

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

MISCELLANEOUS CIVIL APPLICATION NO. E004 OF 2025

IN TE MATTER OF THE ESTATE OF LAWRENCE KARANJA

GATUNE (DECEASED)

ELIZABETH NGECHI KARANJA.....APPLICANT

-VERSUS-

PETER NDEGWA.....1ST RESPONDENT

JULIA WAMBUI.....2ND RESPONDENT

JULIA MWERU.....3RD RESPONDENT

JOHN MAINA.....4TH RESPONDENT

DAVID KARIUKI.....5TH RESPONDENT

RULING

1. The Applicant through the firm of Ondicho Shem Nyakenyanya & Co. Advocates filed an application dated 3rd June, 2025 seeking orders thus;

1) Spent.

2) Spent.

3) That a stay of execution in Nyahururu Succession Cause No. E084 of 2022 be granted pending the hearing and determination of this application.

4) The court be pleased to grant leave to the Applicant to appeal against the Judgment made by the Hon. E.H. Keago on the 28th May, 2025 in Nyahururu Succession Cause No. E084 of 2022.

5) The said leave do operate as a stay of all proceedings.

6) The costs of this application be provided for.

7) Any other orders that meets the ends of justice.

2. The application is premised on grounds that the Applicant is aggrieved by the judgment of Hon. E.H. Keago in **Nyahururu Succession Cause No. E084 of 2023** and she wishes to appeal and to do so she will require typed certified copies of proceedings for purposes of lodging the appeal.

3. That the court do grant stay of execution because the Respondents are likely to execute the decree herein at any time and it is in the interest of justice that the Applicant be granted leave to appeal as the Respondents will suffer no prejudice.

4. Subsequently, there was a Notice of Change of Advocates dated 18th July, 2025 filed by the firm of Naomi Muriithi & Co. Advocates notifying the court of the appointment to act in place of Ondicho Shem Nyakenyanya & co. Advocates.

5. The application is opposed through a replying affidavit deposed by Peter Ndegwa the 1st Respondent with authority of his Co-Protestors. It is deposed that the firm of Naomi

Muriithi & Co. Advocates is not properly on record. That execution has already taken place as the certificate of confirmation of grant has been issued. That the delay in filing of the appeal has not been explained and the execution has not caused displacement.

6. The application was canvassed through written submissions. It is urged by the Applicant that the delay in filing the appeal out of time was occasioned by the death of the Advocate who had conduct of the matter at the time of judgment. And on becoming aware of the fact, the Applicant acted promptly by instructing another counsel. Reliance is placed on the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR** where it was held that extension of time is a discretionary remedy which should be exercised to advance substantive justice where a reasonable explanation for delay is given.
7. On stay of execution, reliance is placed on the principle settled under **Order 42 Rule 6(2) of the Civil Procedure Rules** by virtue of **Rule 63 of the Probate and Administration Rules**.
8. That the subject matter of the dispute being land that forms the core asset of the Estate, subdivision and transmission to multiple beneficiaries will permanently alter the Estate and make reversal impossible. Reliance on the question of substantial loss was placed on the case of **Butt v Rent Restriction Tribunal [1982] KLR 417; and, Kenya Shell Ltd v Kibiru [1986] KLR 410.**

9. On the issue of security, it is urged that the Estate itself constitutes sufficient security, and, that procedural objections should not defeat substantive rights. Also relied on is **Article 159(2)(d) of the Constitution and Rule 73 of the Probate and Administration Rules.**

10. That Respondents submit that the prayer sought is for stay of execution pending hearing and determination of the application not intended appeal and submissions have deviated from the prayer sought which calls for status quo orders granted being vacated. That a party is bound by its pleadings.

