

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA TA VIHIGA**  
**HCFA NO E008 OF 2024**

**IN THE MATTER OF THE ESTATE OF MARIA KEGEHI LIJODI**

**ALEX DIMBA LIJOODI.....**  
**APPELLANT**

**VERSUS**

**NASIBU HOLDINGS**  
**LIMITED.....RESPONDENT**

**RULING NO (1)**

**INTRODUCTION**

1. In his Notice of Motion dated 30<sup>th</sup> October 2024 and filed on 31<sup>st</sup> October 2024, the Appellant herein sought orders that pending the hearing and determination of the intended Appeal herein, there be an order of stay of execution of the Ruling and all consequential orders delivered by Hon J. A Agonda PM on 24<sup>th</sup> October 2024. He also sought a stay of all proceedings in **Vihiga PM Succession Cause No 399 of 2023 In the Estate of Maria Ageli Lijodi.**
2. He swore an affidavit in support of the said application on 30<sup>th</sup> October 2024. He averred that he was appointed as the Administrator of the estate of the deceased herein and that the Grant was issued after revocation of the earlier Grant that had been issued to the Petitioner Henry Walter Magaga and which order had never been appealed or set aside.
3. He asserted that the order that revoked the Grant had also cancelled the transaction that transferred the suit land to the Respondent. He added that the estate of the deceased comprised of LR North Maragoli/1005 (hereinafter referred to as the "subject

land”) and the same was distributed to the beneficiaries of the estate who were his sister Rose Catherine Dimba and himself.

4. He pointed out that after the estate of the deceased was distributed, a title was issued to him and his sister. He contended that the said subject land was fallow for a long time as he was following up the issue of the fraudulent Grant. After he obtained the title, he moved onto the land and started cultivating it.
5. He further contended that as at 31<sup>st</sup> July 2024, when the Respondent filed its application, the subject of the impugned Ruling, it was not in occupation of the estate land and that even if it was, then such occupation was illegal as it did not own the estate land. He added that it was dishonest for the Respondent to mislead the court in its application that it was in occupation of the estate land and seek an order of *status quo* to continue occupying the land against the interests of the beneficiaries of the deceased’s estate.
6. He was categorical that the rights of the real beneficiaries of the estate could not be given away to the Respondent who obtained title through a fraudulently acquired grant. He was emphatic that they were greatly prejudiced by the Ruling that was delivered on 24<sup>th</sup> October 2024 as the Trial Court surrendered the estate land to the Respondent in total disregard of the interests of the children of the deceased and in contravention of the law.
7. He asserted that it was important that the Ruling be stayed as they sought to exercise their right of appeal. He added that the Respondent would not suffer any prejudice as it was neither the

child/beneficiary of the estate nor did it have the title to the estate land.

8. Oliver Kehodo Osengo, the Farm Manager of the Respondent swore a Replying Affidavit on 29<sup>th</sup> November 2024 on behalf of the Respondent in opposition to the Appellant's application.
9. The Respondent prayed that the application be dismissed as it had not met the threshold for grant of an order of stay and that the Appellant had no *locus standi* to seek orders on the suit property having sold it to one Musalia Mudavadi. It averred that it was the registered owner of the subject land since 2012 and that in July 2024, unknown parties invaded the same and forcefully evicted its agents.
10. It asserted that upon enquiry, it learnt that the Appellant had revoked the Grant in **Vihiga PMC Succession Cause No 399 of 2023**, cancelled its title and transferred the subject property to Musalia Mudavadi. It added that it, therefore, filed an application seeking joinder in the Succession Proceedings and injunctive orders.
11. It further added that it also filed **ELC 55/2024 Nasibu Holdings vs Musalia Mudavadi & 3 Others** seeking to invalidate the title that was fraudulently issued and transferred by the Appellant. It asserted that on 24<sup>th</sup> September 2024, the court directed the Defendant therein to grant it immediate possession of the subject property pending the hearing and determination of the application. It stated that accordingly, it was put back in possession pending hearing of that suit.

