

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
SUCCESSION CAUSE NO. 288 OF 2015
IN THE MATTER OF THE ESTATE OF MURIANKI MURUGU
alias MURINGI MURUGU (DECEASED)

MBAE MURIANKI.....PETITIONER/APPLICANT

VERSUS

LINUS KARANI JOSES &

KELLEN KAARI NJUEAPPLICANTS

R U L I N G

1. The Applicants filed summons dated 3rd June 2024 for orders that:-

- (i) That the Honourable court be pleased to certify this summons urgent owing to its urgent nature, hear the same ex-parte in the first instance and issue the orders sought. (spent)

- (ii) That the Honourable court be pleased to issue an order of stay of proceedings and/or

hearing of the Petitioner/Applicant's summons dated 17th October 2023 pending hearing and determination of this summons.

(iii) That the Honourable court be pleased to issue an order of stay of proceedings and/or hearing of Petitioner/Applicant's summons dated 17th October 2023 pending hearing and determination of this summons.

(iv) That the Honourable court be pleased to issue an order of stay of proceedings and/or hearing of the petition. Applicant's summons dated 17th October 2023 pending the hearing and determination of Nyeri Court of Appeal, Civil Appeal No.E176 of 2023.

(v) That the costs of this application be provided for.

2. In the Supporting Affidavit sworn by the 2nd Applicant, the Applicants stated that their case as

follows. That they were the legal representatives of their deceased father one Joses Mwihandi Waingentu alias Joses Mwihandi Waingentu who was also the registered owner of parcel No. Mwimbi/South Mugumango/519. That the suit land was the subject matter in Chuka PMCC No. 60 of 2006, Mwimbi Land Dispute Tribunal Case No. 11 of 2006, Chuka PMCC LDT 34 of 2008, Eastern Province Land Dispute Appeals Committee No. 28 of 2009 and Meru High Court Civil Appeal No134 of 2010. He died during the pendency of the proceedings and the case was dismissed on 15th July 2015 for want of prosecution.

3. The Applicant's state that upon obtaining letters of administration and a confirmed grant, they took up the litigation and applied to appeal out of time the decision in Chuka Senior Principal Magistrate Land Dispute Tribunal Case No. 34 of 2008 which had

divested their late father of the suit property. That their request was dismissed and they appealed to the Court of Appeal. That in the process, they learnt of the Respondent's proceedings to rectify a grant on the estate of their father and which application was to distribute the suit parcel claimed by the Applicants' deceased father's estate.

4. The Applicants stated that their Civil Appeal No. 176 of 2023 was pending before the Nyeri Court of Appeal and it was only fair and just to stay the Respondent's summons for rectification of grant dated 17th October 2023. That if the summons for rectification proceeded, the suit land would be distributed and would be placed out of their reach.
5. The Respondent. Mbae Muriangi filed a replying affidavit dated 19th June 2024 opposing the Application.

6. Mbae Murianki stated that the Applicants were not sincere that they were not aware of the previous litigation over the suit land which finally granted his (Respondent's) father Murianki Murungi a decree in his favour dated 23rd November 2010. That the said decree had not been appealed and he had subsequently included LR Mwimbi/South Mugumango/519 as part of the estate of his late father.
7. The Respondent stated that he was aware of the Applicant's appeal but that such appeal does not operate as stay of execution; and the decree had not been vacated. Further that there was inordinate delay in challenging the award.
8. The Respondent stated that he would be prejudiced by stay of proceedings. That it was not true that the Applicants were in occupation of the suit land. That the Applicants if successful on

appeal, would still have the remedy of reversing any gains by the Respondents. That the Applicant had not shown the nature and extent of damages that would result if appeal succeeded considering that their success would only lead to their being allowed to appeal which appeal would already be statutorily time-barred.

Submissions

9. The Applicants filed submissions dated 27th May 2025 in which they identified issues for determination as follows:-

- (i) Whether the honourable court has jurisdiction to hear the summons dated 3rd June 2024
- (ii) Whether the Applicants are entitled to the prayers sought in the summons dated 3rd June 2024.

(iii) What appropriate orders should the court grant in respect of the summons dated 3rd June 2024.

10. The Applicant submitted that the court was clothed with the requisite jurisdiction to entertain and grant the Application. They cited Rule 47, 49, and 73 of the Law of Succession Act and Article 50(1) of the Constitution as the basis of such jurisdiction.

11. The Applicant stated that the Civil Appeal emanated from Chuka ELC Misc. Application No.E007 of 2023. That however the Land Parcel No. Mwimbi/South Mugumango/519 was now the subject of succession proceedings in High Court Succession Cause No.288 of 2015 pending before this court. The Applicant submitted that the gravamen of their summons was to protect and

preserve the suit parcel. They urged that no prejudice will be suffered by the Respondents.

