



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
CHERERE-J
HCFP&A E005 OF 2024

**IN THE MATTER OF THE ESTATE OF
ESTHER KEMUNTO ONSOMU (DECEASED)
BETWEEN**

**EVERLYN M. MAGATI.....1ST
PETITIONER/RESPONDENT**
**MARY KEMUNTO MONARI.....2ND
PETITIONER/RESPONDENT**
**PHILIS KEMUMA MONARI.....3RD
PETITIONER/RESPONDENT**
AND
**MARY MORAA ONSOMU.....1ST
PROTESTOR/APPLICANT**
**HENRY MORANGA OSIEMO.....2ND
PROTESTOR/APPLICANT**

RULING

1. This ruling concerns the Notice of Motion dated 27th November 2025 by the Protestors/Applicants seeking an order of stay of execution of the judgment delivered on 23rd October 2025 pending the hearing and determination of an intended appeal to the Court of Appeal.
2. The application is supported by the affidavit of Henry Moranga Osiemo, the 2nd Protestor sworn on 27th November 2025 and is opposed through a replying affidavit sworn on 26th January 2026 by Everlyn M. Magati, the 1st

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Petitioner/Respondent, on behalf of the
Petitioners/Respondents.

3. The Court directed that the application be canvassed by way of written submissions, and the parties duly complied.
4. I have considered the application, the affidavits on record, the submissions filed, the judgment sought to be stayed, and all the authorities relied upon by the parties.
5. The Applicants contend that they are dissatisfied with the judgment confirming the grant and directing distribution of the estate and that unless stay is granted, the intended appeal will be rendered nugatory. They assert that they stand to suffer substantial loss.
6. The Respondents oppose the application and submit that the Applicants have failed to satisfy the legal threshold for grant of stay and that the beneficiaries are entitled to enjoy the fruits of the judgment.
7. Having considered the material before the Court, the issues that arise for determination are:
 - 1) **Whether the judgment sought to be stayed constitutes a positive order capable of execution**
 - 2) **Whether transmission of the estate property was proved**

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3) Whether the Applicants have demonstrated substantial loss so as to warrant the grant of stay of execution pending appeal.

1) Whether the judgment sought to be stayed constitutes a positive order capable of execution

7. The judgment delivered on 23rd October 2025 confirmed the grant and directed that Land Parcel No. Nyansiongo/Settlement Scheme/111 be distributed equally among the four children of the deceased in accordance with section 38 of the Law of Succession Act.

8. By expressly authorising distribution of the estate, the judgment imposed positive obligations and was therefore a positive order capable of execution, as opposed to a negative order that merely dismisses a claim.

9. I accordingly find that the judgment sought to be stayed is a positive order capable of being stayed.

2) Whether transmission of the estate property was proved

10. In the present application, the Respondents alleged that transmission had taken place. However, upon consideration of the material placed before the Court, I am not satisfied that transmission was conclusively proved so as to warrant a finding that execution had already been completed.

11. The Court therefore does not proceed on the basis that the application has been overtaken by events, and this issue is determined in the negative.

3) Whether the Applicants have demonstrated substantial loss

12. The applicable principles governing stay of execution are well settled. An appeal does not operate as an automatic stay, and an applicant must demonstrate substantial loss. This principle was clearly articulated in **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, where the Court held that execution, being a lawful process, does not by itself amount to substantial loss.

13. The Applicants did not place before the Court any evidence showing how implementation of the judgment, as framed, would occasion substantial loss on their part. The judgment merely directs equal distribution of the estate among all beneficiaries.

14. Equal distribution of an intestate estate is the default position under section 38 of the Law of Succession Act, and compliance with a statutory mode of distribution cannot, without more, constitute substantial loss.

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15. The Applicants did not demonstrate any risk of wastage, dissipation, alienation to third parties, or any irreversible dealing with the estate property that would render the intended appeal nugatory.

16. Mere apprehension or dissatisfaction with a lawful mode of distribution is insufficient to meet the threshold for grant of stay. As stated in **Butt v Rent Restriction Tribunal [1982] eKLR**, the discretion to grant stay must be exercised judiciously and on the basis of sound legal principles.

17. In exercising that discretion, the Court is also required to balance the Applicants' right of appeal against the Respondents' right to enjoy the fruits of judgment. In **Samvir Trustee Limited v Guardian Bank Limited [2007] eKLR**, the Court emphasised that a successful party is prima facie entitled to enjoy the fruits of judgment and that stay should not be granted lightly.

18. Even assuming that the intended appeal raises arguable issues, that fact alone is insufficient to warrant grant of stay. The Applicants must also demonstrate that the appeal would be rendered nugatory if stay is declined.

19. Courts are enjoined to refrain from granting orders that serve no practical purpose, a principle reaffirmed by the Court of Appeal in **Avistia SRO Limited v Njenga & 8 Others**

