



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sammy & another v Ngayai (Civil Appeal E008 of 2024)  
[2025] KEHC 1943 (KLR) (24 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 1943 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E008 OF 2024  
NIO ADAGI, J  
JANUARY 24, 2025**

**BETWEEN**

**LILLIAN MUTHEU SAMMY ..... 1<sup>ST</sup> APPELLANT**

**KEVIN MWENDWA SAMMY ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SAMMY MWANGALI NGAYAI ..... RESPONDENT**

*(Being an Appeal from the Ruling of Hon. E. Kimaiyo Suter (PM)  
in Mavoko CMCC MCSUCCMISC No. 019 OF 2021 In the matter  
of the Estate of Agnes Mueni Sammy delivered on 25/7/2024)*

**RULING**

1. This ruling is in respect to the application dated 07/8/2024 by the Appellants /Applicants seeking prayers under Articles 50(1), 159 (1) & (2) and 165 (1) (a) & (b) of *the Constitution* of Kenya, 2010, Sections 10(1),10(2)(b), 10 (4) and 39 of the High Court (Organizational and Administration) Act 2015 (Rev. 2017), Rules 3,15,16,17 and 32 of the High Court (Organization and Administration (General) Rules, Sections 1A,1B,2.3,3A & 78 of the *Civil Procedure Act*, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provision of the Law that:-
  1. Spent
  2. Spent
  3. The Deputy Registrar of this court be directed to call for and/or avail before this court the original court file – Chief Magistrate’s Court at Mavoko MCSUCCMISC. No. E019 of 2021 In the matter of the Estate of Agnes Mueni Sammy (Deceased).



4. There be stay of execution of the ruling of the Hon. E. Kimaiyo Suter, PM, delivered on 25<sup>th</sup> July 2024 virtually via Microsoft Teams, in Chief Magistrate's Court at Mavoko MCSUCCMISC. No. E019 of 2021 In the matter of the Estate of Agnes Mueni Sammy (Deceased) and all consequential orders thereof pending the lodging, hearing and determination of this appeal
5. Costs of and incidental to the application do abide the result of the intended appeal.
2. The application is supported by the joint affidavit of the Applicants herein sworn on 7<sup>th</sup> August 2024.
3. The application is opposed by the Respondent through a Notice of Preliminary Objection dated 04/09/2024 on the major ground that the application offends the provisions of Rule 63 of the Probate and Administration Rules and thus this court lacks jurisdiction to determine the same.
4. Directions were given for the Notice of Preliminary Objection dated 04/09/2024 to be heard first and Parties were to file and exchange written submissions on the same which they complied. The Applicants' submissions are dated 25/10/2024 and the Respondent's submissions are dated 17/10/2024.

### **Analysis and determination**

5. I have carefully considered the application, the notice of preliminary objection, the grounds of opposition and the parties' rival submissions. The main issue for determination is whether the preliminary objection is merited.
6. The Supreme Court in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696*, where the Court held as follows:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.
7. The Supreme Court also in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR* made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”
8. In view of the foregoing decisions, this Court shall seek to establish whether the ground outlined in the Preliminary Objection herein, has meet the threshold set out in the aforementioned cases.



9. The preliminary objection contends that the application herein offends the provisions of of Rule 63 of the Probate and Administration Rules and thus this court lacks jurisdiction to determine the same. Rule 63 of the Probate and Administration Rules provides that:-

“ 63 (1) Save as 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 Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (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.”

10. From the above, it is crystal clear that the objection by the Respondent is not without merit. The drafters of the Law of Succession Act, Cap 160 Laws of Kenya intended that the said Act be a complete piece of legislation by itself. That is why they enacted the Probate and Administration Rules as the Practice Rules applicable in matters touching on the Act. Faced with a similar situation, Justice A. Mabeja, J in *Zubheir Abdalla v Yussuf Juma* [2018] eKLR observed as follows: -

“ The question that arises then is, does the exclusion of Order 42 of the Civil Procedure Rules from those imported by Rule 63(1) of the Probate and Administration Rules take away the jurisdiction of the court from entertaining an application such as the one before me? Is this court left powerless in the event a litigant facing imminent execution approaches it with a stay application? I don't think so. Two provisions within that Act, in my view, give this court jurisdiction to come to the aid of such a distressed applicant. These are Section 47 of the Act and Rule 73 of the Probate and Administration Rules.