12. It contended that despite being served with the summons in the ELC suit, the Appellant was yet to file a defence. It pointed out that the order revoking the Grant was currently being challenged through an application by Henry Magaga and the same was yet to be responded to and/or finally determined.
13. It further averred that it was not true that the land was fallow as claimed by the Appellant and that it had adduced substantial and uncontroverted evidence in the ELC suit from members of the community establishing that the Appellant was claiming ownership of the subject property that belonged to their maternal grandmother among other allegations.
14. It pointed out that despite having been served by several affidavits, the Appellant had not controverted any of the information contained therein. It asserted that it was, therefore, false for the Appellant to claim that he was entitled to the subject property as a child of the deceased as the deceased never had any title to the subject land. It added that the Appellant no longer had a title to the subject property as he had transferred the same to the said Musalia Mudavadi on the 3<sup>rd</sup> July 2024.
15. It was emphatic that in the premises, the Appellant had no *locus standi* to seek an injunction or stay order and that he had not illustrated any good grounds for the exercise of the court's discretion to stay any further proceedings of this matter.
16. It argued that a stay of proceedings was a serious and fundamental interruption on the right of a party to conduct their

litigation towards trial on the basis of the substantive merits of their case. It added that it should not, therefore, be imposed unless the proceeding ought not be allowed beyond all reasonable doubt.

17. It asserted that the Appellant had not met the threshold for being granted the orders he had sought and that his application would prevent the just and expeditious disposal of the Succession proceedings. It urged the court to deny the orders sought herein.

18. The Appellant swore a Further Affidavit on 7<sup>th</sup> May 2025 in opposition to the Respondent's Replying Affidavit. The same was filed on even date. He averred that the Respondent's title was a product of a fraudulently acquired Grant which was annulled and the nullification had never been set aside. He asserted that for all purpose and intents, the Respondent was not the *bona fide* owner of the subject property.

19. He reiterated his averments in his Supporting Affidavit and noted that it was unconceivable for the Respondent to state that he had no *locus standi* yet he was the 1<sup>st</sup> Administrator of the deceased's estate and that the fact that the land was sold to Musalia Mudavadi did not oust his position as son of the deceased and as an Administrator. He denied the averments in the Respondent's Replying affidavit and contended that the issues in ELC Court were materially different from this cause and this court could not determine the issues pending before the ELC Court through these proceedings.

20. He was emphatic that he had demonstrated all the requirements for grant of an order of stay of execution of the Ruling as well as stay of the proceedings in the lower court and that there was no bar to grant of stay of proceedings.

21. The Appellant's Written Submissions were dated 7<sup>th</sup> May 2025 and filed on 8<sup>th</sup> May 2025. Although the Respondent indicated that it had filed its Written Submissions, the same could not be traced on the e-filing portal. The Ruling herein is therefore based on the said Appellant's Written Submissions only.

### **LEGAL ANALYSIS**

22. The Appellant placed reliance on the case of **Halal & Another vs Thorton & Turnip Ltd[1990]eKLR** where it was held that for one to satisfy the conditions for grant of an order of stay of execution pending appeal the applicant had to establish a sufficient cause, secondly the court had to be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant had to furnish security. The application had to be also made without unreasonable delay. He was emphatic that he had met the above conditions as well as those espoused by the Court of Appeal in the case of **Butt vs Rent Restriction Tribunal Civil App No 6 of 1979**(eKLR citation not given).

23. He argued that the Respondent did not make any prayer for any orders pending the determination of the suit or pending the determination of the issue of ownership of the subject property and therefore the Trial Court erred when she exercised her discretion

injudiciously by granting the Respondent orders that had not been prayed. In this regard, he relied on the case of **Daniel Kariuki Kamau vs Hannah Wanjiru Kamau & 8 Others[2018]eKLR** where it was held that the applicant ought to have applied for a temporary injunction pending the hearing and determination of the application and a second prayer for a temporary injunction pending the hearing and determination of the appeal.

24. He contended that a single *bona fide* arguable point would suffice as an applicant was not required to show a multiplicity of arguable points. In this regard, he relied on the case of **Dennis Mugambi Mongare vs Attorney General & 3 Others [2012]eKLR** where it was held that an arguable point was not one that had to succeed.

25. He further argued that the Respondent did not cite any provisions of the Law of Succession to ground his application. In this regard, he relied on several cases among them the case of **Josephine Wambui Wanyoike vs Margaret Wanyira Kamau & Others[2013]eKLR** where it was held that the Law of Succession Act was a self sufficient Act of Parliament with its own substantive law and rules of procedure.

