



In re Estate of Ezekiel Lukalo Aluda (Deceased) (Succession Cause 408 of 1998) [2025] KEHC 9207 (KLR) (25 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9207 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 408 OF 1998**

S MBUNGI, J

JUNE 25, 2025

IN THE MATTER OF THE ESTATE OF EZEKIEL LUKALO ALUDA(DECEASED)

BETWEEN

MARGARET OSOLIKA 1ST PETITIONER

BEATRICE LUKALO 2ND PETITIONER

AND

TOM LUKALO OBJECTOR

RULING

1. The applicant herein filed a Notice of Motion dated 7th March 2025 under Certificate of Urgency seeking the following orders:
 - a. Spent
 - b. That There be a stay of execution of the orders issued herein on 14/2/2025 pending the hearing and determination of this application.
 - c. That The Honorable Court be pleased to grant the applicant leave to appeal against the orders issued herein on 14/2/2025.
 - d. That The Honorable Court be pleased to extend the time for giving notice of Intention to appeal from the ruling delivered herein on 14/2/2025.
 - e. That Cost be provided for.
2. The application was premised on the grounds that the applicant, being aggrieved by the ruling delivered on 14th February 2025, seeks leave to appeal against the said ruling, an extension of time to file and serve the notice of appeal, and a stay of execution of the orders issued therein. The applicant stated that



although the ruling was scheduled for virtual delivery on 14th February 2025, he was online from 10:45 a.m. to 12:30 p.m., during which no court session took place.

3. The applicant further averred that he only became aware of the delivery of the ruling on 3rd March 2025 when the same was uploaded to the system on 28th February 2025. He contends that no summary or outcome of the ruling had been posted before that date. Upon discovery, he promptly initiated steps to appeal and now seeks leave to do so out of time. A copy of the draft notice of appeal was annexed to his affidavit.
4. The applicant deponed that he stands to suffer substantial loss if stay of execution is not granted, as the estate in dispute may be disposed of before the intended appeal is heard and determined. He further stated that the application was filed without undue delay and that the respondents would not suffer any prejudice if the stay is granted, as it merely seeks to preserve the estate in the interim.
5. The respondent opposed the application by filing a preliminary objection and a replying affidavit both dated 14th April 2025. The respondent stated that the application is incompetent, vexatious, and an abuse of the court process since it was brought under the wrong procedure; specifically, that it was filed by way of a Notice of Motion instead of a Chamber Summons as required under Rule 59 of the Probate and Administration Rules. Secondly, it was contended that the applicant failed to annex a draft memorandum of appeal or disclose the grounds of appeal, and did not attach the decree sought to be stayed. It was submitted that these omissions are fatal and render the application defective and unmeritorious.
6. In the replying affidavit, the respondent deponed that the ruling of 14th February 2025 affected a broad class of beneficiaries to the estate of the late Ezekiel Lukalo Aluda, and that only the applicant, Tom Lukalo, had expressed dissatisfaction with the ruling. It was her position that the delay caused by the applicant's challenge is against the collective interest of the estate and may occasion undue prejudice and exposure to liability.
7. The respondent further averred that the applicant had not demonstrated how he stands to suffer substantial loss should stay of execution be denied. She stated that there was no evidence of security having been provided or offered for the due performance of the decree, and urged the Court to dismiss the application for failure to satisfy the threshold under Order 42 Rule 6 of the Civil Procedure Rules.
8. The matter came up for hearing interpartes on 23.04.2025 and the court directed that parties put in submissions on both the Preliminary Objection filed by the respondent and the instant Application. On record are submissions by the applicant dated 16th May 2025 and the respondent's submissions dated 25th April 2025; both of which I have carefully considered.

Applicant's Case.

9. The applicant through his submissions and supplementary affidavit averred that the orders sought were necessitated by circumstances beyond his control. Although the ruling he intends to appeal against was delivered on 14th February 2025, he only became aware of it on 3rd March 2025 after it was uploaded on the court portal on 28th February 2025, the very last day for filing a notice of appeal. He submitted that the delay in accessing the ruling was attributed to the fact that it was delivered while the Hon. Judge was stationed in Lodwar, and the physical file had not yet returned to the Kakamega Registry.
10. It was submitted that the delay was not inordinate and that the applicant could not have filed a notice of appeal earlier without knowledge of the ruling's content. Counsel further pointed out the complex procedural background of the cause, noting that the matter was initially handled by multiple judges; Hon. Justice Njagi, Hon. Justice Amin (as she then was), and later Hon. Justice Musyoka, before being



concluded by Justice P.J. Otieno. The applicant argued that Justice Otieno proceeded to deliver final orders without first addressing the directions issued by Justice Musyoka, which had called for further submissions before a final decision could be rendered. According to the applicant, this departure from procedure occasioned a miscarriage of justice, thereby justifying the intended appeal.

