



REPUBLIC OF KENYA



Wanjohi v Muthoga & 4 others; Muthoga & 3 others (Respondent) (Succession Cause 18 of 2019) [2025] KEHC 1330 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1330 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 18 OF 2019**

M MUYA, J

FEBRUARY 27, 2025

BETWEEN

LILIAN WANJIRU WANJOHI APPLICANT

AND

ANTHONY GITAHU MUTHOGA 1ST PETITIONER

ESTHER WAMBAIRE MUTHOGA 2ND PETITIONER

THOMAS NJAGI MUTHOGA 3RD PETITIONER

GEORGE MATHENGE WANJOHI 4TH PETITIONER

CAROLINE WANGUI MUTHOGA 5TH PETITIONER

AND

JANE NYAGUTHII MUTHOGA RESPONDENT

MARY WAMBUI NDERITU RESPONDENT

DAVID NJAGI WANJOHI RESPONDENT

EDWIN GITAHU WANJOHI RESPONDENT

RULING

1. The Notice of Motion application dated 18th February 2022 seeks the followings:-
 - a. That there be a stay of proceedings pending the hearing and determination of the court of appeal civil appeal no. 129 of 2021 pending in the court of appeal.
2. The grounds are:-
 - a. The applicant has already filed a memorandum of appeal in the court of appeal.



- b. Substantial loss would result if the proceedings are not stayed.
 - c. The appeal has overwhelming chances of success.
 - d. If the proceedings are not stayed, the appeal would be rendered nugatory.
3. In his replying affidavit David Njagi Wanjohideposes that:-
- a. He is a bonafide beneficiary, an administrator and a biological son of the intestate estate, duly appointed so by the court on 24th June, 2021.
 - b. He is authorized to swear the affidavit on behalf of himself, the Citor and 8th Respondent who are his biological mother and brother respectively and represent the 2nd house.
 - c. That the application dated 18th February, 2022 is opposed as it is frivolous and an abuse of the court process.
 - d. That the application is unmerited as the applicant continues to enjoy income flowing into the deceased estate and used to support the 7th and 8th Respondent and Citor during his lifetime.
 - e. That the applicant represents the 1st house and wishes to disinherit the 2nd house.
 - f. That the applicant was given permission by the court to file the petition but did not, citing age reasons
 - g. That the court appointed the 1st and 7th Respondent as administrators and were to file summons for confirmation of grant which the 7th Respondent did.
 - h. That the deceased had catered for the educational needs of the 7th Respondent who is still in need of support.
 - i. That the applicant has not shown the prejudice he will suffer if the summons are not granted.
 - j. That in response to paragraph 5, 6 and 7 of the applicants Supporting Affidavit, the 7th Respondent proposes that specific members be appointed as the deceased estate to ensure the Estate is not intermeddled.
4. This would be for the purposes of:-
- i. Collecting and preserving the assets of the Estate.
 - ii. Paying such expenses and allowances to the dependants of the Estate and meeting such other basic needs for the dependants that the deceased used to cater for in his lifetime.
 - iii. To collect rent and such other income generated by the various moveable and immoveable assets of the Estate and to bank the same in a bank account opened for that purpose or such other accounts as the court may direct.
 - iv. To employ such employees as those relevant to run the Estate.
 - v. To report to court after three months on the status of the Estate.
 - vi. That the 2nd house be included in the affairs, shares and management of the deceased vast estate.

The Applicants Case

5. It is the submission by the applicants that the appeal filed has an overwhelming chance of success.



6. That the Respondents and their mother have never lived on any of the deceased's properties or lived with him and therefore the existence of the 2nd house is doubtful.
7. It is contended that the deceased was a very generous person and that he used to support many needy cases as he was the chairman of Kiriti Secondary School in Tetu, Nyeri.
8. That the appeal would be rendered nugatory if the stay is not granted and the appeal succeeds.
9. The applicant's contention is that the Respondents are not beneficiaries to the Estate of the Deceased. That it is an issue as to whether David Wanjohi and Ediwn Wanjohi are children of the deceased. That the 2nd Respondent his brother and mother were strangers to the Estate of the Deceased and their intention is to unlawfully benefit therefrom and therefore the need to have the stay of proceedings.
10. The applicant places reliance in the case of *MWK v JDK* [2020] eKLR.
11. Reliance is also placed on the case of *Niazon (K) Ltd China Road & Bridge Corporation Kenya* [2001] eKLR.
12. Both cases support the contention that if stay of proceedings is not granted, the result of the appeal may well render the orders sought as nugatory and an exercise in futility.
13. That the application was done without delay. That the orders appealed from are dated 22nd November, 2021 whereas the memorandum of appeal was filed together with the application for stay on 21st February, 2022.
14. On that regard the applicant places reliance on the case of *Ezekiel Mule Musembi v H. Young and Company EA Ltd* [2019] eKLR where appeal was filed 30 days after the order was made and the application made 8 months later and the court allowed a stay of proceedings.