26. He was emphatic that he had an arguable appeal and the application for stay of the impugned orders was merited. He placed reliance on the case of **Tropical Commodities Suppliers Ltd & Others vs International Credit Bank Limited (in Liquidation) (2004) E.A LR 331** where it was held that substantial loss referred

to any loss, great or small that was of real worth or value as distinguished from a loss without value or a loss that was merely nominal.

27. He argued that he had demonstrate substantial loss as the Trial Court had ordered the Respondent to occupy the subject land yet it was not a beneficiary in the estate to his detriment as a beneficiary. He added that the application for stay of execution was filed timeously and there was no inordinate delay. He pointed out that this being a succession matter the issue of security did not arise.

28. He cited several cases among them the case of **William Odhiambo Ramogi & 2 Others vs A.G & 3 Others[2019]eKLR** where it was held that for an order of stay of proceedings to be granted, there had to be an appeal pending before the higher court, the applicant had to demonstrate that the appeal raises substantial questions to be determined or was otherwise arguable and that it would be rendered nugatory if the order is not granted, that there are exceptional circumstances which would make the stay of proceedings warranted as opposed to having the case concluded and that the application was filed expeditiously and without delay.

29. He was emphatic that he had satisfied the above conditions and had hence, met the threshold for grant of orders of stay of proceedings. He asserted that the propriety of granting a stay of proceedings pending an appeal over interlocutory matters was decided on the facts of each case and with due regard to the

salutary general rule that appeals were not entertained piecemeal. He added that on the other hand, staying the proceedings would save judicial time as this appeal would uphold the hallowed principle that parties are bound by their proceedings and that courts only determine issues placed before them and only granted orders that had been prayed.

30. He further relied on the case of **Kenya Anti-Corruption Commission vs Bhangra Limited & Another**[2009]eKLR where it was held that in circumstances where final determinations had been made, it would be befitting to stay further proceedings until the appeal was determined as any continuation with the matter would be prejudicial in view of the final determinations made at an interlocutory stage. He urged the court to allow his application and order the Respondent to pay costs of the application herein.

31. A perusal of the orders the Appellant sought were in the nature of orders for stay of execution. He did not, however, cite the provisions of the law in this regard. In addition, it was not clear which orders the Appellant was seeking under Order 9 Rule 1 and 7 of the Civil Procedure Rules.

32. Order 9 Rule 1 of the Civil Procedure Rules stated that:-

**“Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or**

done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:

Provided that—

- a. any such appearance shall, if the court so directs, be made by the party in person; and
- b. where the party by whom the application, appearance or act is required or authorized to be made or done is the Attorney- General or an officer authorized by law to make or to do such application, appearance or act for and on behalf of the Government, the Attorney-General or such officer, as the case may be, may by writing under his hand depute an officer in the public service to make or to do any such application, appearance or act.

33. The above notwithstanding, this court found and held lack incorrect citation of the provisions of the Civil Procedure Rules or failure to cite the same was not fatal. Indeed, Order 51 Rule 10 of the Civil Procedure Rules provides as follows:-

1. Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

**2. No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.**

34. It was on that basis that this court found it prudent to address itself to the merits or otherwise of the prayer for stay of execution of the orders that were issued by the Trial Court on 24<sup>th</sup> October 2024.

35. Notably, Order 42 Rule 6 of the Civil Procedure Rules, 2010 empowers a court to stay execution of its own orders or an appeal court to stay orders from the court whose decision was being appealed from. Under the said Order 42 Rule 6 of the Civil Procedure Rules, an applicant had to demonstrate the following:-

**a. That substantial loss may result unless the order is made.**

**b. That the application has been made without unreasonable delay.**

**c. Such security as the court orders for the due performance of the decree has been given by the applicant.**

36. The three (3) conditions for the grant of an order for stay of execution had to be met simultaneously as they were conjunctive and not disjunctive.

37. As to whether the application herein was made without unreasonable delay, the order subject of this appeal was delivered on 24<sup>th</sup> October 2024. The Appellant filed this application on 31<sup>st</sup> October 2024. A period of about seven (7) days was reasonable in

the circumstances and did not amount to unreasonable delay. As there was no money decree, the condition for security would not have been applicable.