11. The applicant emphasized that the intended appeal raises arguable issues, as captured in the annexed draft memorandum of appeal. He stated that the trial Judge failed to properly appreciate the scope of prior directions issued by the Court of Appeal and misapplied the law to the facts, thereby unfairly prejudicing his proprietary rights in the estate. He further averred that some beneficiaries were left out of consideration, and that a deceased beneficiary who had been substituted was nonetheless allocated a share of the estate.
12. On the issue of substantial loss, the applicant deponed that he stood to suffer irreparable harm if the estate was distributed or disposed of before the intended appeal was heard and determined. He contended that the orders sought would serve to preserve the estate pending appeal and would not occasion any prejudice to the respondents.
13. In response to the Preliminary Objection raised by the respondent, the applicant submitted that the objection was based on mere technicalities and lacked substantive merit. He urged the Court to disregard the argument that the application was defective for being brought by way of Notice of Motion instead of Chamber Summons. He argued that the use of a Notice of Motion was a procedural formality that had since been cured through his supplementary affidavit. He also noted that the respondent's own cited authority involved a Notice of Motion and that the form of the application was not a determining factor.
14. The applicant averred that the delay was inordinate and that no prejudice would be suffered by the respondents if leave was granted and stay of execution issued.

Respondent's Case

15. The bulk of the respondents' submissions reiterated the contents in their P.O and replying affidavit. They submitted that the application was improperly brought under a Notice of Motion instead of a Chamber Summons as required under Rule 59 of the Probate and Administration Rules; and second, that the applicant had failed to annex a draft memorandum of appeal or decree of the impugned decision, or otherwise disclose specific grounds of the intended appeal.
16. It was argued that the applicant had not met the legal threshold for grant of stay of execution, particularly under Order 42 Rule 6 of the Civil Procedure Rules. They cited the case of *Machira T/A Machira & Co. Advocates v East African Standard* (Nairobi HCCC No. 612 of 1996), to emphasize that the burden is on the applicant to satisfy the court that the circumstances warrant a stay.
17. On the issue of leave to appeal, the respondents cited *Rhoda Wairimu Kioi & John Kioi Karanja v Mary Wangui Karanja & Salome Njeri Karanja* (CA Civil App. No. 69 of 2004), and submitted that leave to appeal will only be granted where the intended appeal raises substantial and arguable grounds that merit serious judicial consideration. In their view, the applicant had failed to meet that standard, and no sufficient basis had been laid before the court to justify the orders sought.

Analysis and Determination

18. I have carefully considered the application before me, the affidavits on record, the submissions of both parties, and the authorities cited. The issues for determination are:
 - i. Whether the preliminary objection is sustainable.



- ii. Whether the applicant has met the threshold for grant of stay of execution under Order 42 Rule 6 of the Civil Procedure Rules;
- iii. Whether the applicant has made a sufficient case for leave to appeal and extension of time to file a notice of appeal.

Issue I: Whether the preliminary objection is sustainable

19. The case of Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

“.....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.”

20. Sir Charles Newbold P. stated:-

“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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.”

21. Similarly the Supreme Court in the case of Hassan Ali Joho & another v Suleiman Said Shabal & 2 others SCK Petition No 10 of 2013 [2014] eKLR held that:-

“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.”

22. Further in the case of Hassan Nyanje Charo v Khatib Mwashetani & 3 others, [2014] eKLR the court held that:-

“Thus a preliminary objection may only be raised on a ‘pure question of law.’ To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

23. Evidently, a preliminary objection must be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with the point of law.

24. On the procedural issue raised in the Preliminary Objection, the respondent asserts that the application should have been brought by way of Chamber Summons pursuant to Rule 59 of the Probate and Administration Rules. While procedural rules are important for consistency and clarity in litigation, courts are increasingly guided by the overriding objective under Article 159(2)(d) of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act*; to administer justice without undue regard to procedural technicalities.