11. Section 47 of the Act provides:-

“ The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this Section be represented by resident magistrates appointed by the Chief Justice.”

12. On the other hand, Rule 73 aforesaid preserves the inherent jurisdiction of this court while dealing with matters succession. The wording of that Rule is *pari materia* with Section 3A of the Civil Procedure Act. That Rule provides:-

“ 73. 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.”

13. In this regard, the court can entertain any application of whatever nature under Section 47 aforesaid and invoke its inherent power under Rule 73 and makes orders for the sake of justice. The court in *Zubheir Abdalla* (*supra*) did not agree and so do I, with the submission that, this court can only exercise its inherent power only in instances where abuse of court process has been pleaded. That jurisdiction in my view, is always inherent in the court to be invoked at any time and at all times when the court is of the view that it will serve the ends of justice.

14. Accordingly, I make a finding that notwithstanding Order 42 of the Civil Procedure Rules not being one of those Orders imported by Rule 63(1) of the Probate and Administration Rules, this court has



jurisdiction to grant orders of stay of execution under Section 47 of the Act as read with Rule 73 of the Probate and Administration Rules. That objection is therefore overruled.

15. As regards the order of stay sought, the strict principles for a grant of stay under Order 42 of the Civil Procedure Rules will not apply. In the circumstances, the court will in my view consider whether there is a real threat of execution; whether the application has been made without undue delay; the nature of the order sought to be executed; whether the situation can be reversed if the execution is undertaken and the cost of effecting the reversal and the extent of loss, damage or hardship the applicant may be subjected to as a result of the execution.
16. In the present case, the applicants alleged that there is eminent threat of execution of the orders made in the lower court's ruling dated 25/07/2024 requiring the Respondent to petition for representation of the Estate herein within a prescribed period of time which order the Respondent is likely to comply with. The Respondent on the other hand has confirmed that the lower court's order is yet to be complied with. From the instant application herein, the ruling was delivered on 25/07/2024, the decree has not been extracted yet. However, I note that the court ordered the Respondent to petition for representation of the Estate herein within thirty days of the ruling.
17. As regards the filing of the instant application, the same was filed in court on 08/08/2024, less than a month from the date of delivery of the ruling. The same was accordingly made timeously.
18. The order sought to be stayed is the one allowing the Respondent to petition for representation of the Estate.
19. It is not denied that the Respondent had been separated with the deceased herein prior to her demise and that the relationship between the parties is very strained and they hold very strong positions in their minds. If the Respondent proceed to petition for representation of the Estate herein as ordered by the lower court while the appeal is pending, of course the Applicants may be subjected to untold hardship as they may not be a position to mutually deal with Respondent in the intended succession cause due to the strained relationship between them. That eventuality can be avoided if the status quo is maintained, albeit for a limited period. This is so considering that in an application for stay of execution, there are always two opposing interests; the right of the Applicant not to have his appeal rendered nugatory, and the right of the successful Respondent to enjoy the success of the litigation.
20. I note that the record of the lower court is not ready and the appeal is yet to be admitted for hearing under Section 79 of the *Civil Procedure Act*. Accordingly, the order that commends itself to me is to allow the application on the following terms:
  - a. There shall be a stay of execution of the ruling and order made on 25th July 2024 in Chief Magistrate's Court at Mavoko MCSUCCMISC. No. E019 of 2021, in the matter of the Estate of Agnes Mueni Sammy (Deceased) and all consequential orders thereof pending hearing and determination of the appeal herein.
  - b. The Applicants to file and serve the Record of Appeal within Forty-Five (45) days of this Ruling, in default the appeal shall stand dismissed without any necessity of an application for such an order.
  - c. The costs to be in the appeal.

**RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 24<sup>TH</sup> JANUARY 2025**

**NOEL I. ADAGI**

**JUDGE**



**DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 24<sup>TH</sup> JANUARY 2025**

In the presence of:-

Mr. Kiluva..... for Appellant

Mr. Kisese h/b for Mr. Muhoro ..... for Respondent

MillyGrace..... Court Assistant