38. Having said so, it is important to point out that a prayer for stay of execution was not one that could be brought under the Law of Succession Act Cap 160 (Laws of Kenya). Notably, Rule 63 (1) of the Probate and Administration Rules, stipulates as follows:-

**“Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules (emphasis court).”**

39. This position was restated in the cases of **Josephine Wambui Wanyoike vs Margaret Wanyira Kamau & Others** (Supra), **In Re Estate of Charles Nyakuti Nyabonga (Deceased) [2023] eKLR** and **Priscilla Vugutsa Kamahiki vs Mary Runyani Ochieng[ 2016] eKLR** that the Appellant herein cited in his Written Submissions. The common holding of the said cases was that there were certain provisions in the Civil Procedure Rules that could not be imported into the Law of Succession Act which had its own distinct legal regime.

40. This court took a similar view and found that the application as drafted was incompetent and defective and lent itself to being dismissed *in limine*.
41. However, this court had at the back of its mind the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 that mandates courts not to have due regard to procedural technicalities and went further to determine if this court could have stayed the order that the Trial Court delivered on 24<sup>th</sup> October 2024.
42. It did appear to this court from the decision of the Trial Court that the subject property was already in possession of the Respondent herein. The Appellant alluded to this fact as he indicated that the temporary injunction lapsed as it was not extended on 2<sup>nd</sup> December 2025. This court granted a *status quo* order pending the hearing of this application to preserve the subject property.
43. If this court was to stay the order of the Trial Court, it would mean that the Respondent would be removed and/or evicted from the subject land yet the question that was pending determination in that court was the ownership of the land. In this court, the question was if indeed, the Trial Court erred when it granted the said order. In addition, the case on **ELCLA No E002 of 2025** related to the ownership of the subject land. The ownership of the subject property was yet to be determined.

44. A careful perusal of the decision of Asati J that was delivered on 22<sup>nd</sup> January 2026 in **ELCLA No E002 of 2025** showed that she rendered herself as follows:-

**a. The order of the trial court dated 28<sup>th</sup> January 2025 is hereby set aside and substituted with an order dismissing the application dated 23<sup>rd</sup> September 2024 together with all orders made thereunder save for the order of inhibition.**

**b. The suit to proceed to hearing before a different Judicial Officer other than Hon Agonda who handled the application.**

45. The Learned Judge also stated as follows:-

**“...the trial court having found the allegation that the title of the appellant was acquired by fraud was a matter that could only be determined through evidence by calling witnesses inclusive of the Land Registrar, the trial court ought not to have proceeded to summarily awarded the land to the respondent whose title had been cancelled.”**

46. The Appeal herein was between a party that argued that it was still the owner of the subject property and a party that also claimed title to the same subject property. This court was mandated to preserve the subject property as it determined the proceedings that had been brought before it. The question as to whether the Appellant who had already sold the land to the said Musalia

Mudavadi, had *locus standi* to litigate over the same subject property as a pertinent one.

47. Prudence, therefore, demanded that the *status quo* ought be maintained to enable the issue of ownership of the subject property be determined. Whereas the circumstances under which ownership by the Respondent came about emanated from succession proceedings, this court could not pronounce itself on which fora the parties herein ought to seek redress as they were both in the High Court Family Division and the Environment Land Court, which were competent courts of equal status. Suffice it to state that parties must at all times proceed in one forum to avoid two (2) different courts issuing two (2) different decisions over the same subject matter as it could cause embarrassment between different court, and confusion and complications to the disputing parties as was already manifest herein.

48. This court was of the opinion that injunctive orders could not be stayed. In the case of **Busienei vs Alphax College Limited; Kenya Forest Service & Another (Interested Parties) (Environment & Land Case 159 of 2015) [2024] KEELC 5399 (KLR) (18 July 2024) (Ruling)**, the court therein observed that a negative order is not capable of being stayed and relied on the case of **Milcah Jeruto Tallam t/a Milka Faith Enterprises vs Fina Bank Limited & Another [2013] eKLR** and that of **Ndungu Kinyanjui vs Kibichoi Kugeria Services & Another Civil Application No Nai 79 of**

2007 (unreported) in the Re Sonalux case where the Court of Appeal had this to say:-

**“This Court has repeatedly stated in previous decisions... that in an application under Rule 5 (2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to pay any sum there would be nothing arising out of that decision for this court to enforce or to restrain by injunction (emphasis court).”**

49. A way a party could seek to preserve subject property in succession causes was under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:-

**“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”**

50. The conditions under which either the trial court or an appellate court could order stay of proceedings were provided in the same provision as those for a stay of execution pending appeal. Order 42(6)(1) of the Civil Procedure Rules states that:-

**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.**

51. It was clear that the conditions for granting an order for stay of proceedings pending an appeal had not been specified in Order 42 Rule 6(1) of the Civil Procedure Rules. The court, therefore, has

to rely on the settled principles on when proceedings could be stayed pending appeal.

