



REPUBLIC OF KENYA



**Gatu & another v Gatu & 3 others (Civil Suit E015 of 2023)
[2025] KEHC 589 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 589 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT E015 OF 2023
HI ONG'UDI, J
JANUARY 30, 2025**

BETWEEN

MWANGI GATU 1ST APPELLANT

DAVID WANDERI GATU 2ND APPELLANT

AND

GRACE NYAMBURA GATU 1ST RESPONDENT

PHYLIS WANJIRU GATU 2ND RESPONDENT

MARY WAMAITHA GATU 3RD RESPONDENT

ERASTO GATERU GATU 4TH RESPONDENT

RULING

1. By the Summons dated 22nd November 2023 the Appellant/ applicants pray for the following orders;
 - iii. - Spent.
 - iv. That this honourable court be pleased to stay the proceedings before Nakuru CM Succession Cause No. 214 of 2019 pending the hearing and determination of the instant appeal.
 - v. That costs of the application be in the cause.
2. The said application is based on the grounds on its face and the joint affidavit by the appellant/ applicants sworn on even date. They deponed that judgment was delivered on 5th September, 2023 in Nakuru Chief Magistrate Succession Cause No.214 of 2019 on distribution of the estate of their father. That being dissatisfied with the Judgment on the distribution they filed an appeal against it.
3. They further deponed that the said summons for confirmation of grant was set for hearing on 28th november, 2023. That they have an arguable appeal that would be rendered nugatory should the said



summons be heard and allowed. They added that their application had been made without delay and the same ought be allowed as prayed.

4. The respondents in response filed a replying affidavit sworn on 5th december, 2023 by the 2nd respondent. She averred that the application herein was incompetent and bad in law, as the same was brought Order 51 of the Civil Procedure Rules which provides for notices of motion yet the application if summons should be brought under the Probate and Administration Rules.
5. She further averred that by the 14th November, 2023, the appellant/applicants had not filed the application to stay proceedings and so the court gave 28th November 2023 as the date for hearing the Summons for Confirmation of Grant. That thereafter the appellant/applicants decided to rush and filed the present application so as to delay and/or stop the confirmation of the grant.
6. She stated that the appellant/applicants had not filed any documents other than the Memorandum of Appeal and there was no record of appeal on record meaning they had no interest in prosecuting the appeal. She further averred that the appellant/applicants had not met the threshold for grant of the orders sought and the court has discretion to dismiss this application. She added that it was only fair and just that the orders sought in this application be denied and the orders granted be discharged.
7. In response to the replying affidavit the appellant /applicants filed a supplementary affidavit dated 15th February 2024 where they reiterated the contents of their supporting affidavit.
8. The application was canvassed by way of written submissions.

Appellant/applicants' submissions

9. These were by filed by Mirugi Kariuki & Co.Advocates and are dated 15th February, 2024. Counsel cited Order 42 rule 6 (2) of the Civil Procedure Rules and submitted that the Appellant/Applicants stand to suffer substantial loss if the present application is not allowed as the distribution provided for in the judgment was unfair and did not provide for an equal distribution as per the law on intestacy.
10. He further submitted that the present application was filed timeously and without delay and as such the cause before the trial court was stayed. He added that the appellant/applicants were willing to comply with any such orders as this court may give. It was also his submission that the appellants/applicants had satisfied all the requirement for grant of stay of execution.

Respondents' submissions

11. These were by filed by Wanjiru Theuri & company advocates and are dated 20th June, 2024. Counsel identified six (6) issues for determination.
12. The first issue is whether or not the applicants' application is bad in law. Counsel submitted in the affirmative while citing Order 51 of the Civil Procedure Rules. On the second issue, on whether there was delay, he gave a chronology of events in the matter and submitted that there was inordinate delay in filing the application. He placed reliance on the decisions in *Congress Rental South Africa v Kenya International Conference Centre, Cooperative Bank of Kenya (Garnishee)* [2019] eKLR.
13. The third issue on whether the applicants have an arguable appeal he submitted in the negative while relying on *Halsbury's Laws of England, 4th Edition. Vol. 37 pages 330 and 332.* The fourth is whether the applicants stand to suffer substantial/irreparable loss and he submitted that the respondents did not intend to sell the suit property and it was not satisfactory for the appellant/applicants to merely state that they would suffer substantial loss. To buttress this position he cited the decision in *Pius Kipchirchir Kogo v Frank Kimeli* [2018] eKLR where the court stated that irreparable injury must



be one that cannot be adequately compensated for in damages and the mere existence of a prima facie case is not sufficient.

14. The fifth issue is on security, where counsel submitted that stay should not be granted as the appellant/applicants had not proposed and/or furnished security nor said anything about it. He placed reliance on the decision in *John Kamunya & another v John Ngingi Muchiri & S others* [2015] eKLR, where the subject issue being land, the court held that the title document should be deposited as security. He urged the court to apply the same case to this case. Lastly, he urged the court to dismiss the application with costs.

Analysis and determination

15. I have carefully considered the application together with the affidavits and the submissions by the respective parties. I opine that the issue for determination is whether the appellant/applicant's prayer for the a stay of the proceedings in the lower court during the pendency of the appeal is merited.
16. In the case of *Re Global Tours & Travel Ltd HCWC No.43 of 2000 Ringera, J* (as he then was) held that:

“...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, 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 case, 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...”

17. The instant application has been brought as a result of a succession cause before the lower court. The appellant/ applicants on one hand have opposed the mode of distribution in the judgment delivered on 5th September 2023 by the trial court while the respondents on the other hand dismissed the appellant/ applicants' application as being bad law since the same was brought under Order 51 of the Civil Procedure Rules instead of the Probate & Administration rules.
18. The applicants have appealed against a decision on distribution of the estate of the deceased in which they are beneficiaries. I find this to be an important issue warranting a decision from this court. The filing of summons instead of a notice of motion and omission to quote the correct provisions of the law as raised by the respondents is a technicality which is excusable and which is curable under Article 159 (2) (d) of *the Constitution* which provides that:-

“justice shall be administered without undue regard to procedural technicalities.”

19. Further, Section 1A and 1B *Civil Procedure Act* urges the court to strive for substantial justice other than relying on procedural technicalities. It is my view that the defects are curable under the above stated provisions of the law.
20. The appellant/applicants should be given an opportunity to ventilate their grievances by being heard on the appeal. The same should be fast tracked.



21. In view of the above findings, I find merit in the application dated 22nd November, 2023 and grant prayer No. iv for stay of the proceedings in Nakuru Chief Magistrate Succession Cause No. 214 of 2019 pending the hearing and determination of this Appeal.
22. Further the appellant/applicants are given 60 days within which to prepare and serve the record of appeal. Mention on 1st April, 2025 before the DR to confirm compliance before the file can be placed before this court for further directions on the admission and hearing of the appeal.

DELIVERED VIRTUALLY THIS 30TH DAY OF JANUARY, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

