

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYERI**  
**HIGH COURT SUCCESSION APPEAL E006 OF 2025**

**ROSE WARUGURU GICHIRA .....1<sup>ST</sup>**  
**APPELLANT**

**BRIGITE KOENIG .....2<sup>ND</sup>**  
**APPELLANT**

**-VERSUS-**

**BETH CYNTHIA NYAWIRA MWEMA .....**  
**RESPONDENT**

**RULING**

1. The application dated 5/1/2026 seeks a stay pending appeal to the Court of Appeal. The grounds are that they have filed the appeal to the Court of Appeal. The parties appeared before me this morning seeking various directions regarding that application. The court pointed out to the applicant that the matter is a first appeal from the decision in Karatina MC Succ Cause Number 96 of 2017.
2. The respondent indicated that there is no right of appeal pursuant to Section 50 (1) of the Succession Act. The applicant informed the court that he had already filed a record of appeal in the Court of Appeal.

3. After perusing the application, I noted that the same is premised on the fact that they have filed an appeal to the Court of Appeal. It provides that the high court's decision is final. this then necessitated that directions be given in respect of the application dated 5.1.2026.
4. The powers of the court in regard to stay pending appeal are circumscribed in Order 42 Rule 6 of the **Civil Procedure Rules** as follows:

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

5. The court notes that there have been previous occasions when a stay pending appeal has been issued. However, recently, there was guidance regarding second appeals in succession matters. The appeals to the High Court are governed by Section 50 of the Succession Act. the same provides as follows:

(1) An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.

6. *Ipsa facto*, there can be no appeal to the court of appeal. Section 42 Rule 6 cannot be invoked in the absence of an appeal. The court *canto* by craft assumes jurisdiction in matters where none exists. In the case of **Macharia &**

**another v Kenya Commercial Bank Ltd & 2 others**

**[2012] KESC 8 (KLR)**, the supreme court stated as doth: -

This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

7. What then happens when one finds that they have no jurisdiction? this was guided upon in the case of **In Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR**, Nyarangi JA, as he then was stated as doth;

With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of

jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: "By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

8. In short, the material before me is an appeal to the Court of Appeal. One may have been filed in that court. However, without determining the outcome, this court does not have jurisdiction *ratione materiae* to grant the orders sought in view of section 50 of the Succession Act.

9. The net effect of this finding is that the Court must down its tools. Accordingly, notice of motion dated 5/1/2026 is struck out.

10. The next question relates to costs. It must be remembered that costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

"It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

11. The application was not opposed by way of affidavit evidence. Therefore, I direct that each party shall bear its own costs.

## **Determination**

12. The upshot of the foregoing is that I make the following orders:
- a. The notice of motion dated 5/1/2026 seeking stay of execution of the judgment herein is struck out.
  - b. Each party shall bear its own costs.
  - c. The file is closed.

**DELIVERED, DATED and SIGNED at NYERI on this 27<sup>th</sup> day of January, 2026.** Ruling delivered extempore, through Microsoft Teams Online Platform.

**KIZITO MAGARE  
JUDGE**

### **In the presence of:**

Mr. Seko for the Appellant/Respondent  
Mr. Kimugung for the Respondent/Applicant  
Court Assistant – Michael