

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 15 OF 2021**

**IN THE MATTER OF THE ESTATE OF JOEL DINDI MAGERO (DECEASED)**

**LEONITA ANYANGO DINDI**

**JOYCE NAMATSI DINDI.....**

**PETITIONERS/RESPONDENTS**

**VERSUS**

**REV. WILSON DINDI MAGERO.....**

**APPELLANT/APPLICANT**

**RULING**

1. This Court is called upon to determine the Notice of Motion dated 3rd May 2025 by the Applicant, Rev. Wilson Dindi Magulero. The Application is brought under Order 42 Rule 6 of the Civil Procedure Rules, Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act, the Law of Succession Act, Cap 21 Laws of Kenya and Order 5 rule 2-34 and order 34 rule 3 order 1 Rules 15(1) and Order 38 Rule 1&2 of the Civil Procedure Rules, Probate and Administration Rules, Law of Succession Act and Civil Procure Act.
2. The Applicant principally seeks :
  1. That this application be certified as urgent and heard ex-parte in the first instance and a matter of urgency.

2. That this honorable court be pleased to grant a temporary order of stay of court proceedings pending the hearing and determination of this application and the initiated Appeal at the Court of Appeal.
3. That this Honorable Court be pleased to dismiss this matter for abuse of the court process as the petitioners herein had already acquired a grant in the intestate succession petition cause No E149 OF 2010 an intestate succession filed in Busia high court family division being in the matter of the Estate of JOEL DINDI MAGERO (deceased):Leonita Anyango Dindi and Joyce Namatsi(Petitioners)
4. The Application is opposed by the Petitioners/Respondents through affidavits and submissions.

### **The Applicant's Submission**

5. The Applicant contends that the deceased died intestate and that Busia H.C. Succession Cause No. 149 of 2010 was filed and concluded as an intestate succession, culminating in the issuance of a grant to the Petitioners. He relies on a gazette notice and a purported grant to demonstrate that the matter was already determined.
6. It is his submission that the present cause, Kakamega H.C. Succession Cause No. 15 of 2021, is therefore a duplicate, scandalous, frivolous, vexatious, and an abuse of the court process.

7. The Applicant argues that the Petitioners deliberately converted the matter from intestate to testate succession in order to disinherit other beneficiaries, particularly Margaret Makokha, who he claims was gifted land parcel Bukhayo/Buyofu/1074 by the deceased during his lifetime.
8. The Applicant further submits that Commercial Plot No. 1, Ekisumo Market, does not form part of the estate as it belongs to him personally, and he relies on correspondence and land rates demands from the Busia County authorities to support this claim.
9. The Applicant submits that he has lodged an intended appeal to the Court of Appeal and that unless stay of proceedings is granted, the appeal will be rendered nugatory, thereby occasioning him irreparable loss.
10. The Applicant cited the case of **In re Estate of the Late Epharus Nyambura Nduati (Deceased) [2021] KEHC 867 (KLR)** and urged the Court to invoke its inherent jurisdiction under Article 159 of the Constitution and Section 76 of the Law of Succession Act to prevent illegality and duplicity.

### **The Respondents' Submissions**

11. The Respondents oppose the Application and submits that while the Applicant filed a Notice of Appeal on 11th March 2025, he failed to file a substantive appeal within the prescribed time.

Consequently, there is no pending appeal upon which an order of stay can be anchored.

12. They submit that stay of proceedings is a discretionary remedy which presupposes the existence of a valid appeal. In the absence of such appeal, the application is incompetent.
13. The Respondents contend that Busia H.C. Succession Cause No. 149 of 2010 was transferred to Kakamega High Court on 6th July 2021, and upon transfer, it was assigned Succession Cause No. 15 of 2021. The present cause is therefore a continuation of the same proceedings and not a parallel or fresh suit.
14. The Respondents submit that the question of whether the deceased died intestate or testate was conclusively determined by this Court during the hearing of the protest, culminating in a ruling delivered on 26th February 2025.
15. The Respondents rely on Gazette Notice No. 5223 dated 13th May 2011, which revoked the earlier gazette notice and clarified that the petition was for letters of administration with will annexed, thereby countering the Applicant's contention.
16. The Respondents submit that the document relied upon by the Applicant as a grant is merely a handwritten draft that was never signed, sealed, or issued by the court, and therefore has no legal effect.

