

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
SUCCESSION CAUSE NO. 173 OF 2008
IN THE MATTER OF THE ESTATE OF ALI ALEX MAGOKHA
(DECEASED)

FRANCIS NIGHT MAKOKHA.....1ST
APPLICANT

HENRY WESONGA MAKOKHA.....2ND
APPLICANT

CUSTOM ONYANGO MAKOKHA.....3RD
APPLICANT

VERSUS

MOSES SIKWE MAKOKHA.....1ST
RESPONDENT

PATRICK WASHISWA SHIKUKU.....2ND
RESPONDENT

JACINTA AUMA ODUOR.....3RD
RESPONDENT

RULING

A. Background

1. The deceased herein died on 24th May 2003, at Lung'anyiro. The 1st and 3rd Respondent herein commenced the petitioning process seeking the Grant of Letters of Administration intestate, and the same was issued on 22nd October 2009. On 25th May 2010 this Court confirmed the Certificate of Confirmation of Grant issued on 28th October 2009.

2. The 1st and 3rd Respondent herein applied for transmission of land parcels **LR. No. Bukhayo/Malanga/734** and **LR. No. Bukhayo/Busiwabo/1543** on 17th August 2010. Subsequently, **LR. No. Bukhayo/Malanga/734** was transferred to the 2nd Respondent and **LR. No. Bukhayo/Busiwabo/1543** to the 1st and 3rd Respondents herein on 17th August 2010.
3. On 28th October 2019, the 3rd Applicant herein filed in this Court Summons for Revocation of Grant dated 28th October 2019, seeking to have this Court revoke the Grant issued to the 1st and 3rd Respondents herein on 25th May 2010 and subsequently confirmed on 28th October 2009, on the ground that the 1st and 3rd Respondents herein concealed material facts during the petitioning process, that they fraudulently sold part of the estate of the deceased herein and failure of them to provide for all the beneficiaries to the estate of the deceased.
4. At the request of the parties, this Court refereed this matter to mediation on 16th March 2023, and the parties were able to come up with a partial settlement whereby the parties agreed to have the Grant issued on 22nd October 2009 and confirmed on 28th October 2009, be revoked. This Court directed that the parties have the same mediation report filed in Court.
5. By consent of the parties, the Grant issued on 22nd October 2009 and confirmed on 28th October 2009, was revoked and a fresh Grant was issued to the Applicants and 1st Respondent herein as the new administrators to the estate of the deceased herein, on 28th September 2023. The Court directed the parties to proceed with the confirmation process.

B. Application

1. Vide Chamber Summons dated 13th May 2024, the Applicant herein approached this Court seeking orders in the following terms:

a. That, this Honourable Court be pleased to issue an order staying these proceedings pending the hearing and determination of Busia ELC No. E002 of 2024.

b. That, the Land Registrar Busia County is orders to place a restriction on LR. No. Bukhayo/Malanga/734 and LR. No. Bukhayo/Busiwabo/1543.

c. That, costs of this application be provided for.

2. The Application is supported by the Affidavit sworn on the even date by the 1st Applicant on behalf of the other applicants. In the Affidavit, he deponed that the applicants herein became administrators' courtesy of the Court order issued on 3rd October 2023, and that the estate of the deceased was previously administered by the 1st and 3rd Respondents herein. According to him, the 1st and 3rd Respondents fraudulently transferred part of the assets comprising of the estate of the deceased herein to the 2nd Respondent herein, **LR. No. Bukhayo/Malanga/734 and LR. No. Bukhayo/Busiwabo/1543**. He deponed that at the advice of his counsel he filed a case at the Busia Environment Land Court to have the two titles cancelled and the same revert back to the estate of the deceased. He insisted that it is in the interest of justice that this suit be stayed and to await the outcome of Busia Environment and Land Court case and the said parcels be reverted to the estate of the deceased. He deponed that the Respondents acquired the two properties through fraud and it was in the interest of justice for the Land Registrar Busia County to be ordered to place a restriction to the said lands register to prevent the current registered proprietors from disposing off the same to their parties in order to defeat his suit. He

asserted that the 2nd Respondent herein is no way related to the deceased herein neither did the deceased sell to him **LR. No. Bukhayo/Malanga/734** and alleges that there is a possibility of his disposing off the same to avoid the **Busia ELC No. E002 of 2024**. He also averred that the other parcel **LR. No. Bukhayo/Busibwabo/1543** registered in the name of the 3rd Respondent is at the risk of been disposed off.

