



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Mary Mbula Muindi (Deceased) (Succession Cause  
68 of 2008) [2025] KEHC 7584 (KLR) (30 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7584 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 68 OF 2008**

**EN MAINA, J**

**MAY 30, 2025**

**IN THE MATTER OF THE ESTATE OF MARY MBULA MUINDI**

**BETWEEN**

**JAMES MUSYOKA MUINDI ..... APPLICANT**

**AND**

**MUNGUTI MUINDI ..... RESPONDENT**

**RULING**

1. By the Application dated 30<sup>th</sup> January 2025 the 2<sup>nd</sup> Administrator/ Applicant seeks an order for stay of execution of the judgment of this court dated 25<sup>th</sup> October 2024, an order for maintenance of status quo and an order barring and inhibiting registration of the certificate of confirmed grant issued herein pending his intended appeal. The Applicant also seeks the leave of this court to appeal.
2. The application is supported by the affidavit of the Applicant sworn on 30<sup>th</sup> January 2025. The gist of the application, as can be discerned from the grounds on its face thereof and in the affidavit is that being aggrieved by the judgment delivered on 25<sup>th</sup> October 2024, the Applicant is desirous of appealing and therefore seeks an order for stay of execution as there is a likelihood of the estate and more specifically Kitanga Plot No 39, for which there is a dispute, being transferred to third parties. According to him such a disposal shall be impossible to reverse in light of Section 93 of the Law of Succession Act and further it is in the interest of justice that the application be allowed
3. The Respondent opposed the application through a Replying Affidavit sworn by himself on 14<sup>th</sup> February 2025, where he deposes that the application is without merit as the Applicant has not demonstrated that he stands to suffer substantial loss; that the Notice of Appeal was lodged on 30<sup>th</sup> January 2025 whereas the impugned judgment was delivered on 25<sup>th</sup> October 2024; that the Law of Succession Act and the Probate and Administration Rules do not contemplate a grant of orders for stay of execution or leave to appeal; that the Applicant filed an application for revocation of grant, a protest



and an application for review of judgment which was withdrawn on 3<sup>rd</sup> February 2025. Further that the Applicant contends that he is entitled to half share of the estate and seeks to appeal against the whole judgment notwithstanding that there is a portion that is not disputed and can be distributed.

4. Lastly, it is deposed that the orders sought are injunctive in nature and the principles for grant of an injunction and for grant of stay of execution have not been satisfied. The court was urged to dismiss the summons as the 1<sup>st</sup> Administrator and the other beneficiaries stand to suffer prejudice if the same is granted.
5. Learned Counsel canvassed the Summons by way of written submissions. For the Applicant it was submitted that he would suffer substantial loss if the orders sought were not granted since Kitanga Plot No 39 is the only property to be distributed as the others have pending disputes in the Environment and Land Court (ELC). It is submitted that the Applicant is aggrieved with the mode of distribution and wishes to exercise his right of appeal and while he stands to suffer substantial loss, the Respondents shall suffer no prejudice if the orders sought are granted. The Applicant also submitted that the application was filed timeously. In support of his submissions, learned Counsel for the Applicant cited the cases of *Sewankambo Dickson v Ziwa Abby* HCT -00-CC MA 0178 of 2005, *Ujagar Singh v Runda Coffee Estates Limited* [1966] EA 263, *Sigfried Busch v MCSK* [2013] eKLR, *Butt v Rent Restriction Tribunal* [1982] KLR 417 and *RWW v EKW* [2019]eKLR.
6. Relying on the cases of *Amoa Mutiithi Kariamatu v Margaret Wambui Wamugunda & another* [2016] eKLR, *Sammy Some Kosgei v Grace Jelet Boit* [2023] eKLR and *Re estate of Wanga Ole Oiyie* [2022] eKLR, Learned Counsel for the Respondent submitted that the Applicant has not demonstrated substantial loss; that the Applicant cannot be said to suffer if the estate is distributed as each beneficiary including the Applicant will get what they are entitled to and that the Applicant has not shown that he is willing and ready to offer security.

#### **Analysis and determination**

7. I have carefully considered the application, the rival submissions, the cases cited and the law. The first issue for determination is whether the Applicant should be granted leave to appeal. There are two schools of thought arising from divergent decisions of the court of appeal on this issue. The first school of thought is that leave is not a requirement. This was so held in the case of *Peter Wabome Kimotho v Josephine Mwijeria Mwanu* [2014] eKLR where the Court of Appeal interpreted its appellate jurisdiction under the *Constitution* to include succession causes. The court stated-

“... Be that as it may, this appeal was filed in 2011 after the *Constitution* of Kenya 2010 that gives the Court of Appeal jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament was operational. Under the *Constitution*, all matters from the High Court are appealable to the Court of Appeal. We therefore find that the appeal is competently before us.”

