



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION APPEAL NO. E036 OF 2025

**IN THE MATTER OF THE ESTATE OF PIUS NYONGESA
MULAA (DECEASED)**

BETWEEN

JAMES ECHESA NYONGESA
APPELLANT/APPLICANT

AND

FLORENCE KWENA NYONGESA
1ST RESPONDENT

REDEMTTA AWINO NYONGESA 2ND
RESPONDENT

RULING

1. This is a ruling on an application dated 25th November 2025 for stay of execution of orders delivered by the Chief Magistrate's Court in Mumias Law Court Succession Cause No. E08 of 2023. The Appellant/Applicant seeks further orders preserving the status quo ante, specifically that the estate and all properties comprising the estate of the late Pius Nyongesa Mulaa revert to and be maintained in the

- status and condition prevailing immediately prior to the delivery of the impugned ruling of 20th November 2025 pending the hearing and determination of the appeal.
2. The application is supported by an affidavit sworn by the Applicant James Echesa Nyongesa and in which he maintains that he has filed an appeal that is arguable and raises substantive factual and legal issues and unless the orders sought are issued, there is a real and imminent risk that the Respondents or their agenda would alienate, partition or dispose of the assets of the estate thereby leading to wastage or dissipation of perishable income generating activities. He maintains that the Respondents will not suffer any prejudice if the orders sought are granted. He also states that the Respondents are acting to the exclusion of certain lawful beneficiaries who have been denied the enjoyment and/or control of the estate.
 3. The application is opposed and the 1st Respondent swore an affidavit on 30th November 2025 in which she avers that her co-Petitioner is the Applicant's mother and that the Applicant has not satisfied the conditions for stay as his appeal does not raise any arguable point nor has he

demonstrated what substantial loss he stands to suffer should execution not issue. She avers that of all the family members of the deceased, only the Applicant is opposed to the confirmed grant.

4. The Application was canvassed through written submissions.

Parties Submissions

5. The Applicant submits that this court has inherent powers under Section 47 and 50 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules among other statutory provisions to make such orders as are expedient for the ends of justice. He submits that Order 42 Rule 2 of the Civil Procedure Rules empowers the court to order stay of execution pending appeal.
6. The Applicant further submits that the application has been made without unreasonable delay and that he has demonstrated that he stands to suffer substantial loss unless the orders of stay are granted. Regarding substantial loss, he submits that the estate property comprises ancestral land on which he and vulnerable dependants including his mother and close relatives

reside and derive a livelihood which is threatened by the likelihood that the Respondents are poised to further subdivide, alienate, transfer to his prejudice. He contends that such a move would lead to loss of his homestead as well as the homes of other dependants and such loss cannot be adequately compensated by monetary damages.

7. On security, the Applicant expresses willingness to furnish security and abide by reasonable terms that the court may impose.
8. Regarding the balance of convenience and interests of justice, the Applicant submits that since this is a succession matter concerning family land, it is more consonant with justice that the status quo is preserved and the estate protected from further dealings pending the hearing and determination of the appeal.
9. On her part, the 1st Respondent contends that the appeal is hopeless as the Applicant did not adduce evidence to substantiate his case before the trial court. She submits that costs are discretionary and there is nothing arguable about the issue of costs. She further submits that even if

the appeal were to succeed, the Applicant would only be entitled to his rightful share of the estate and no more and that there is no exposure to substantial loss that cannot be remedied by costs.

10. Further, the 1st Respondent submits that the Applicant is in abuse of the process of the court as he seeks to stay a ruling that ought to be enjoyed by the rest of the beneficiaries of the estate of the deceased. She submits that she is an aged blind widow without any means of income and that the Applicant's pursuit of the orders of stay are aimed at stopping a posho mill project which her nephews seek to set up next to her matrimonial home, a step the Applicant is vehemently opposed to. She urges the court to dismiss the application.

Analysis and Determination

11. Having considered the pleadings and the parties' written submissions, the court has no doubt that it has the power to grant the orders sought. There are two issues for determination:-
 - (a) Whether the Applicant has satisfied the requirement for stay of execution.

