Ndegwa v Kanuri (Family Appeal E004 of 2024)
[2025] KEHC 3904 (KLR) (25 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3904 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

FAMILY APPEAL E004 OF 2024

LN MUTENDE, J

MARCH 25, 2025

BETWEEN

ANN NJERI NDEGWA ..... APPELLANT

AND

ANN NJOKI KANURI ..... RESPONDENT

RULING

1. In the Notice of Motion dated 23rd October, 2024 the Applicant seeks stay of the ruling and order in CMC Citation No. E032 of 2024 pending hearing and determination of the appeal.

2. The application is premised on grounds that the Applicant was ordered by the court to take out letters of Administration in respect of her late husband within a period of 30 days from the date of the ruling, a decision she is dissatisfied with as the deceased did not leave any estate capable of administration and has an appeal that has high chances of success.

3. That the Applicant is afraid that unless the order is stayed she will be compelled to embark on a futile exercise since there is no estate to be administered, a process that will amount to waste of time and resources.

4. That the interest of justice, fairness and reasonability will be served if the prayer for stay of execution is granted.

5. In an affidavit in support of the application, the Applicant avers inter alia that the deceased was employed by the Teachers Service Commission and did not leave any asset in his name except for his pension/death gratuity benefits from the employer which is subject to the doctrine of nomination which are excluded by law from distribution by court which was not considered by the trial court.

6. That unless the appeal is stayed it will be overtaken by events and rendered nugatory; the application has been filed without undue delay, it is made in good faith, the Respondent shall not suffer prejudice and the nature and circumstances of the matter do not require provision of security.

7. In a response thereto, the Respondent through a replying affidavit avers that following advice given, the firm of Mithega & Kariuki Advocates is not properly on record for non-compliance with Order 9 Rule 7 of the Civil Procedure Rules which calls for striking out pleadings on record.

8. That the replying affidavit to the citation to refuse and accept to take out letters of administration contended that the deceased did not have assets but just pension which is not subject to Laws of Succession but through a supplementary affidavit the Respondent did indicate that the deceased left assets and even the Teachers Service Commission declined to issue any benefits until the grant is confirmed.

9. That the Applicant has not shown any substantial loss to be suffered. That lack of granting orders sought will not render the appeal nugatory.

10. The application was disposed through written submissions. It is urged by the Applicant that the Respondent has failed to establish that the deceased left any estate as no ownership document of any moveable properties in the name of the deceased has been annexed to the response. That funds that are subject of the nomination such as pension/death gratuity benefits payable by the Teachers Service Commission do no form part of the nominator's estate. That such funds are not subject to succession process as they are not dealt with in accordance with the Law of Succession. Reliance was placed on In Re-estate of Caroline Achieng Wagah (Deceased) [2005] eKLR where the court stated that;

> " It is the law that the funds the subject of a nomination do not form part of the nominator's estate, and therefore such funds cannot pass under the will of the deceased or vest in his personal representative. Such funds are not subject to the succession process, and should be dealt with in accordance with the law governing the nomination. Nominations are statutory, in the sense of them being specifically provided for by a particular statute."

11. And, in Benson Mutuma Muriungi v CEO Kenya Police Sacco & Another [2016] eKLR where it was stated that;

> " As a general rule, discretionary pension schemes may allow the contributor to nominate a third party who will receive the member's benefits on the death of the contributor. However, such nomination is merely indicative of the deceased's contributor wishes; it neither gives property rights to the nominee nor legal ownership of any part of the Trust to the deceased contributor so as to form part of the deceased's estate. Similarly, the trustees are not bound to pay the nominated funds to the nominee. The reason is because the trustees are the legal owners of the Trust property. Nevertheless, the discretion of the Trustees is guided at first instance by the nomination which is taken to be the wishes of the deceased contributor. And where the trustees exercise their discretion in favour of the nominated person, they pay the lump sum or pension directly to the third party. See for example rule 19 of the Retirement Benefits (Individual Retirement Benefits Schemes) Regulations 2000, which provide that upon the death of a member, the benefits payable from the scheme should be paid to the nominated beneficiary, and if the deceased had not named a beneficiary, then the trustees should exercise their discretion in the distribution of the benefits to the dependants of the deceased."

12. That the need to preserve the status quo pending hearing of the appeal and that the application was filed timeously.

13. In response it is argued that pursuant to Order 9 Rule 7 of the Civil Procedure Rules, the firm of Mithega Kariuki & Co. Advocates who did not file a notice of appointment to act for the Appellant/ Applicant is contrary to the law. Reliance is placed on the case of Joshua Nyamache T. Omasire v Charles Kihonge Maena [2008] eKLR where the court observed that;

> " An advocate who is not duly appointed is an affront to the court process and is nullity. The court can strike out ex debito justiciae.
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> When an advocate who is on record in a matter realizes that there is a strange application in the file, filed by an advocate who is not duly appointed by his client, the right thing to do is to ask the court to expunge the strange document out on the record. In this case M/ s Nyameya Osoro & Nyameya Advocates are not properly on record together F.N. Orora & Co. Advocates."