C. Replying Affidavit

3. In response, the 1st Respondent sworn a Replying Affidavit on 28th January 2025, on behalf of the 1st Respondent wherein he averred him and the 3rd Respondents were Administrators of the estate of the deceased herein, but the Applicants herein lodged their objection prompting them to proceed to mediation which resulted with him and the Applicants been appointed as the new administrators. He averred that they ought to have proceeded to with the confirmation of the new grant and not filing of this application for stay of proceedings. He averred that the actions of the previous Administrators became inconsequential with the issuance of the new title and the Applicants application is devoid of legal foundation. He urged this Court to dismiss the application as the is vexatious, frivolous and a waste of the Court's time.

D. Application hearing.

4. The Application was canvassed by way of written Submissions. The Applicants filed their Submissions on 18th March 2025, while the Respondents filed theirs on 28th January 2025.

E. Applicants submissions

5. The Applicants submitted that it is in the interest of justice for this Court to allow their application dated 13th May 2024, as the same will ensure that **LR. No. Bukhayo/Malanga/734** and **LR. No.**

Bukhayo/Busiwabo/1543 which initially belonged to the estate of the deceased prior to the sale and/or subsequent transfer revert to the estate of the deceased. Counsel argued that if this suit is stayed to await outcome of the **Busia ELC No. E002 of 2024**, then the distribution of the estate of the deceased will be seamless.

6. Counsel further argued that since the transfer of ownership of the parcels was through fraud and there was a possibility of interference by 3rd parties it is essential for this Court to issue orders to have the Land Registrar Bungoma place restrictions on the said parcel in order to avoid having **Busia ELC No. E002 of 2024** overcome by such events.

F. Respondents Submissions

7. On the other hand, the Respondents submitted that after the demise of the 3rd Respondent's husband, her brothers-in-law have become hostile and interfered with the administration and distribution of the estate of the deceased herein with the aim of disinheriting her and her children. Counsel argued that the 3rd Respondent sold off **LR. No. Bukhayo/Malanga/734** to raise funds to enable her administer the estate of the deceased and cater to the needs of her and her children. Further, counsel argued that with the issuance of the fresh Grant, the Applicants were expected to focus on the confirmation of the same Grant instead of instituting the application dated 13th May 2024.
8. The Respondents argued that the order of stay of proceedings is discretionary in nature and the Court has to ensure that the Applicants have presented a prima facie case to warrant the issuance of the same. Counsel relied on the case of **Global Tours vs Travels Limited (Nairobi HC Winding up Cause No. 43 of 2000)**.

9. Counsel submitted that the proceedings in **Busia ELC No. E002 of 2024** has no bearing on this succession cause and given the different scopes of jurisdiction between the two Court it will be prejudicial on the Respondent to stay these proceedings simply because the Applicants have instituted other proceedings in an Environment and Land Court. Counsel relied on the cases of **Muchanga Investments Ltd vs Safaris Unlimited (Africa) & 2 Others (2009) eKLR** and **Kenya Wildlife Service vs James Mutembei (2019) eKLR**.
10. Counsel submitted that since the jurisdiction of this Court is centered on purely the matters of both moveable and immovable properties of deceased person, the grounds as raised by the Applicants in their application is focused on the Environment and Land Court, the Applicants ought to apply for partial confirmation of Grant by virtue of Section 71 of the Law of Succession Act as they await the outcome in **Busia ELC No. E002 of 2024**.
11. Counsel urged this Court to dismiss the Applicants application as the same is devoid of merit and aimed at obstructing judicial process.

G. Determination

12. The issue that arises for determination herein is “whether the proceedings herein should be stayed pending the hearing and determination of the suit filed by the Applicants, namely, Eldoret Environment and Land Court Case No. E002 of 2024 and whether this Court should order the Land Registrar Busia County to place a restriction on LR. No. Bukhayo/Malanga/734 and LR. No. Bukhayo/Busiwabo/1543.”
13. It should be recalled that this this Cause is long overdue. The same was to be set down for confirmation of

the fresh Grant and distribution of the estate of the deceased.