Respondents Case

15. The Respondents did not file Submissions but placed reliance on the replying affidavit dated 4/3/2022.
16. The contents of that affidavit have been quoted in extenso and I need not reproduce them here again.

Analysis and Determination

Issues for determination

17. Whether a stay of proceedings should be granted in this suit?

The Law

18. Stay of proceedings applications are governed by order 42 rule 6 of the *Civil Procedure Rules* and Section 3 of the *Civil Procedure Act*.

Order 42 rule 6 provides:-

“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 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 sub-rule (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”

19. Going by the above, and in a nutshell, the power to grant a stay of proceedings is discretionary in nature.

20. There is a long line of authorities decided by the courts.

21. In the case of *Global Tours & Travels Limited Nairobi winding up* Cause No. 43 of 2000, Ringera Judge (as he then was) had this to observe:- “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 cases, 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”

22. In the court of appeal case of *David Morton Silverstein v Atsango Chesoni* [2002] eKL it held:- “The court is not laying down any principle that no order for stay of proceedings will ever be made. That would be contrary to the provisions of rule 5(2)(b) of the courts own rules. But as the court pointed out in the case already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay?”

Whether the present appeal has overwhelming chances of success?

23. As can be gleaned from the memorandum of appeal, the applicant raises several grounds:-

- a. That the learned judge erred in framing the issue of whether the 4th and 5th Respondents were beneficiaries and determined the same when the issue at hand was on who was to be appointed as administrator of the Estate of the deceased.
- b. That the learned judge erred in rushing to determine the Respondents as beneficiaries of the Estate of the Deceased in answer and cross-application under section 69(2) of the *Cap 160* Laws of Kenya when she was only required to determine who was entitled to letters of administration.
- c. That the learned judge erred in appointing David Njagi Wanjohi as one of the administrators having not proved that he and the 1st Respondent were children of the deceased.
- d. That the learned judge erred in law in appointing the second Respondents as one of the administrators in total disregard of provisions of section 66 of *Cap 160* Laws of Kenya.
- e. That the learned judge erred in holding that the Respondents were beneficiaries of the Estate of the deceased and appointing the 2nd Respondent as one of the joint beneficiaries without conclusively establishing and holding in which capacity they were beneficiaries.



- f. That the learned judge erred in law in holding that the 1st appellant may not be able to singularly administer the Estate due to her age without evidence to that effect.
 - g. That the learned judge erred in law by disregarding the wishes that the 1st and 2nd appellants be administrators as she had been the one running, together with the deceased, the Estate.
24. The test is whether the above grounds demonstrate an arguable appeal with a chance of success.
 25. In the case of *David Omwana v John Teleyio Kisii* HCCC No. 149 of 2010, the court, following the decision in *Butt v Rent Restriction Tribunal* [1982] eKLR held:- “If there is no overwhelming hindrance, a stay ought to be granted so that an appeal is not rendered nugatory should the appeal succeed.”
 26. This court is not sitting on appeal in this matter which is rightfully before the court of appeal. It therefore cannot be seen to be attempting to determine the success of the appeal itself, its duty at this stage is to find out whether there is an arguable appeal which raises triable issues.
 27. Having perused the memorandum of the appeal, I am satisfied that the applicant has presented an appeal which is arguable and does contain triable issues with high chances of success.

Whether substantial loss would result if proceedings are not stayed?

28. In the case of *Ezekiel Musembi v H. Young & Company Ltd* [2019] eKLR Odunga Judge observed:- “It is not in doubt that this court has powers to stay proceedings pending appeal and this jurisdiction is derived from both order 42 rule 6 of the *Civil Procedure Rules* as well as the inherent jurisdiction reserved in Section 3A of the *Civil Procedure Act*”.
29. In the present case the gist of contention is that the deceased had only one legal wife and not two. If the stay is not granted the Estate will not be distributed in accordance with Section 35 of the *law of Succession* and subsequently substantial loss would occur.
30. I am of the considered view that there is serious need to evaluate the status of the 2nd Respondent, his brother and mother so as not to cause loss to the applicants.
31. There is need to order stay of proceedings as the appeals result would be rendered nugatory without such a stay.
32. On the issue as to whether there was unreasonable delay
33. I find that the orders appealed from were made by the court on 22nd November, 2021. The memorandum of appeal and the application for stay was filed on 21/2/2022. The delay in the present matter I find was not unreasonable in the circumstances of the case.
35. The upshot is that I am satisfied that the applicant has made an arguable appeal with triable issues. The application for stay has merit and is allowed as prayed.

RULING READ, DELIVERED THIS 27TH DAY OF FEBRUARY, 2025.

In presence of:-

Karanja Maina for the Petitioners

Macharia for the Respondents

Miss Njuguna for the Objector

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M. MUYA
JUDGE