25. This was the position held in *Mbogo v Kariuki* (Civil Appeal E050 of 2023) [2024] KEHC 7506 (KLR) where the Hon. Judge stated as follows:

“In the instant applicant, the Appellant approached the Court through notice of motion instead of the prescribed manner by way of chamber summons. However, I am afraid I have to disagree with the Respondent and the trial court that the defect mentioned above is incurable. The above default on the applicant’s part should not have robbed the Appellant of the right to consider their application on its own merits. The default is curable in law not only under the inherent power of the Court and the overriding objective principle of the Court but also under the now crystallized non-technicality principle in the delivery of justice enshrined in Article 159(2)(d) of *the Constitution* which provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities.”

26. I find that while the applicant erred in form, no prejudice has been demonstrated to have been suffered by the respondent as a result of the use of a Notice of Motion. I am therefore inclined to overlook the procedural defect in the interest of substantive justice.
27. On the issue raised by the respondent in the P.O, that the applicant had not annexed a draft memorandum of appeal, the court finds that this argument lacks merit. While procedural compliance is important, the overriding objective under Sections 1A and 1B of the *Civil Procedure Act* emphasizes the just, expeditious, and affordable resolution of disputes. In any event, the applicant subsequently cured any omission through the supplementary affidavit, in which the draft memorandum of appeal was duly annexed.

Issue II : Whether the applicant has met the threshold for grant of stay of execution under Order 42 Rule 6 of the Civil Procedure Rules

28. On whether the applicant has satisfied the threshold for stay of execution under Order 42 Rule 6(2), the Court is required to consider:
- i. Whether substantial loss may result unless the order is made;
 - ii. Whether the application has been made without unreasonable delay; and
 - iii. Whether such security as the court may order has been given.
29. The applicant deponed that he only became aware of the delivery of the ruling on 3rd March 2025 after it was uploaded on 28th February 2025, the very last day for giving notice of appeal. He acted with reasonable promptness thereafter. I find that the delay was not inordinate and has been satisfactorily explained.
30. On the question of substantial loss, the applicant contends that the estate may be distributed or disposed off, thereby rendering any appeal nugatory. Considering the nature of the dispute and the stage of distribution of the estate, this Court is persuaded that the risk of substantial loss is real if a stay is not granted. While the applicant has not formally offered security, the interest of justice demands that the estate be preserved pending the hearing of the intended appeal. In any event, this Court may impose conditions for stay to safeguard all parties’ interests.
31. It is worth noting that the applicant, sought for stay pending the hearing and determination of this instant application, not the appeal itself.



Issue III: Whether the applicant has made a sufficient case for leave to appeal and extension of time to file a notice of appeal

32. In determining whether to grant leave to appeal, the court must be satisfied that the intended appeal raises arguable or triable issues. As stated by the Court of Appeal in Rhoda Wairimu Kioi & Another v Mary Wangui Karanja & Another [2014] eKLR, leave will only be granted where there exists a prima facie case that merits consideration by an appellate court. In the present case, the Court finds that the applicant has demonstrated sufficient cause for the delay and has raised arguable grounds in the draft memorandum of appeal.
33. This Court is also mindful of the fact that land matters are inherently emotive, as they often touch on livelihoods, shelter, family heritage, and deeply rooted social dynamics. Thus, it is always prudent to allow parties the opportunity to fully ventilate their grievances if dissatisfied through the appellate process to the very end.
34. In the result, I find merit in the application dated 7th March 2025. The Preliminary Objection dated 14th April 2025 is hereby dismissed.
35. Accordingly, the Court makes the following orders:
- a. The applicant is granted seven (7) days leave to appeal against the ruling delivered on 14th February 2025.
 - b. Time for filing and serving the Notice of Appeal is hereby extended. The applicant shall file and serve the same within seven (7) days from the date of this ruling.
 - c. This being a family matter, Each party to bear its own costs.
 - d. Mention 20.11.2025 for further directions.
 - e. Right of Appeal 30 days explained.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF JUNE, 2025

S.N MBUNGI

JUDGE

In the presence of:

Court Assistant – Elizabeth Angong’a

In absence of the parties.

