Court Succession Cause No. E005 of 2020 pending the hearing and determination of the appeal.

2. The application is supported by an affidavit sworn by the 2nd Applicant who depones that the trial court did not take into account the fact that the deceased had another property being L.R. No. KAKAMEGA/CHEKALINI/398 comprising 5.7 hectares which he had gifted the seven of the heirs *inter vivos* when ordering that each of the three households of the deceased share L.R. No. SOUTH KABRAS/SHAMBERERE/1754 equally.
3. The 1st Applicant further depones that by reason of the trial court's decision, their house, which comprises of daughters only was discriminated against. She contends that if the Certificate of Confirmation of Grant were to be implemented, it would lead to chaos, unrest, confusion and disruption of peace and since their appeal has overwhelming chances of success, the orders of stay ought to issue.
4. The application is opposed. The Respondents aver that the appeal is a ploy to delay the finalization of the succession process.

5. There are no express provisions for applications for stay of execution under the Law of Succession Act. Rule 49 of the Probate and Administration Rules 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.”

6. Additionally, Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules empowers the court to make such orders as it deems fit to meet the ends of justice.

7. I have considered the application and the rival submissions. The grounds upon which an order of stay of execution can issue are well settled. An applicant has to meet the following conditions:-

(a) That the application has been made without unreasonable delay.

(b) That the substantial loss may result for the application unless the order is made.

(c) *That the applicant has offered security for the due performance of the decree in the event the appeal succeeds.*

See James Wangalwa & Another v. Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR).

8. The impugned decision was delivered on 24th September 2025 and the appeal and application for stay of execution were filed on 15th October 2025 respectively. The application was therefore filed expeditiously.
9. On perusal of the Memorandum of Appeal, I am satisfied that the same raises triable issues as it calls upon the court to determine whether the trial court erred in its decision that L.R. No. KAKAMEGA/CHEKALINI/398 should not be taken into account in distributing the estate of the deceased.
10. This is a family matter, and I am mindful of the fact that the family ties ought to be preserved. A survey and sub-division of the deceased's estate at this juncture could lead to chaos as stated by the Applicant. Since the parties are already settled on certain portions of the land that is the subject matter of the succession cause, there will be no prejudice to any of the dependants of the deceased if the survey is

stayed. Conversely, if survey and subdivision were to proceed and the appeal eventually succeeds, the Applicants would have suffered substantial loss as they may have been dislodged from their developed portions of the estate. In **James Wangalwa & Another v. Agnes Naliaka (Supra)**, the court held as follows:-

“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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”

11. In regard to the third condition that should be met by an applicant, this is a Succession matter involving family members. The unique circumstances of succession matters, means that courts often do not award costs to the parties unless under exceptional circumstances. It has been held that the main determinant in an application for stay in such matters is whether there would be substantial loss. See **In re Estate of the late Kibet Sang (Deceased) [2025] KEHC 2736 (KLR)**.
12. The upshot is that the application is allowed. An order is issued staying the implementation of the Certificate of Confirmation of Grant issued by the trial court following its judgment dated 24th September 2025.

Dated, signed and delivered at Kakamega this 19th day of December 2025.

**A. C. BETT
JUDGE**

In the presence of:

Ms. Orengo for the Appellants

Mr. Isiakho holding brief for Mukavale J. for the Respondents

Court Assistant: Polycap

COPY