

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
HCFA NO. E15 OF 2024

IN THE ESTATE OF PHILISILA MATIVO (DECEASED)

SYLVESTOR MUTISO KILONZO 1ST
APPELLANT/APPLICANT

MULOKO KILONZO 2ND
APPELLANT/APPLICANT

VERSUS
NYUMU
KILONZO.....RESPONDENT

RULING

1. Before this Court for determination is a Notice of Motion dated 6th December 2024, seeking;
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this application inter-partes the Honourable Court be pleased to grant stay of execution of the ruling delivered on the 26/11/2024 in Kangundo Chief Magistrate Court Succession Cause Number 48 of 2018 in the matter of the estate of Philisila Mativo (deceased).
 - d. That the Honourable court do make such other order and directions to preserve the assets of the estate of

the deceased herein pending the hearing of the appeal.

e. That the cost of this application be in cause.

2. The grounds for the Applicants' application, as deponed by Sylvester Mutiso Kilonzo, are that they have filed a memorandum of appeal against the entire ruling of the Kangundo Chief Magistrate's Court in Succession Cause No. 48 of 2018. He states that the impugned ruling relates to the distribution of the sole asset of their late mother's estate, and that the trial court allegedly upheld an imaginary and non-existent subdivision of the land, when in fact no such subdivision was ever carried out or implemented.
3. The Applicants contend that the trial court failed to consider that there is no distinctive or ascertainable distribution of the land on the ground, and that the beneficiaries do not know where their respective portions lie; thus, any attempt to implement the ruling would result in confusion and conflict. He further avers that none of the daughters of the deceased were factored into the distribution of the sole asset, thereby effectively disinheriting them, despite there being no express or implied intention by the deceased to do so. In addition, he depones that the Respondent has commenced steps towards implementing the trial court's decision, and that such execution will render the appeal nugatory unless the orders of stay sought are granted.

4. The application was opposed by the Respondent through a Replying Affidavit sworn on 14th January 2025. In summary, the Respondent deposed that the application is defective, having been brought under inappropriate provisions of the law and is therefore unmerited. He averred that the Applicants have not demonstrated that they would suffer substantial loss if stay is not granted and asserted that the application is an afterthought, noting that the 2nd Appellant did not raise any protest regarding the mode of distribution during the trial.
5. He further stated that the trial court relied on documented evidence of the beneficiaries' settlement, including a document dated 23rd September 1989 and an agreement executed by the 1st Appellant and other beneficiaries on 21st August 1989. He added that following the deceased proprietor's subdivision, the beneficiaries took possession of their respective portions, which was confirmed by the trial court, and that the court also observed clear boundaries during its scene visit as reflected in the judgment.
6. The Respondent maintained that the Applicants have failed to show any loss they stand to suffer, as the beneficiaries have already been settled in accordance with the court's findings. He further averred that the Applicants have neither proposed nor provided security for the costs of the appeal, and he accordingly urged the Court to direct them to deposit security of Kshs.500,000/= should the Court be inclined to grant

stay. He stated that stay of execution should only be granted in exceptional circumstances, which the Applicants have not demonstrated, and that any delay in implementing the distribution order would unfairly prejudice the rightful beneficiaries. He added that the Applicants' attempt to stay execution of a ruling affecting multiple beneficiaries will result in undue delay and frustrate the realization of the deceased's estate by the rightful heirs.

7. The Applicants filed a supplementary affidavit sworn on 27th February 2025, in which they averred that some beneficiaries of the estate, including the 2nd Appellant, stand to be completely disinherited if the trial court's ruling is implemented as it is, without affording them an opportunity to be heard on the issues raised in their memorandum of appeal. They further asserted that the trial court failed to consider that their late mother did not disinherit any of her children and did not divide her land in the manner alleged by the Respondent.
8. The Applicants contended that they stand to suffer great loss and damage if stay of execution is not granted, as the Respondent may dispose of portions of the sole asset Land Parcel Matungulu/Sengani/1693 and has already begun introducing potential buyers. They averred that if the Respondent is allowed to sell parts of the estate's only asset, the estate will be exposed to genuine risk and prejudice, including possible land disputes with third parties. They further asserted that their memorandum of

appeal has merit and may be rendered academic should the orders for stay not be granted. The Applicants also stated that the trial court did not award costs to any party and directed that each party bear its own costs, and therefore the Respondent's request that the Appellants be ordered to deposit security for costs lacks basis and ought to be disregarded.

9. The parties canvassed the application by way of written submissions. The Applicants submissions are dated 1st March 2015, while the Respondent's submissions are dated 9th May 2025.

Applicant's Submissions

10. The Applicants reiterated that the trial court's ruling on distribution of their late mother's sole estate asset was flawed, as it directed that the land be shared only among the sons in undefined portions, thereby excluding the daughters. They argued that this exclusion was unjust, particularly since the 2nd Appellant had never renounced her claim, and thus they lodged the appeal to challenge the mode of distribution.
11. Relying on **Rhoda Mukuma v John Abuoga**, they submitted that their appeal is arguable and raises substantial issues. They contended that unless the Court preserves the property, the appeal would be rendered nugatory, especially if the respondent proceeds to sell the land before determination. They emphasized that all

siblings, except the Respondent, are willing to await the outcome of the appeal, and granting stay would not prejudice the Respondent as he is also a beneficiary. They further noted that the application was filed promptly and that the record of appeal is being prepared.

