



REPUBLIC OF KENYA



KENYA LAW
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**Wachira v Wanjohi & 4 others (Civil Application E124 of 2024)
[2025] KECA 1270 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1270 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E124 OF 2024
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
JULY 4, 2025**

BETWEEN

VIRGINIAH WAIRIMU MWANGI WACHIRA APPLICANT

AND

PETER MURIITHI WANJOHI 1ST RESPONDENT

JOHN WACHIRA WANJOHI 2ND RESPONDENT

CHARLES NJONJO WANJOHI 3RD RESPONDENT

GRACE WANGECHI WANJOHI 4TH RESPONDENT

JOSEPH MBUTHIA WANJOHI 5TH RESPONDENT

(Application for stay of proceedings and execution of the Order of the High Court at Nyeri (Kizito Magare, J.) delivered on 17th October, 2024 in HCFP&A No. E010 of 2022)

RULING

1. The application, a Notice of Motion dated 27th November, 2024 is premised under section 3 & 3A of the *Appellate Jurisdiction Act*, rule 5 (2)(b) of the Court of Appeal Rules and all other enabling provisions of the law. The application seeks three orders:

“2. That pending the hearing and determination of the Respondents’ Appeal being COACA/E010/2024: Peter Muriithi Wanjohi & 4 Others v Virginiah Wairimu Mwangi Wachira, this Honorable court be pleased to order a stay of execution of the Orders dated 17th October 2024 issued in Nyeri HCFP&A/E010/2022: In the Estate of John Mwangi Wachira by Hon. Justice Magare Dennis Kizito Ngwono.



3. That pending the hearing and determination of the Respondents' Appeal being COACA/E010/2024: Peter Muriithi Wanjohi & 4 Others v Virginia Wairimu Mwangi Wachira, this Honorable court be pleased to order a stay of proceedings in Nyeri HCFP&A/E010/2022: In the Estate of John Mwangi Wachira.
 4. That the costs of this Application be provided for."
2. The grounds of the application are That the respondents have already filed an appeal before this Court being Civil Appeal No. E010 of 2024: Peter Muriithi Wanjohi & 4 Others v Virginia Wairimu Mwangi Wachira against the judgment dated 16th November, 2023 issued in Nyeri High Court Family Probate & Administration Case No. E010 of 2022 Re: In the Estate of John Mwangi Wachira by F. Muchemi, J.
 3. That after the judgment of Muchemi, J. the respondent went back to the same court before Magare, J. on a mention date seeking an order of maintenance of status quo which was granted vide the orders of 17th October, 2024. The applicant's position is That the High Court was functus officio and had no jurisdiction to entertain the respondents' request. It is the applicant's contention That the instant application raises very weighty factual and legal issues amongst them being That the orders issued on 17th October, 2024 emanate from a post-judgment and That the orders clearly overturn and contradict the judgment of F. Muchemi, J. dated 16th November, 2023.
 4. It is stated That the proceedings currently before the High Court offend the principles of res judicata as the court is engaged in a retrial of the issues already determined in the case of Peter Muriithi Wanjohi & 4 Others v John Mwangi Wachira Nyeri Environment and Land Court [ELC] in ELC No. 226 of 2015: Further, That the High Court considered matters over which it had no jurisdiction as the subject property had already been transmitted to beneficiaries pursuant to a valid judgment of the court, and the land known as Nyeri/Uasonyiro/82 no longer exists.
 5. The application was canvassed before us though the virtual platform on the 11th February, 2025. Present for the applicant were learned counsel Mr. Wanyingi and Mr. Leronka for the applicant while learned counsel Mr. Tumu was present for the respondents.
 6. A preliminary issue was raised and we propose to deal with it first. What transpired before us is That the instant application arises from an order issued by Kizito Magari, J. on the 20th November, 2024 in Nyeri HCFP&A/E010/2022. Re: In the Estate of John Mwangi Wachira. The respondents have filed an appeal before this Court against the judgment of Muchemi, J. being Civil Appeal No. E010 of 2024. There is no notice of appeal against the order of Magari, J. filed by the applicant, a matter which they admitted during the proceedings before us.
That being the case, the issue is whether this Court has the jurisdiction to entertain the instant application.
 7. This Court's jurisdiction to stay the said orders is contingent on a notice of appeal having been filed against the impugned orders within 14 days of the date of issue, pursuant to rule 77 of the Court of Appeal Rules. This requirement is prescribed by Rule 5 (2)(b) as follows:
 - "(b) in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just."



8. The same was confirmed by this Court in *Halai & Another v Thornton & Turpin* [1963] Ltd. [1990] KLR 365; and in a more recent decision of this Court in the case of *Equity Bank Ltd v West Link MBO Ltd* [2013] eKLR, per Kathurima M’inoti, JA., discussing the jurisdiction of the Court of Appeal under rule 5 (2)(b) of the Court of Appeal Rules observed:

“In my view Rule 5(2) (b) was to address powers of the Court of Appeal That are incidental to hearing and determination of Appeals from the High Court. These powers were never meant to exist independent of the jurisdiction of the court to hear appeals ... the fact of the matter is That, the Court of Appeal cannot assume or exercise jurisdiction under rule 5 (2) (b) unless a competent Notice of Appeal has been filed. The filing of the Notice of Appeal from the decision of the High Court is a condition precedent before the powers under rules 5 (2)(b) can be invoked. This position is reiterated in order 42 rule 6(4) of the Civil Procedure Rules, 2010 which provides That an appeal to the Court of Appeal is deemed to have been filed when a Notice of Appeal has been given under the Court of Appeal Rules ... In my view Rule 5 (2)(b) read together with rule 2 leaves no doubt That the powers under rule 5 (2)(b) are exercised only in the context of an appeal.”

9. The applicant did not exhibit any such notice of appeal against the orders issued on 17th October, 2024, and has therefore incompetently filed the instant application, in so far as it seeks orders of stay of execution against an order not appealed against. In the premises we lack the jurisdiction to entertain this application and accordingly strike it out with costs to the respondents.

DATED AND DELIVERED AT NYERI THIS 4TH DAY OF JULY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI – ARONI

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JUDGE OF APPEAL

I certify That this is a true copy of the original.

Signed

DEPUTY REGISTRAR