12. On whether they were entitled to the prayers sought, the Applicants submitted that they were the ones in actual occupation of the suit land parcel and they would suffer prejudice if the same was distributed before the determination of their pending appeal as it would be impossible to reverse the distribution if they were to succeed on appeal. They urged that they would suffer irreparable loss if the land was distributed and subdivided and their appeal would then be rendered nugatory.

13. The Applicants further submitted that they filed the present summons without delay once they learnt of the summons for the rectification of grant by the Petitioners to distribute the suit land.

14. Finally, the Applicants submitted that stay of proceedings was an equitable remedy awardable at the discretion of the court. They urged the court to exercise its discretion in their favour.

The Petitioner's/Respondent's submissions

15. The Respondent outlined the background to the present summons and outlined four issues for determination by this court as follows:-

- (i) Whether this court has constituted (P&A Court) as the requisite jurisdiction to hear and determine the instant summons which are largely predicated on ELC matters.
- (ii) Whether the Applicant has met threshold to warrant being issued with stay of proceedings in the Application dated 17th October 2023.

(iii) Whether the Applicants have other equitable remedies before the Court of Appeal.

(iv) Who should pay the cost of this summons.

16. On jurisdiction the Respondent submitted that this court sitting as a Probate and Administration court had no jurisdiction to grant orders on matters squarely in the jurisdiction for the Environment and Land Court. That the court was being invited to issue orders without jurisdiction. They cited the *classicus* case of **Owners of Motor Vessel Lilian S. Versus Caltex Oil (Kenya) Limited [1989] eKLR.**

17. On whether the Applicant met the threshold for stay of proceedings, the Respondent submitted that there was nothing in the Applicant's supporting Affidavit to show that they would suffer any loss or damage as they had no interest to protect by stay of proceedings, having lost all

cases in respect of the suit property LR Mwimbi/South Mugumango/519. That the Applicant had no known interest to protect.

18. The Respondent further submitted that the Applicant had equitable remedies before the Court of Appeal, and that court and not this court, being the court with jurisdiction over both ELC and P&A matters could stay the proceedings in this court. The Respondent prayed for costs of the Application.

19. I have considered the rival affidavits and submissions.

The two issues arising for my determination are:-

- (i) Whether this court has jurisdiction to entertain the Application on merits.
- (ii) Whether the Applicant has met the threshold for stay of execution.

(i) Jurisdiction

20. The Applicants' case is that they were the legal representatives of the estate of their late father Mwiandi Baingetu who had been in a long drawn battle with the Petitioner's deceased father Murianki Murugu over land parcel No. Mwimbi/South Mugumango/519. That the contest over the land parcel was now at the Court of Appeal where they were seeking leave to appeal out of time.

21. The facts as to the existence of a long standing contest over the suit parcel are not contested by the Respondent. The Respondent however argues that the parcel was now registered in their deceased father's name and formed part of his estate for which they seek to succeed. That this court lacks jurisdiction to entertain a matter exclusively in the jurisdiction of the Environment and Land Court.

22. Jurisdiction is the foundation upon which judicial authority rests. A court can only exercise powers expressly conferred upon it by the Constitution or statute. Where a court acts outside those limits, its decision is a nullity, regardless of the merits of the dispute. This principle was authoritatively stated in **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1**, where the Court of Appeal held that once a court determines it lacks jurisdiction, it must down its tools. The court as per Nyarangi J. held that:-

““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 downs its

tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

23. Article 162 of the Constitution and Section 13(2) of the Environment and Land Court Act 2011 vests exclusive jurisdiction in the ELC court to handle Environment and Land disputes.

Article 162 of the Constitution provides:-

(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations;

and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

13.(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land. (2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power

to hear and determine disputes relating to environment and land, including disputes— (a) relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; (b) relating to compulsory acquisition of land; (c) relating to land administration and management; (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land.

24. It is clear from the above that court has no jurisdiction to hear and determine any dispute on

land ownership as that jurisdiction is divested by the Constitution and the Environment and Land Act. I therefore agree with the Respondent on that legal premise.

25. The dispute before this court however is not a land ownership but a succession matter. The Petitioner Mbae Murianki approached this court vide summons for review of grant seeking orders that the grant issued to him (Mbae Murianki) and confirmed on 16th November 2015 be reviewed and rectified to include the asset LR Mwimbi/South Mugumango/519 measuring 8.00 acres. He stated that at the time the grant was confirmed on 16th November 2015, the LR Mwimbi/South Mugumango/519 was in the name of Joses Mwiandi Baingentu. He stated in the Supporting Affidavit that the parcel Number had since been awarded to the Petitioner and formed part of the estate for distribution.