- (b) Whether the balance of convenience and interests of justice favour the preservation of the status quo.
12. The principles governing applications for stay of execution pending appeal are set out under Order 42 Rule 6(2) of the Civil Procedure Rules and they are as follows:-
- (a) The application must be made without unreasonable delay.
 - (b) The Applicant must demonstrate that he stands to suffer substantial loss unless the stay is granted.
 - (c) The Applicant must be willing to provide such security for due performance as the court may order.
13. Since the Applicant filed the appeal as well as the application for stay of execution pending appeal within 5 days of the impugned ruling, the application was made timeously.
14. Regarding the second condition, the Applicant has made generalized averments in his affidavit sworn on 25th November 2025. He claims that unless the orders sought are granted, there is a likelihood of prejudice to him and other beneficiaries of the estate. He has not disclosed the beneficiaries that would be adversely affected nor

demonstrated in what manner they stand to suffer loss. He has not even annexed the Certificate of Confirmation of Grant that he was seeking to revoke. The court therefore cannot deduce any circumstances that would lead to substantial loss more so in view of the fact that the Applicant is a joint administrator of the estate of the deceased.

15. In **James Wangalwa & Another v. Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR)**, the court explained substantial loss as:-

“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.”

16. It is not enough for the Applicant to claim that he stands to suffer substantial loss. He must be able to demonstrate that loss. The deceased was polygamous man with a large family. The Applicant is the only child so far who has challenged the confirmation despite the fact that he was part of the succession proceedings. The 1st Respondent has averred that the Applicant is the only one discontented with the confirmation as all the other beneficiaries are content. She deponed that the Applicant is in occupation of his share of land as allocated to him by the deceased and on which portion he has planted trees which he has been harvesting but is now seeking to impede her rights vide the application. The Applicant did

- not file any rejoinder to refute the 1st Respondent's averments.
17. When making a determination as to whether to grant an order of stay in a succession cause, the court is obligated to balance the interests of the Applicant and the other beneficiaries' rights to enjoy the fruits of a successful judgment in order to avoid unnecessary delay. See **In re Estate of Mridulla Kishor Makwana (deceased) [2025] KEHC 759 (KLR)** and **In re Estate of the late Samuel Waweru Mugo (Deceased) [2025] KEHC 2120 (KLR)**.
 18. The court takes cognizance of the 1st Respondent's averments that she is an elderly blind woman whose livelihood is dependent on the assets of the deceased whose distribution the Applicant is opposed to. Considering the Respondents are quite elderly, it would be prejudicial to deny them the fruits of the Certificate of Confirmation of Grant.
 19. The court further notes that the Applicant is seeking stay of execution of "negative orders". Generally, an order of stay is not granted against a negative order as there is

nothing to stay. In this case, the Applicant's prayer for revocation of grant was denied. In the circumstances, the prayer for stay and/or preservation of status quo is a prayer for stay of an order that did not confer any benefits to parties. In **Titus Kiema v. North Eastern Welfare Society [2016] KEHC 3524**, the Court had this to say:-

“12. I appreciate the order to be a negative one authorising no action nor placing any obligation upon the Appellant to be performed. In that event therefore one would pose the question; what execution is threatened and that need to be stayed? I have been unable to see any such threat...”

20. In the case of **Thuo v. Kimani & 2 others [2025] KEHC 4520 (KLR)** the court rendered itself thus concerning a negative order:-

“Additionally, the trial court dismissed the applicant's application seeking for revocation of grant, which is in effect a negative order. Notably, the court cannot grant stay of the impugned ruling as it dismissed the applicant's application which in

essence is a negative order and incapable of execution...The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise..."

21. Looking at the memorandum of appeal and the impugned judgment, the court is of the opinion that the grounds of appeal are flimsy. As argued by the Respondents, the Applicant did not adduce sufficient evidence to substantiate his claim before the trial court. His

application was for revocation of grant and to succeed, he needed to adduce evidence to prove on a balance of probabilities, the existence of the conditions set out in Section 76 of the Law of Succession Act. He did not do so, prompting the court to dismiss his application with costs. The failure to adduce the evidence before the trial court renders his present appeal tenuous.

22. Flowing from the above, I find that the Applicant has not met the threshold for grant of stay of execution pending appeal.
23. Consequently, I find no merit in the application dated 25th November 2025. The same is dismissed with no order as to costs.

Dated, signed and delivered at Kakamega this 21st day of January 2026.

**A. C. BETT
JUDGE**

In the presence of:

No appearance for the Appellant

Mr. Kuchio for the Respondents

Court Assistant: Polycap

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