



REPUBLIC OF KENYA



**In re Estate of Mbau Kinyuru alias Mbau Kinyuru Njuguna (Deceased)
(Succession Cause 144 of 2017) [2024] KEHC 8999 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 144 OF 2017**

CM KARIUKI, J

JULY 26, 2024

**IN THE MATTER OF THE ESTATE OF MBAU KINYURU
ALIAS MBAU KINYURU NJUGUNA (DECEASED)**

BETWEEN

JONATHAN NJUGUNA MBAU APPLICANT

AND

RACHAEL NJOKI MBAU RESPONDENT

RULING

1. The Applicants in their application dated 6/3/2024 sought for stay of execution of the certificate of confirmation of grant dated 8/2/2021 and issued on 11/2/2021 pending the hearing and determination of Nakuru Court of Appeal Case No. 24 of 2024.

2. Applicants' Submissions

3. The Applicants asserted that they are children of the deceased from the 1st house and in the impugned distribution, the 10 jointly got half of the deceased land whereas the Respondent who represents a single unit got the other half. It was alleged that the distribution was unfair and inequitable and the Applicants were not informed of the summons for confirmation of grant and the hearing date for confirmation and the same was done without their knowledge and the grant was thus confirmed as per the Respondent's application for confirmation of grant which gave her a lion share of the estate.

4. It was argued that their annexed memorandum of appeal is an arguable one.

5. They cited the cases of *Reliance Bank Ltd (In Liquidation) v Noriaka Investments Ltd*-Civil Appl. No. Nai. 93/02 (UR), *Kiu & Another v Khaemba & 3 Others* (Civil Appeal (Application) E270 of 2021) [2021] KECA 318 (KLR) (17th December 2021), *Michael Ntouthi Mitheu V Abraham Kivondu Musau* [2021] eKLR, Order 42 Rule 6 (2) of the *Civil Procedure Rules*



6. It was asserted that substantial loss is imminent and it is up to the court to ensure status quo is maintained through a stay order pending the hearing and determination of the appeal. It was asserted that the Applicants run the risk of eviction, demolitions and the suit land being exposed to adverse dealings by the Respondent including sale, transfer, lease or mortgage to third parties which in turn would affect the substratum of the appeal thus rendering it nugatory. Reliance was placed in *RWW v EKW* [2019] eKLR, *Mukuma v Abuoga* [1988] KLR 645, *Charles Kariuki Njuri v Francis Kimaru Rwara (suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru, Butt v Rent Restriction Tribunal* [1979]

Respondent's Submissions

7. Not available in file at the time of drafting this ruling.

8. Analysis and Determination

9. The principles upon which this Court may grant stay of execution pending appeal are well-settled as enshrined in Order 42 Rule 6 of the *Civil Procedure Rules* which requires an Applicant seeking a stay of execution pending appeal to demonstrate that:-

Substantial loss may result to the Applicant unless the order was made;

The application was made without unreasonable delay; and

Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the Applicant.

10. An Order of stay of execution pending appeal is a discretion of the Court. In *Butt v Rent Restriction Tribunal* (1982) KLR the court gave guidance on how such discretion should be exercised and held that –

“The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge's discretion.

A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.

The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

The Court in exercising its powers under *Order XLI rule 4(2)(b) of the Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”



11. On the purpose of an application for stay of execution pending appeal the court in *RWW v EKW* [2019] eKLR held:

“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.”

12. Accordingly, for the court to grant stay of execution orders, three conditions must be met:-

- I. The application has been made without unreasonable delay
- II. The Applicant will suffer substantial loss
- III. The Applicant has offered security for due performance of the decree

13. In regard to the first condition, the memorandum of appeal was filed on 23rd February 2024 and the instant application was filed on 12th March 2024 therefore the application was done without unreasonable delay hence this condition has been fulfilled. Furthermore, the memorandum of appeal and the record of appeal were filed on 23rd February 2024.

14. On the second condition, the Applicants stated that they are likely to suffer substantial loss if the stay order is not granted. They asserted that they run the risk of eviction, demolitions and the suit land being exposed to adverse dealings by the Respondent including sale, transfer, lease or mortgage to third parties. They annexed photographs of permanent buildings and structures comprising of their homes and permanent developments including trees. They contended that Respondent has never occupied the land as she had separated from the deceased many years prior to his demise and she does not have any developments on the land. It was their averment that the Respondent shall proceed to demolish the houses and cut down the trees and other vegetations which will occasion irreparable loss to the Applicants and their families.

15. Substantial loss was explained in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR 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.”

16. Accordingly, I find that the Applicants have proven they stand to suffer substantial loss as they ran the risk of being evicted from their homes and losing any developments they may have made on the land whoa will irreparable affect them and render the appeal nugatory.



17. On the issue of security, the Applicants are ready to give such security as the court may deem fit including deposition the original title deed for the land in court. I agree that the same sufficiently covers the requirement for security for due performance in the instant application.

18. The purpose of security was clearly enunciated in *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated:-

“The purpose of the security needed under *Order 42* is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the Respondent. That is why any security given under *Order 42 rule 6 of the Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

19. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find and hold that the Applicants have fulfilled the requirements for grant of stay of execution pending appeal as stipulated under *Order 42 Rule 6 of the Civil Procedure Rules*. Accordingly, I hereby allow the Applicants’ application and grant stay of execution as prayed in the following terms: -

- i. The Applicants shall deposit the original title deed (s) for the land as security in court within 14 days of this ruling;
- ii. Failure to comply with condition (i) above, the application herein shall stand dismissed and stay of execution orders discharged accordingly.
- iii. Costs shall be in the cause.

RULING DATED AND SIGNED AT NYANDARUA THIS 26TH DAY OF JULY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

CHARLES KARIUKI

JUDGE

