



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Luke Owuor Ochido (Deceased) (Probate & Administration  
E015 of 2021) [2022] KEHC 15544 (KLR) (21 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15544 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
PROBATE & ADMINISTRATION E015 OF 2021  
RE ABURILI, J  
NOVEMBER 21, 2022**

**RULING**

1. The applicant herein is Phillipa Nyamulo Ochido. She filed the instant application dated March 18, 2022 praying for the following orders against the Respondent Margaret Achieng Kaseje:
  - a. The court be pleased to grant an order of stay of execution or proceedings and the operationalization of orders issued from the ruling of this honourable court pending the hearing and determination of the application.
  - b. The court be pleased to grant an order of stay of execution or proceedings and operationalization of orders issued from the ruling of this court pending the hearing and determination of the appeal lodged with the court of appeal.
  - c. Costs of the application.
2. The application is predicated on the grounds that the court issued orders in favour of the respondent who is in the process of executing to the applicant's detriment. The applicant faults the court's ruling as having by implication handed over the estate herein to the respondent through a grant ad colligenda bona despite the existence of a substantive grant of letters of administration issued by another court which has not been revoked and or objected to by the respondent.
3. The applicant swore an affidavit disclosing that she was aggrieved by the ruling of this court and that she has already filed a notice of appeal and she is in the process of obtaining certified copies of the proceedings so that she can prepare her memorandum of appeal as well as the record of appeal. She further deposes that her appeal has high chances of success and that she therefore beseeches the court to grant the orders sought to forestall the intended execution by the respondent whom she terms to have an improper motive.
4. The respondent Margaret Achieng Kaseje filed her replying affidavit opposing the application. The affidavit is dated March 25, 2022 and a further affidavit sworn on June 6, 2022. In a nut shell, the Respondent deposes that the appeal has no chances of success for the reason that the same has been filed out of time. That the applicant has not demonstrated the substantial loss that she stands to suffer



as provided for under Order 42 of the Civil Procedure Rules since the order impugned is merely for the collection and preservation of the deceased's estate.

5. The Respondent further deposes that since there are court orders in the matter which have not been set aside, the applicant is in contempt of the said court orders issued by this court and that her actions constitute intermeddling with the estate. She urges the court to dismiss the application.
6. The court directed the application to be canvassed by way of written submissions. Both parties filed their respective submissions.
7. The applicant submitted that she has met the conditions set out under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules in that the deceased herein was polygamous and the application herein touches on the very emotive issue of land. That by ordering her to surrender all the original titles to land, the court is deemed to have disinherited the applicant's family. She proposes that the original title documents be deposited in court as a neutral custodian. She relies on the authority in Michael Ntouthi Mitheu v Abraham Kivondo Musau (2021)eKLR.
8. On her part, the respondent submitted that from the prayers sought as framed, it is not clear whether the applicant seeks orders for stay of execution or stay of proceedings. She relies on the decisions in Rose Jebor Kipngok v Kiplagat Kotut (2020)eKLR, Suleiman Mwamlole Warrakkah & 2 others v Mwamlole Tchappu Mbwana & 4 others (2018)eKLR and Daniel Kimani v Francis Mwangi Kimani & another (2015) eKLR in support of the argument in contention that it is the applicant's duty to properly invoke the court's jurisdiction rather than leaving the court to assume jurisdiction.
9. It was submitted that for the ends of justice to be met, the applicant ought to obey and comply with the orders of the court before she can be heard on the application for stay. On this issue, the applicant's counsel relied on the case of Micahel Ntouthi Mitheu (supra).
10. Counsel for the respondent further submitted that the court should also consider the lower risk of injustice between the applicant and the respondent. That the applicant has tendered no evidence to show that the appeal would be rendered nugatory if the orders are declined. Reliance was placed on the case of Prime Bank Ltd v Esige (2005)1KLR 160 and Shimmers Plaza Limited v National Bank of Kenya Limited (2015)eKLR. Counsel contended in his submissions that in any case, the grant issued herein is a limited one under Section 67 of the Law of Succession Act and ultimately, the respondent would still have to account under Section 82 and 83 of the Law of Succession Act.