12. On the issue of security for costs, the Applicants argued that the subject matter is family land inherited from their mother, not purchased, and all siblings are entitled to benefit equally. They stressed that the trial court did not award costs to any party, making the Respondent's demand for security baseless.
13. Finally, citing **Phillip Keipto Chemwolo & Another v Augustine Kubende [1986] KLR 495**, they submitted that no prejudice would be suffered by the Respondent if stay is granted, as the orders sought merely preserve the estate and safeguard their right of appeal.

Respondent's submissions

14. The Respondent began by outlining the background of the application and cited Order 42 Rule 6(2) of the Civil Procedure Rules together with the case of **Dominic v Muiyenda (Civil Appeal E049 of 2023) [2023] KEHC**, and submitted on the principles of stay of execution namely unreasonable delay, substantial loss and security of costs.
15. Regarding unreasonable delay, the respondent acknowledged that the application was filed promptly,

soon after the ruling of 26th November 2024 and therefore was brought without unreasonable delay.

16. Regarding substantial loss, the respondent relied on **Tropical Commodities Suppliers Ltd v International Credit Bank Ltd (in Liquidation) (2004) 2 EA 331, James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, Century Oil Trading Co. Ltd v Kenya Shell Ltd (HCMCA No. 1561 of 2007), and Charles Wahome Gethi v Angela Wairimu Gethi [2008] eKLR.** The Respondent argued that the Applicants had not produced any credible evidence of irreparable loss. He submitted that claims of intended sale of the property were speculative and unsubstantiated, and that the Applicants' affidavit improperly invited the Court to re-evaluate the merits of the trial court's decision at an interlocutory stage. He further contended that the estate distribution has been pending since 2018 due to the Applicants' delay tactics, which continue to infringe on his right as a rightful beneficiary to enjoy his portion of the estate.

17. On security for costs, the respondents rely on the case of **Gianfranco Manenthi & Another v Africa Merchant Assurance Co. Ltd [2019] eKLR and Nduhiu Gitahi v Warungongo [1988] KLR 621,** the Respondent submitted that security is mandatory and urged the Court to compel the Applicants to deposit Kshs. 500,000/= to safeguard his interests. In conclusion, the

Respondent prayed that the application be dismissed with costs.

Analysis and Determination

18. This Court has considered the Notice of Motion, affidavits, and rival submissions. The issue for determination is whether the Applicants have satisfied the conditions for grant of stay of execution pending appeal under Order 42 Rule 6(2) of the Civil Procedure Rules, namely: whether the application was filed within reasonable time, whether the applicants have demonstrated substantial loss and security for costs.
19. On timeliness of the application, the impugned ruling was delivered on 26th November 2024, and the present application was filed on 6th December 2024. The Respondent concedes that the application was filed without unreasonable delay. The Applicants acted expeditiously and therefore satisfy this requirement.
20. The cornerstone of stay applications is proof of substantial loss. In **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, the Court held that substantial loss is what must be prevented by preserving the status quo, and it is not enough to merely state that loss will be suffered. It is incumbent upon the Applicant to demonstrate that execution of the decree would occasion circumstances that negate the very substratum of the appeal, thereby undermining the

Applicant's right to fully benefit should the appeal ultimately succeed.

21. The Applicants argue that unless stay is granted, the Respondent may dispose of portions of the sole estate asset, thereby disinheriting some beneficiaries and rendering the appeal nugatory.
22. The Respondent counters that the allegation of sale is speculative and unsupported by evidence. He relies on **Charles Wahome Gethi v Angela Wairimu Gethi [2008] eKLR**, where the Court held that vague assertions of loss without particulars are insufficient.
23. However, this Court notes that the subject matter is land forming the sole estate asset. In succession disputes, once land is alienated to other parties, recovery becomes complex and may defeat the appeal. In **Mukuma V Abuoga (1988) KLR 645**, the Court observed that preservation of the subject matter is necessary to avoid rendering an appeal nugatory. Further that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
24. On a balance, the Applicants have demonstrated that there is a real risk of the estate being dissipated, which would occasion irreparable prejudice and render the appeal academic. This satisfies the requirement of substantial loss.
25. Order 42 Rule 6(2)(b) requires provision of security. The Respondent urges that the Applicants be compelled to

deposit Kshs. 500,000/= as security. The Applicants argue that since the subject matter is family land and no costs were awarded in the trial court, security should not be imposed. While this Court appreciates the family nature of the dispute, the Court is persuaded that a modest security, proportionate to the circumstances, should be deposited to balance the interests of both parties.

26. This court is expected to balance out the interests of the successful litigant and the applicants' unfettered right to file an appeal to fully ventilate their grievances. Here, the balance of convenience tilts in favour of preserving the estate until the appeal is heard, as alienation of the land would irreversibly affect the rights of all beneficiaries.

27. Accordingly, the Court is inclined to grant stay of execution of the ruling delivered on 26th November 2024 in Kangundo Chief Magistrate's Court Succession Cause No. 48 of 2018, on condition that the Applicants deposit security for costs in the sum of Kshs. 100,000/= within 30 days. Costs of the application shall abide the outcome of the appeal.

Orders accordingly

Dated, signed and delivered at Machakos this 18th day of December 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....for Applicant:

.....for Respondent:

Selina court assistant:

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