26. The above Summons prompted the Applicants' Application for stay of proceedings. The Applicant states that he has not exhausted the appeal process and his appeal against the ELC decision dismissing his application to appeal out of time was pending at the Court of Appeal.
27. This court is clear that it has not been asked to adjudicate on the contest over the suit land which is squarely within the jurisdiction of the Environment and Land Court. Instead, it has been asked to stay further action on the pending succession proceedings, being not to proceed to review and rectify the Petitioner's grant to include the suit land.
28. In the case of **Trouistik Union International & another v Jane Mbeyu & another [1993] KLR 230** the Court of Appeal held that the free estate of a deceased person comprises only

property which the deceased was legally competent to freely dispose of during his lifetime. That where ownership of property is disputed, the probate court must first be satisfied that such property forms part of the estate. The Court further cautioned that the Probate Court's inquiry must not mutate into a full adjudication over title or ownership.

29. I am duly guided by the above case.

30. Further in **re Estate of Alice Mumbua Mutua (Deceased) 2017 eKLR** Musyoka J. held that: -

“It may be argued that the subject land is estate property and by dint of that fact the probate court would have jurisdiction thereon. The position is not as simple. 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.

Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration rules are tailored for resolution of disputes between the

personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules.

Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41 (3), which provides as follows -

‘where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules’

Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for

resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be *functus officio* so far as the property in question is concerned. *The primary mandate of the probate court is distribution of the estate and once an order is made distribution the*

estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by the court are limited to what I have stated above."

31. In the present case, the grant issued to the Petitioner earlier excluded the suit land which was then subject to litigation. According to the Respondent, that litigation ended, while according to the Applicant, he sees prospects of proceeding to the Court of Appeal once allowed to appeal out of time.

32. It is my finding that to the extent that this court, sitting as a Probate court is not concerned with the issue of ownership, this court has jurisdiction to entertain the Application on merits.

(ii) Whether the Application is merited

33. The Principles governing stay of proceedings were set out by the Court of Appeal in the case of **William Odhiambo Ramogi & 3 Others v AG [2020] eKLR** where the court held: -

“A scan of our decisional law reveals that our courts have established the following principles for grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher court;

a. *First*, there must be an appeal pending before the higher Court;

b. *Second*, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has

been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;

c. *Third*, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;

d. *Fourth*, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;

e. *Fifth*, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and

f. *Sixth*, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.

34. In the present matter, the Applicants' case is that there exists a pending appeal before the Court of Appeal arising from their quest to challenge the process through which the suit

property was divested from their late father. It is their contention that unless the proceedings herein are stayed, the Respondent will proceed to rectify the grant and distribute the suit property, thereby altering the substratum of the dispute. They assert that they are in actual occupation of the land and that any distribution thereof would expose them to eviction and dispossession, thereby occasioning them substantial prejudice. It is further contended that once the property is transmitted and possibly transferred to third parties, the resultant legal consequences would be difficult to reverse, even in the event of a successful appeal, thus rendering the appellate process nugatory.

35. The Respondent, on his part, maintains that the Applicants have not demonstrated the existence of a competent appeal, noting that what

is pending is an application for leave to appeal out of time. He further contends that the decree in favour of his deceased father remains valid and enforceable, and has neither been set aside nor stayed. It is his position that the Applicants' prospects of success are speculative, and that the grant of stay would unjustly delay the conclusion of succession proceedings to the detriment of the beneficiaries. The Respondent also argues that any prejudice that may be suffered by the Applicants is capable of being remedied, should they ultimately succeed in their intended appeal.

36. I have carefully considered the rival positions. My duty in an application of this nature is to balance the competing interests with a view to doing substantive justice. On the one hand is the Respondent's right to proceed with the administration and distribution of the estate, and

on the other is the Applicants' right to pursue their appellate remedies without the risk of those proceedings being rendered illusory. In my view, the possibility that the suit property may be distributed and transmitted to third parties, thereby creating new proprietary interests, presents a real risk of irreversibility and multiplicity of proceedings. Such a state of affairs would not only prejudice the Applicants but would also complicate the implementation of any eventual decision of the appellate court. In the circumstances, I am satisfied that the Applicants have demonstrated that their intended appeal would be rendered nugatory if the orders sought are not granted, and that the interests of justice demand the preservation of the subject matter pending the determination of the appellate process.

37. It is my finding therefore that Applicants have demonstrated that their appeal would be rendered nugatory.

38. In the end these are my final orders:-

(i) There shall be stay of proceedings or hearing in the summons dated 17th October, 2023 pending the determination of Civil Appeal No. E176 of 2023 pending at the Court of Appeal.

(ii) Either party is at liberty to apply upon expiry of 90 days.

(iii) Though successful, the Applicant is denied costs. Each party shall therefore bear their costs.

**Ruling delivered, dated and signed at Chuka
this 16th day of March, 2026.**

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**R. LAGAT-KORIR
JUDGE**

Ruling delivered in the presence of Mr. Nyamu Nyaga for the Applicants and Mr. I.C Mugo for the Respondents; Muriuki (Court Assistant).

ORIGINAL