#### **Analysis and determination.**

11. I have considered the application, the grounds and affidavit in support and against the application together with the parties' rival submissions and in my view, the main issue for determination in this application is whether the applicant is entitled to the orders of stay of execution sought.
12. It is not in dispute that this court (FA Ochieng J) delivered a ruling on January 31, 2022 making a raft of orders key among them is the order that the petitioner (respondent herein) is issued with limited grant of letters of administration (ad colligenda bona) for purposes of collecting and preserving the deceased's assets. The court also ordered that the petitioner files and serves a detailed inventory of the assets of the deceased's estate in court within 90 days of the order, extending to taking into custody all original documents of title.
13. My reading of the ruling shows that the court's decision was informed by the fact that the applicant had been found to have irregularly transferred part of the estate of the deceased Luke Owuor Ochido to herself before the grant issued could be confirmed thus the order that the estate be preserved pending certificate of confirmation of the grant is issued in the matter.



14. Having been aggrieved by the orders aforesaid, the applicant now moves this court for orders of stay against the execution and or the implementation of the orders now in force pending the disposal of an appeal she claims that she has preferred to the Court of Appeal where she has filed only a notice of appeal.
15. There is no doubt that there exists a succession cause in relation to the estate of the deceased herein pending confirmation at Maseno Principal Magistrate’s Court. Both parties concede to this fact. However, the court in the ruling now impugned found that despite the pendency of the Succession Cause, the applicant had already transferred part of the properties forming part of the estate of the deceased Luke Owuor Ochido into her names as the sole owner thereof, and that is exactly what the court in the impugned ruling sought to protect from further wastage.
16. As matters stand, the orders issued by this court have not been complied with in what the applicant deems to be disinheritance by the court. She fears that the respondent will execute the said orders with vengeance due to the acrimony between her and the respondent thus the orders of stay of execution being sought.
17. It is trite law that applications for stay of execution are governed by Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides that:
  - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
  - (2) No order for stay of execution shall be made under subrule (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.
18. Courts have severally held that the power to grant an order of stay pending appeal is discretionary as was observed by the Court of Appeal in [RWW v EKW](#) (2019) eKLR 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.



Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

19. The first question to resolve is that of substantial loss. The application is based on the fact that this court allowed the respondent to collect and preserve the assets of the estate of the deceased to which the applicant is apprehensive will interfere with her peaceful stay in her matrimonial home. It is also a fact that part of the estate of the deceased was irregularly transferred to the applicant’s name.
20. What then is substantial loss in terms of Order 42 Rule 6? The Court of Appeal in *Absalom Dova v Tarbo Transporters* (2013) eKLR stated that:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”
21. Having perused the affidavit in support of the petition, the order sought to be appealed from was granted with a view to preserving the estate of the deceased which had illegally been transferred to the applicant. That order was aimed at preserving the estate pending the conclusion of the succession proceedings. I do not find any demonstrable loss that the applicant stands to suffer if the respondent executes the orders of the court. In any event, the orders which were issued by F.A. Ochieng J (as he then was) are interim and temporary in nature, intended to forestall the applicant’s illegal actions over the estate. These illegal actions border on intermeddling with the estate of the deceased and for which criminal sanctions apply as stipulated in section 45 of the *Law of Succession Act*.
22. The next question is whether the appeal is arguable and in my view, this is for the appellate court to determine, assuming that appeal or as intended is competent. It is not in dispute that every party has the undoubted right to prefer an appeal against any outcome he or she deems injurious to her, where the law allows such appeal. However, the respondent also deserves the right to enjoy the fruits of a decision sought to be appealed against, to protect and preserve the estate of the deceased Luke Owuor Ochido until all objections filed in the succession cause are heard and determined on their merits. I will refrain from discussing the merits of the appeal or as intended since the time for such discussion and analysis will come during the hearing of the alleged appeal.
23. Needless to say that this is a court of law and is deemed to know the law. It is also a court of record and its decisions bind the subordinate courts. It must therefore not be afraid of making legal pronouncements which are obvious under the law. Under section 51 of the *Law of Succession Act*, any party wishing to prefer an appeal from this Court to the Court of Appeal in succession matters must first seek and obtain leave of this court to appeal.
24. That section has been interpreted in various decisions of the superior courts. In the case of *John Mwitwa Murimi & 2 Others vs. Mwikabe Chacha Mwitwa & Another* [2019] eKLR the Court of Appeal categorically had this to say:
  - “9. ... there is no evidence on record that leave of the High Court or this Court was obtained to institute the appeal. We re-affirm the decisions of this Court in Rhoda Wairimu Karanja & Another -vs- Mary Wangui Karanja & Another



