



**In re Estate of M’ugambi M’nkanata (Deceased) (Civil Appeal
E012 of 2022) [2024] KEHC 348 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E012 OF 2022
TW CHERERE, J
JANUARY 25, 2024**

IN THE MATTER OF THE ESTATE OF M’MUGAMBI M’NKANATA (DECEASED)

BETWEEN

WINFRED KAJUJU JOSES APPELLANT

AND

JOHN KIRIMI MUGAMBI 1ST RESPONDENT

IRENE MUGITO BONIFACE 2ND RESPONDENT

RULING

Background

1. By judgment dated 13th July, 2023, this court confirmed the orders of the trial court that Appellant and Glory Nkatha were not wife and daughter of the deceased respectively and were therefore not beneficiaries to his estate.
2. By summons dated 26th July, 2023, Applicant seeks stay of execution of the judgment dated 15th December, 2021 in Nkubu Succession Cause No. 38 of 2018 and leave to appeal the judgment of this court dated 13th July, 2023. The application is based on the grounds that Applicant is aggrieved and wishes to appeal and that she might be disinherited if the orders sought are not granted. The application is additionally supported by an affidavit sworn by the Applicant on 26th July, 2023 in which she reiterates the grounds on the face of the application.
3. The 1st Respondent opposed the summons by his replying affidavit sworn on 24th October, 2023 in which he faults the Applicant for intermeddling with the estate and further contending that she has not demonstrated substantial loss.
4. Applicant has by her supplementary affidavit dated 05th December, 2023 denied intermeddling with the estate.



Analysis and Determination

5. I have considered the summons in the light of the affidavit on record and annexures thereto and submissions for the Applicant and I have deduced the issues for determination as follows:
1. Whether leave to appeal ought to be granted
 2. Whether the Applicant has met the threshold for grant of the order of stay of execution

1. Whether leave to appeal ought to be granted

6. I have considered the holding by the Court of Appeal in *Rhoda Wairimu Karanja & Another V Mary Wangui Karanja & Another* [2014] eKLR where it upheld the decision of the High Court that the right to appeal to the Court of Appeal, in succession matters, lies with leave. The same court in the case of *Mugab v Kunga* (1988) KLR stated that the practice of the court of appeal in the case of land which is a sensitive issue is that the parties should be allowed to come to the court to have the issues involved in their dispute determined by a court of last resort.
7. Article 50 (1) of *the Constitution* underscores the right to be heard and provides that:
- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
8. As this is a succession matter involving land, I am persuaded that the interest of justice would be better served if the Applicant is granted leave to appeal and the same is hence granted.

Whether the Applicant has met the threshold for grant of the order of stay of execution

9. An applicant who seeks an order of stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in order 42 rule 6(2), namely:
- (a) that substantial loss may result to the applicant unless the order is made,
 - (b) that the application has been made without unreasonable delay, and
 - (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. (*Halai & another v Thornton & Turpin (1963) Ltd* [1990] eKLR and *Beatrice Ndunguri Mwai & Another V Sicily Wawira Titus & Another* [2020] eKLR)
10. In *Butt vs. Rent Restriction Tribunal* [1979] eKLR, the Court of Appeal stated that discretion whether or not to grant an order of stay pending appeal ought to be exercised in a manner that would not prevent the appeal, if successful from being nugatory.
11. In the instant case, the Applicant complains that the orders of the trial court which were upheld by this court have the potential to disinherit her and her daughter and I therefore find that it would be in the interest of justice to preserve the estate pending the determination of the intended appeal.
12. Consequently, the summons dated 26th July, 2023 is allowed in the following terms:
1. Leave to appeal the judgment of this court dated 13th July, 2023 is hereby granted
 2. In order to preserve the subject matter, it is hereby ordered that the beneficiaries shall upon distribution of the estate to them, neither offer for sale, sell, dispose off, transfer, charge or deal



with the estate in any adverse manner until the intended appeal is heard and determined or until any or further orders of the court.

3. Costs shall abide the outcome of the appeal.

DELIVERED IN MERU THIS 25TH DAY OF JANUARY 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti/Munene

For Appellant - N/A for Mutembei & Kimathi Advocates

For 1st Respondent - Mr. Muthomi for Muthomi John & Co. Advocates

For 2nd Respondent - N/A