17. They submit that the present application is itself an abuse of the court process, aimed at reopening issues already heard and determined.

### **Issues for Determination**

18. The Court identifies the following issues for determination:
- I. Whether the Applicant has met the threshold for grant of stay of proceedings.
  - II. Whether there exists duplicity of proceedings amounting to an abuse of the court process.
  - III. Whether the issue of intestacy versus testacy is res judicata.
  - IV. Whether this Court can dismiss the succession cause at this stage.
  - V. Costs.

### **Analysis and Determination**

#### **1. Whether the Applicant has met the threshold for grant of stay of proceedings.**

19. Under Order 42 Rule 6(2), an applicant must demonstrate substantial loss, absence of delay, and the existence of a competent appeal. **In Kenya Wildlife Service v James Mutembei [2019] eKLR (CA)**, the Court of Appeal held that stay orders cannot issue where no appeal exists. Similarly, in **Butt v Rent Restriction**

- Tribunal [1982] KLR 417 (CA)**, the Court held that the discretion to grant stay must be exercised judiciously and on sound legal principles.
20. The court's ruling was delivered on 26<sup>th</sup> February, 2025. The Applicant filed a notice of Appeal on 11<sup>th</sup> March, 2025 within the 14 days timeline as per rule 75 of the Appellate Jurisdiction Act Cap 9.
21. The Applicant was required under Section 82(1) of the Appellate Jurisdiction Act Cap 9 to institute a substantive appeal within the period of 16 days therefrom. Thus, 11<sup>th</sup> May, 2025 was the last day for the Applicant to file the Appeal.
22. On that date he had not filed the appeal thus as envisaged by section 83 of the Appellate Jurisdiction Act the notice of Appeal is deemed as withdrawn.
23. The Applicant has not filed a substantive appeal, nor sought extension of time. Accordingly, there is no appeal upon which this Court can anchor an order of stay.

**2. Whether there exists duplicity of proceedings amounting to an abuse of the court process.**

24. **In Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR (CA)**, abuse of process was defined as instituting multiple suits between the same parties over the same subject matter.

25. The record shows that Busia H.C. Succession Cause No. 149 of 2010 was transferred to Kakamega and renumbered as Succession Cause No. 15 of 2021. There is therefore no multiplicity of proceedings.

### **3. Whether the issue of intestacy versus testacy is res judicata**

26. The Court of Appeal in **IEBC v Maina Kiai & 5 Others [2017] eKLR** held that once a court has conclusively determined an issue, the same cannot be reopened except on appeal.

27. This Court had already determined the issue of testacy in its ruling of 26th February 2025. The Applicant's attempt to revisit the issue through the present application is impermissible.

### **4. Whether this Court can dismiss the succession cause at this stage**

28. Dismissal of a succession cause is not contemplated under the Law of Succession Act. The appropriate remedy for allegations of fraud or concealment is revocation of grant under Section 76. **In re Estate of M'Ngarithi M'Miriti (Deceased) [2017] eKLR**, the Court emphasized that succession proceedings should proceed to confirmation to allow all beneficiaries to ventilate their claims.

29. This Court therefore finds no basis to dismiss the cause at this interlocutory stage.

### **5. Costs**

30. Guided by Section 27 of the Civil Procedure Act and the nature of family disputes, each party shall bear its own cost of the Application.

**Orders**

I. The Notice of Motion dated 3rd May 2025 is dismissed.

II. The prayer for stay of proceedings is declined.

III. Kakamega H.C. Succession Cause No. 15 of 2021 shall proceed to hearing and determination in accordance with the courts ruling dated 26.02.2025.

IV. Each party to bear its own costs of the Application.

31. It is so ordered.

32. Right of Appeal 30 days.

**DATED,SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 16<sup>TH</sup> DAY OF JANUARY,2026.**

**S. N MBUNGI**

**JUSGE**

**In the presence of:-**

**CA:Ang'onga**