[2014]eKLR and Josephine Wambui Wanyoike -vs- Margaret Wanjari Kamau & Another [2013] eKLR, where it was clearly stated that in succession matters, there is no automatic right of appeal without leave of court.

10. ...the decision in *Makhangu v Kibwana* [1996] 1EA 175 (CAK) cited by the respondent was succinctly considered by this Court in *Rhoda Wairimu Karanja & Another –vs- Mary Wangui Karanja & Another* [2014] eKLR. In analyzing the *Makhangu* decision (supra), this Court held 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 leave of this Court. (See also in *Re Estate of Mbiyu Koinange (Deceased)* [2015] eKLR; HCC Succession Cause No. 527 of 1981).
25. In light of the above expositions by the superior Court, whose decisions are binding on this court, there is no way the applicant can exercise her intended appellate right without first of all seeking leave of this Court.
26. I note that neither party in both of their rival pleadings and submissions have given any address on this issue. Lack of such address by the respective parties does not perse preclude this court from addressing the issue as serious as it is a serious point of law which this court cannot just ignore.
27. I fully adopt what Kiage J.A stated in the case of *Francis Macharia Karanja & 6 Others vs. Virginia Muthoni Karanja* [2020] eKLR in a lead ruling in the said case, where the learned Judge of Appeal expressed himself on this issue as follows:

“As I considered the record of this appeal and was on the verge of rendering my decision on it, a fundamental jurisdictional issue came to my attention. The same relates to the procedure to be invoked by an intended appellant before this Court can assume jurisdiction to hear succession matters. The issue goes to the heart of this Court’s jurisdiction and as such must be dealt with before we get into the merits of the appeal, if at all. It is trite law that jurisdiction is everything. It therefore must be raised and addressed at the earliest since without it, the Court must down its tools as well elucidated in the famous dicta by Nyarangi, JA in *The Owners of The Motor Vessel "Lillian S" vs. Caltex Oil Kenya Ltd* [1989] KLR 1.

I appreciate that the respondents did not raise this issue. However, on crucial question of jurisdiction, the Court has authority to act on its own motion. It was so held by this Court in *Hafswa Omar Abdalla Taib & 2 Others vs. Swaleh Abdalla Taib* [2015] eKLR:

“Unfortunately for the parties and despite their industry in ventilating the issue of goodwill, the determination of the appeal will disappoint them as it turns on the question of jurisdiction; that is, whether this Court has jurisdiction to entertain this appeal in the first place. We appreciate that it is an issue that was not raised by any of the parties. However, it is an issue of law that has long been settled and the parties and indeed their legal teams are deemed to know. Accordingly, this Court can suo moto raise and determine the same.”

There is a long line of authorities in which it has been held consistently that no appeal lies to this Court in succession matters unless with leave. This was echoed in *Rhoda Wairimu Karanja & Another vs. Mary Wangui Karanja & Another* [2014] eKLR.” (see the elaborate



citation by Nambuye JA (as she then was) in Joyce Wangechi Ruga v Hannah Gathoni Ruga [2021] eKLR).

28. Therefore, as to whether the applicant sought and obtained such leave and therefore as to whether the appeal as per the Notice of appeal or as intended is competent is a matter for another day. The writing is on the wall.
29. Having resolved the first question as above, I find no need to analyze the other grounds presented by Order 42 Rule 6 of the Civil Procedure Rules.
30. In the circumstances, I find and hold that the application dated March 18, 2022 is found to be devoid of any merit and is hereby dismissed with an order that the applicant shall pay to the respondent costs of this frolicsome application.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2022**

**R.E. ABURILI**

**JUDGE**