14. That documents filed by the firm of Mithega Kariuki & Co. Advocates ought not to be considered as the firm is a stranger to the proceedings. That firm does not have a legal standing in law and cannot be salvaged by Article 159(2) (d) of *the Constitution* and documents filed should be struck out.

15. On whether stay orders should be granted the Respondent relied on Re Estate of the late Kaburachi Peter (Deceased) [2021] eKLR where it was stated that;

> " 11. However, I note that the instant application is brought under section 47 of the *Law of Succession Act* and Rules 49 and 73 of the Probate and Administration Rules. Under Section 47 of the Act, this court has 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. Further, pursuant to rule 49 of the Probate and Administration Rules, a person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in the Rules ought to file a summons supported if necessary by affidavit. Rule 73 on the other hand 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* on inherent powers of this court.
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> 12. It is thus my view that notwithstanding Order 42 of the Civil Procedure Rules not being one of those Orders imported into succession matter by Rule 63(1) of the Probate and Administration Rules, this court has jurisdiction to grant orders of stay of execution while invoking its inherent powers under Rule 73 and make orders for the ends of justice to be met. The application before me is by way of summons and supported by an affidavit and thus in compliance with rule 49 and as thus the instant application is proper before the court.
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> 13. Order 42 deals with stay of execution pending appeal. The power to grant orders of stay of execution pending appeal is a discretionary power and which must be exercised judiciously. Further, in the exercise of the discretion the court is supposed to do so in a manner that would not prevent the appeal from being heard and determined on merits (See Bhutt –v- Rent Restriction Tribunal (1982) KLR 417.)

14. The conditions which a party must establish in order for this court to order stay of execution are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules. Basically, the applicant must satisfy the court: -

    i. that substantial loss may result to the applicant unless the order is made;

    ii. that the application has been made without unreasonable delay; and

    iii. that the applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him."

16. That according to the ruling in the Citation Cause E032/2024 the Applicant was either to file a petition or Respondent. That the deceased has properties but the Applicant has confiscated/concealed the documents annexed to the sale agreements. That as stated in Re Estate of Josiah Muli Wambua (Deceased) [2014] eKLR quoted with approval in Re Estate of Kiprono Arap Misoi (Deceased) [2021] eKLR that;

> "In intestacy, citations issue only in cases where no petition has been lodged in court. Citations are intended to trigger the process of applying for letters of administration intestate in circumstances where the persons entitled to apply are not willing or are slow in moving the court in that behalf. The citor should not be a person who has himself already applied for the grant, for the citor should only apply for grant after the citee fails to so apply."

The purpose of citation is to trigger the process of filing a substantive petition.

17. That the appeal is premature as no substantial loss will result as the Respondent may file the petition and the Applicant may file an objection and/or protest.

18. I have considered the application, affidavits in support and opposition, and, rival submissions. The first issue for determination will whether the firm of Mithega & Kariuki Advocates are regularly on record. Order 9 Rule 7 of the Civil Procedure Rules provides that;

> Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.

19. I have perused the annexure from the lower court which is the ruling delivered in Nyahururu CM's Citation Cause No. E032 of 2024. What can be deduced from the ruling is that the Citor (Anne Njoki Karuri) had an advocate who proposed issues for determination. There is no mention of the Applicant's (Citee) advocate.

20. That being the case and there having been no supplementary affidavit filed to challenge the allegations, it follows that the firm of Mithega Kairuki & Company came on record at the point of filing the appeal.

21. It was a requirement for the Applicant to inform the court about the appointment through a Notice of Appointment. In the result without the required formal notice to the court and the other party of having been retained, to represent the Applicant, arguments put forth are considered as having been made by the Applicant in person.

22. I wish to point out that this matter came before Ndung'u J at the outset and both parties were represented by counsels – but, no such arguments was brought forth. Such an argument should have been brought forth then. Directions as to filing of submissions to dispose of the matter were given. Similarly, the matter came up on 16/01/2025 and no such issue was raised. As an officer of the court counsel, for the Respondent should have raised the question in order for the court to give necessary directions.

23. On the issue whether stay of execution should be granted.

24. Principles for granting stay of execution are discretional and provided in Order 42 Rule 6(1) (2) which enacts;

> (1)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 the 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.
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> (2) No order for stay of execution shall be made under subrule (1) unless—
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> (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
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> (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.

25. In RWN v EKW [2019] eKLR it was stated that;

> " The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs."

26. On the question whether substantial loss will result, in the cited case of James Wangalwa & Another v Agnes Naliaka Cheseto, Misc. Application No. 42 of 2011 [2012] eKLR Gikonyo J. sated that;

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of

substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

27. As correctly submitted, the Applicant was given an option to file the petition or not. If she is unwilling to act then the Respondent who has demonstrated interest in the estate of the deceased may do so. It is not demonstrated what considerable injury will be suffered if stay of execution is not granted. Assertions put forth that the exercise will be waste of resources will be determined at the appropriate time.

28. The upshot of the foregoing is that the application lacks merit. Accordingly, it is dismissed.

29. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF MARCH, 2025.

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L.N. MUTENDE

JUDGE