14. I believe that the instant Application is a consequence of the revocation of the Grant issued on 22nd October 2009 and the Certificate of Confirmation of Grant issued on 28th October 2009. The parcels **LR. No. Bukhayo/Malanga/734** and **LR. No. Bukhayo/Busiwabo/1543** were clearly transferred from the estate of the deceased by the 1st and 3rd Respondents herein, and it is explicit that the issue before the Environment and Land Court Case No. E002 of 2024 is centered on the ownership of these two land parcels.
15. It is true that the mandate of a Probate and Administration Court is to determine the assets of the deceased, identify the rightful beneficiaries of the estate, ascertain their respective shares and finally, distribute the estate accordingly. This has been restated in a plethora of decisions including for instance, the case of **re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR**, in which W. Musyoka J held that:

“The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”

16. Questions on ownership of property are therefore outside the jurisdiction of this Court. This is a preserve of the Environment and Land Court (ELC) as well established under Article 165 (2)(b) of the Constitution of Kenya, 2010 and Section 13 of the Environment and Land Court Act, 2011. Accordingly, in my view, the Applicants have taken the right step in placing the questions surrounding the ownership of parcel of the land known **LR. No. Bukhayo/Malanga/734** and **LR. No. Bukhayo/Busiwabo/1543** to the ELC.
17. Returning to the Application seeking stay of proceedings, when determining an Application seeking stay of proceedings, the Court is required to exercise its discretion but after due consideration of the merits of the case and the likely effect on the ends of justice. Needless to state, exercise of discretion must be grounded on judicious principles. On this issue, Hon. Justice Ringera J in **Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000** held as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial

time and whether the application has been brought expeditiously.”

18. The requirement for the Court to judiciously exercise its discretion when considering an Application to stay proceedings was reiterated by Hon. F. Gikonyo J in the case of **Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited (2015) eKLR** in which he stated as follows:

“..... what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice”

19. In line with the foregoing guidelines, it is generally agreed that in an Application for grant of stay of proceedings, the matters that the Court must satisfy itself on are (a) that the applicant has established a prima facie arguable case; (b) that the Application was filed expeditiously; and (c) that the Applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.

20. On whether there is an arguable case that deserves to adjudicated before the ELC, I may reiterate that the Applicants claim is that the **LR. No. Bukhayo/Malanga/734** and **LR. No. Bukhayo/Busiwabo/1543** were fraudulently sold and/or transferred from the estate of the deceased. According to the Applicants it is in the interest of justice that this suit be stayed and to await the outcome of Busia Environment and Land Court case and the said parcels be reverted to the estate of the deceased. They deponed that the Respondents acquired the properties through fraud and

it is in the interest of justice for the Land Registrar Busia County to be ordered to place a restriction to the said lands register to prevent the current registered proprietors from disposing off the same to their parties in order to defeat his suit. They thus contended that the proceedings in this Cause were conducted through misconcealment of facts and that their interests were therefore unfairly excluded. It is for these reasons that they successfully sought the annulment and/or revocation of the Grant issued on 22nd October 2009 and confirmed on 28th October 2009. However, his case before the ELC seems to have mutated from the one herein since the case at the ELC is on the ownership of **LR. No. Bukhayo/Malanga/734** and **LR. No. Bukhayo/Busiwabo/1543** by the estate of the deceased herein.

21. On whether the Application has been brought expeditiously, I observe that with the issuance of the fresh Grant on 28th September 2023, and filed the instant Application on 13th May 2024. It is therefore clear that the Applicants having filed the ELC suit, seeking determination of ownership of parcels of land that once formed the assets of the estate of the deceased, moved with speed to file the Application seeking stay of these proceedings. There was therefore no inordinate delay in bringing the Application.
22. To determine the Application, I need to interrogate whether the Applicants have demonstrated sufficient cause to the Court's satisfaction that granting the orders of stay of proceedings aligns with the interest of justice. In answering this question, I may state that it is clear that the outcome of the ELC suit is likely to conclusively resolve the matter of the ownership of the said property and thus shape the fate of its distribution.

23. As aforesaid, I will defer any further proceedings in the cause herein to allow the parties to first address the Environment and Land Court on the said issue of ownership of **LR. No. Bukhayo/Malanga/734** and **LR. No. Bukhayo/Busiwabo/1543**. In the premises, the application dated 13th May 2024, is with and is hereby allowed in its entirety.

H. Final Directions

24. This Court hereby issues the following orders:

- a. Any further proceedings in this case are hereby stayed pending determination of Busia ELC Case No. E002 of 2024.
- b. The Land Registrar Busia County to place a restriction on **LR. No. Bukhayo/Malanga/734** and **LR. No. Bukhayo/Busiwabo/1543** pending hearing and determination of Busia ELC Case No. E002 of 2024.
- c. No orders as to costs.

Orders accordingly.

Dated and delivered at Bungoma this 21st day of January 2026.

Mwanaisha.S. Shariff
Judge

In the presence of:

N/A for Applicants

N/A for Respondents

Peter Machoni - Court Assistant