8. However, in the case of *Rboda Wairimu Karanja v& another v Mary Wangui Karanja & another* [2014] eKLR the Court was of a different view and there held as follows-

“... We think we have said enough to demonstrate that under the *Law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with the leave of this court.....”



9. The Court cited with approval the case of *Rboda Wairimu Karanja & another v Mary Wangui Karanja & another* (*supra*) in the case of *John Mwita Murimi & two others v Mwikabe Chacha Mwita & another* [2019] eKLR and categorically held that “ there is no automatic right of appeal without leave of court.”
10. Similarly in the case of *Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 others* [2013] eKLR it was held as follows;
 

“ .... The intended appeal herein is in respect of the decision of the High Court dismissing the applicant’s application for revocation of grant..... There is no provision in the *Law of Succession Act* which required the applicant herein to obtain leave to appeal against the decision of the High Court dismissing the application for revocation. It is trite law that where any proceedings are governed by a special Act of Parliament, like in this case, the *Law of Succession Act*, the provisions of such an Act must be strictly construed and applied.... Therefore, what is in the *Law of Succession Act* is what was intended to be therein in the manner and extent it is there. What is not therein expressly is what was intended not to be there by the legislator. I find that the applicant in this case was not required to seek leave to appeal from the High Court.”
11. While there seems to be no clarity on whether leave is necessary or not, it is my finding that the issue raised by the Applicant in regard to Plot No 39 Katangi, merit serious judicial consideration and in the circumstances should the right to appeal not be automatic then leave is hereby granted.
12. The second issue is whether the court should grant an order for stay of execution pending the Appeal. Again, unlike the *Civil Procedure Rules*, the *Law of Succession Act* and the *Probate and Administration Rules* do not make provision for applications for stay of execution. The Act only provides for preservation of the estate and also vests the court with power to entertain any application not provided for in the rules under Rule 49 of the *Probate and Administration Rules*. Inherent power to grant any order in order to meet the ends of justice and to prevent abuse of the court process is also vested in the court under Rule 73 of the *Probate and Administration Rules*. I am therefore persuaded that the application for stay of execution, though not specifically provided for, is competent and properly before this court.
13. Whether to grant an order for stay of execution of the judgment or not is in the discretion of the court save that in granting the order the court must be satisfied that the application has been filed/brought timeously, that the applicant will suffer substantial loss in the event that the stay is not granted and the appeal succeeds and that the Applicant has been willing to deposit security. Of necessity there must be an appeal before the grant of such an order.
14. In this case there is no appeal yet but the Applicant has informed this court that he is desirous of appealing but had first to seek the leave of this court to do so. This application was filed on 3<sup>rd</sup> February 2025 and whereas there was delay in bringing the application I do not, in the circumstances of this case, consider it inordinate. It is also my finding that the circumstances of this case are such that were this estate to be distributed in the manner contained in the certificate of confirmed grant, which is what the Applicant seeks to challenge in the appeal, and the appeal succeeds there shall be nothing left in that property to distribute and the Applicant shall suffer irreparable loss. An order for the status quo to be maintained is therefore necessary.
15. Moreover, there are other properties of the estate which, according to the judgment, were to remain undistributed as they are awaiting resolution of disputes arising therefrom in the Environment and Land Court and as such the Respondents shall not suffer any prejudice should this court grant an order



to stay of distribution of land parcel Kitanga No 39 so as for the Applicant to exercise his constitutional right of appeal.

16. In the premises the application is allowed and distribution of Kitanga Plot No 39 is stayed, pending the filing and determination of the Applicant's appeal. However, should there be no appeal, the order for stay shall automatically lapse and the Respondents shall be at liberty to proceed with the next steps of the administration of the estate.

17. As this is a family matter parties are to bear their own costs.

Orders accordingly.

**RULING SIGNED, DATED AND DELIVERD VIRTUALLY ON THIS 30<sup>TH</sup> DAY OF MAY 2025.**

**E.N. MAINA**

**JUDGE**

In the presence of:

Mr. Kaluu for the 1<sup>st</sup> Administrator

Ms Simiyu for the 2<sup>nd</sup> Administrator

Geoffrey – Court Assistant