52. The question of whether or not to grant an order for stay of proceedings was a discretionary one. This discretionary power had to be exercised judiciously. The court had to consider if it would be in the interests of justice to grant the same. The underlying interest ought to be that the appeal should not be rendered nugatory.

53. This aspect of being rendered nugatory had to be hinged on the fact of whether or not the appeal was an arguable appeal and not whether the appeal would be successful. It was only concerned with the question of whether or not the appeal would be rendered nugatory. This was because at this stage, a court ought to not to look into the merits or otherwise of the appeal as that was under the purview of the appellate court.

54. This court was cognisant of the fact that an arguable appeal only needed to raise a single *bona fide* point worthy of consideration and need not be one that would necessarily succeed as was held in the case of **Co-operative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya) [2015]eKLR**.

55. As the Court of Appeal also held in the case of **UAP Insurance Company Ltd vs Michael John Beckett [2004]eKLR**, all an applicant was required to show was that he had an arguable appeal which was not frivolous and that the appeal would be rendered nugatory if the stay of proceedings was not granted.

56. Further in the case of **Niazsons (K) Ltd vs China Road & Bridge Corporation (Kenya) [2001]eKLR**, it was held that a stay of proceedings would be granted if the result of the appeal may well render the orders made nugatory and render the exercise futile.
57. The prayer for stay of proceedings was an equitable relief. An applicant had to come to court with clean hands. It was, therefore, important for the court to consider whether or not the application for stay of proceedings had been filed expeditiously. This court had held above that there was no delay in filing the present application.
58. A perusal of the Memorandum of Appeal herein led this court to the conclusion that the intended appeal was indeed arguable and not frivolous as the question before the appellate court was whether or not the lower court exercised its discretion correctly in having granted orders that ceded possession of the subject land being the estate of the deceased herein to the Respondent.
59. In the event the court did not to grant an order for stay of proceedings and the Appeal herein was heard and was successful, the proceedings in the lower court would be rendered unnecessary, even though an appropriate order for costs could have been made to remedy that.
60. This court was gave this order for stay of proceedings not under Order 42 Rule 6 (1) of the Civil Procedure Rules but pursuant to Rule 73 of the Probate and Administration Rules that provides as follows:-  
**“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be**

**necessary for the ends of justice or to prevent abuse of the process of the court.”**

61. Accordingly, having considered the affidavit evidence and the Appellant’s Written Submissions, this court came to the firm conclusion that this was a suitable case for it to grant an order of stay of proceedings so as not to render the Appeal herein nugatory. Judicial time was precious and scarce and was not be wasted in proceedings that would end up being academic exercise.

62. As was held in the case of **Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others [2009]eKLR**, that judicial time was the only resource the courts had at their disposal and its management did positively or adversely affect the entire system of the administration of justice.

### **DISPOSITION**

63. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Notice of Motion application dated 30<sup>th</sup> October 2024 and filed on 31<sup>st</sup> October 2024 was partly merited and the same be and is hereby allowed as follows:-

**1. THAT there shall be a stay of proceedings in Vihiga PM Succession Cause No 399 of 2023 In the Estate of Maria Ageli Lijodi pending the hearing and determination of the appeal herein.**

**2. THAT for the avoidance of doubt, the Ruling and all consequential orders of Hon J. A. Agonda that were issued on 24<sup>th</sup> October 2024 in Succession Cause No**

**MCSUCC No 399 of 2023 regarding possession of the subject property shall remain in force pending the hearing and determination of the Appeal herein and/or until further orders of the court.**

**3. Costs of the application herein will be in the cause.**

64. It is hereby directed that the matter be mentioned on 25<sup>th</sup> May 2026 for further orders and/or directions.

65. It is so ordered.

**DATED and DELIVERED at VIHIGA this 23<sup>rd</sup> day of March 2026**

**J. KAMAU  
JUDGE**