11. Further, that there is no substantial loss to be occasioned as no valid appeal has been filed. Reliance is placed on the case of **Morris Mwirigi Njuguna v US Jamhuri Commercial Center Welfare Association & 5 Others, Civil Application No. E268 of 2023** where it was held that;

“Firstly, the orders of the trial court required the Applicant to surrender his title to the suit property on account that it was public property. There is therefore no risk of any irreparable dealings being undertaken on the property, and if the appeal succeeds, the possibility of the property reverting back to the Applicant. Secondly, the loss that may be occasioned in the event of eviction can be recoverable in damages....”

12. Also relied on is the case of **Jecinta Wangari Githeki v Charles Ebeiyo Eriya HCF Misc. E002 of 2025** where the court held that;

“26. The relief sought is two pronged. On the question of stay of proceedings, the remedy is sought pending filing an appeal following the decision of the court that dismissed the protest and paved way for confirmation of the grant of letters of administration in Succession Cause No. 20 of 2019 and subsequent issuance of the certificate of the confirmation of grant. The stated order of the court closed the cause until further orders, be it appealed, revocation or annulment in the event of sufficient reasons being adduced.

27. As demonstrated by the Applicant through the draft memorandum of appeal there is an intention to appeal but the appeal is yet to be filed, hence the proceedings cannot be stayed.”

13. Finally, that there is no evidence attached that the previous advocate died and that the firm ceased to exist. Hence the delay was not satisfactorily explained.

14. I have considered the application, affidavits in support and opposition and rival submissions alongside authorities cited. This is a matter that emanates from a succession matter where the Applicant intends to appeal the decision of the trial court which is faulted for various reasons as

captioned in the draft Memorandum of Appeal. The matter having been determined on 28th May, 2025, the Applicant instructed an advocate who filed an application on 3rd June, 2025. Mr. Ondicho did appear in court on 3rd July, 2025 with a view of prosecuting the application which however did not proceed for lack of service on the Respondent. The date given was 8th October, 2025 when Mr. Bosire appeared for the Applicant. It is argued that there was no evidence that the previous advocate's death and/or the firm no longer exists. A further affidavit was deposed by the Applicant to that fact but she was not subjected to cross - examination to test the accuracy of the information. Besides, judicial notice of that fact may be taken following the obituary published.

15. Be as it may, a Notice of Change of Advocate dated 18th July, 2025 was filed on 22nd July, 2025 by the firm of Naomi Muriithi & Co. Advocates and duly served on the firm of Waichungo Martin & Co. Advocates as acknowledged in court by learned council Mr. Gakenia Gicheru Advocate. For that reason, legal representation was formally substituted.

16. On the question of the relief sought, on the prayer for stay of execution, it is sought pending hearing and determination of the application. There must be procedural order. A court dwells on what is sought. It cannot imagine what an Applicant may have purported to seek or what is ideal for the party. It only adjudicates on what is presented before it. That is why a party is bound by its pleadings. In the ***Nigerian case of Adetoun Oladeji (NIG) v Nigeria***

Breweries PLC SC 91/2002 The Supreme Court stated that:

“..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

17. This court can therefore not introduce what was not sought as purported in submissions by the Applicants counsel.

18. In **Butt v Rent Restriction case (Supra)** it was held that;

“...It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory.”

19. As afore stated, upon delivery of the decision of the trial court on 28th May 2025, this Applicant moved timeously by

instructing counsel who filed the application on 3rd June, 2025. The delay was not inordinate.

20. The Applicant herein was legitimately part of the matter concerning land in question following the decision of the court in the succession case. And she has a right of appealing if dissatisfied by the decision of the court. In doing so, the appellate court should endeavor to ensure the matter is resolved with finality. This can only be done if the Applicant who is seeking to appeal is granted the opportunity to do so. On the question of the leave sought operating as stay of proceedings it is demonstrated that the matter was concluded.

21. The upshot of the above is that the application succeeds partially in that I grant the Applicant leave to appeal out of time within 30 days of today, the 29th October, 2026. Costs of the application shall abide the appeal.

22. It is so ordered.

Dated, signed and delivered virtually this 29th day of April, 2026.

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L.N. MUTENDE
JUDGE