



REPUBLIC OF KENYA



KENYA LAW
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**Warobo v Kimani & 2 others (Succession Cause 59 of 2016)
[2024] KEHC 9966 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9966 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 59 OF 2016**

A MSHILA, J

JULY 26, 2024

BETWEEN

JAMES NGIGE WAROBO APPLICANT

AND

TERESIA WANJIRU KIMANI 1ST RESPONDENT

ESTHER NJOKI MURIGI 2ND RESPONDENT

DAVID MBEKE WANYORO 3RD RESPONDENT

RULING

1. Before court is the Notice of Motion application dated 2nd May, 2023 brought under Article 159 of the [Constitution](#), Order 42 rule 6(1) & (2) of the [Civil Procedure Rules](#), Section 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law. The Applicant sought for orders:-
 - a. Spent
 - b. That the Honourable Court be pleased to order stay of execution of the Ruling given on 10th March, 2023 in Kiambu High Court Succession Cause No. 59 of 2016 and any other consequential actions pending the hearing and determination of this application inter-parties.
 - c. That the Honourable Court be pleased to order stay of execution of the Ruling given on 10th March, 2023 in Kiambu High Court Succession Cause No. 59 of 2016 and any other consequential actions pending the hearing and determination of the appeal pending in the Court of Appeal.
2. The application is premised on the grounds that the Respondents are threatening to demolish the Applicant's buildings and borehole vide the court's ruling dated 10/3/2023 which has been appealed against as such the Applicant will suffer irreparable loss. That the appeal will be rendered nugatory if the orders sought are not granted.



3. The Application is supported by the affidavit of James Ngige Warobo sworn on even date where he deposed that vide the court's ruling dated 10/3/2023, the court ordered for the demolition of his houses, borehole and car wash business which caused him to lodge an appeal. He took possession of the suit property during the deceased's lifetime. That the Respondents are threatening to demolish his properties as well as evicting his tenants which will cause him to suffer substantial loss. He is ready to give security as granting the orders sought will render his appeal nugatory. He contended that his appeal is arguable and that the Respondents will not suffer prejudice.
4. Teresia Wanjiru Kimani filed her replying affidavit sworn on 23rd June, 2023. She stated that the application is only meant to frustrate the process of execution which has taken long and the same must come to an end. The issues raised by the Applicant have been dealt with and that the Respondents are only seeking to execute the court's orders issued on 10/3/2023. The Applicant was said to be playing victim as he is always defying court orders. The intended appeal was said to have no chances of success and no sufficient cause has been shown to warrant the orders sought. That no substantial loss will be suffered if the orders sought are not granted as such the court was urged to dismiss the application as the Respondent's will be greatly prejudiced if the orders sought are granted.
5. David Mbeke Kanyoro filed his replying affidavit as well dated 27th June, 2023. He deposed that the deceased had demarcated what each of the beneficiaries should get. The process of subdivision was halted by their father's ill health. By consent, the Kiambu County Surveyor was tasked to conduct survey of the suit properties whose proposed subdivision mirrors the deceased's wishes and that the Applicant's developments are outside his designated area. He averred that status quo had been maintained at the lower court and the same has not been vacated and the developments thereof are against court orders given by consent as such the appeal has no chances of success. The court was urged to dismiss the Applicant's application.
6. The application was canvassed by way of written submissions.

Applicant's Submissions

7. The Applicant submits that being dissatisfied with the ruling delivered on 10/3/2023, a Notice of Appeal was filed on 13/3/2023 and the application herein was filed on 2/5/2023 as such there was no unreasonable delay. The purpose of the stay order was said to be to preserve the status quo pending the appeal. Reliance was placed in the case of *RWW vs EKW* (2019) eKLR. It was submitted that the Applicant has demonstrated that he will suffer substantial loss which cannot be compensated by money if the appeal was to be successful as the Applicant has developed part of the estate as such the demolition would cause the appeal to be rendered nugatory. Lastly, it was submitted that the Applicant was ready to furnish security that may be ordered by the court. The court was urged to allow the Applicant's application.

1st and 2nd Respondents' Submissions

8. The instant application was said to have been filed nearly two months after the impugned ruling which constitutes unreasonable delay that is not explained by the Applicant. The application was said to be an afterthought aimed at denying the Respondents the fruits of the ruling of the court. Reliance was placed in the case of *Kibugu Farmers Co-operative Society Limited Vs Philip Mungai T/a Mungai Electrical Ventures* (2019) eKLR. The Respondents submitted that they have suffered prejudice as they are unable to enjoy the fruits of the ruling by using the land as intended by the deceased. It was submitted that the Applicant seeks to preserve developments brought up in contempt of court orders. The application was said to cause delay in distribution of the estate. It was submitted that the Applicant



will not suffer loss as he put up developments on the land allocated to the Respondents and is only playing the victim. The Respondents were said to be the ones suffering loss as they have been denied use of their land. The Applicant was said to have acted in bad faith when he erected the buildings the subject of this application in contempt of the court orders. It was submitted that the intended appeal has no chances of success as the Applicant is the author of his own misfortunes having disregarded court orders in place. Reliance was placed in the case of *M.N. vs T.A.N & another* (2015) eKLR. In any case it was submitted that the Applicant has not furnished any security in the event the appeal fails. The court was urged to dismiss the application with costs.

3rd and 4th Respondents' Submissions

9. The Applicant was said to have erected permanent structures after the order of 16/11/2001 which was recorded by consent thereby disobeying court orders and further depriving the Respondents of their rightful share. It was said that the court cannot determine whether the appeal is arguable as there is no draft Memorandum of Appeal attached. The application was said to have been brought as an afterthought and that there was unreasonable delay as such it's an abuse of the court process. The proposed security was not elaborated as such it was concluded that the Applicant never intended to abide by any order for security. The court was urged to dismiss the Applicant's application with costs.

Issues for Determination

10. Having considered the application herein, the Respondents' replying affidavit and the rival submissions. The main issue framed for consideration is whether the Applicant is deserving of the stay orders sought.

Analysis

11. The law regarding stay of execution is provided for under Order 42 Rule 6 of the [Civil Procedure Rules](#). A stay of execution is a discretionary matter and is not automatic. Order 42 Rule 6(1) provides as follows:

“No appeal or 2nd appeal shall operate as a stay of execution or proceedings under a decree or Order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order a stay of execution of such decree or order and whether the application for such stay have been granted or refused by the court appealed from, the court to which the appeal is preferred shall be at liberty, on an application being made, to consider such application and to make such order thereon as may seem just to it.(emphasis added).”

12. This therefore, means that a court can only exercise its discretion and order stay of execution if the Applicant demonstrates good cause and shows that he has an arguable appeal or shows any other basis why the court should exercise its discretion and order a stay of execution.
13. The provision of sub-rule (2) of Order 42 Rule 6 clearly states *inter alia* that no order of stay, shall be granted unless the court is satisfied that substantial loss may result to the Applicant and that the application for stay has been made without unreasonable delay.
14. Further, an Applicant seeking for stay of execution pending appeal according to Order 42 Rule 6 of the [Civil Procedure Rules](#) must demonstrate that;-
 - a. Substantial loss may result to the Applicant unless the order was made.
 - b. The application was made without unreasonable delay and



- c. 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.
15. The court exercises its discretion in granting of stay of execution pending appeal. This was held in the case of *Butt v Rent Restriction Tribunal* (1982) KLR that:-
- “ 1. 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.
 2. 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.
 3. 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.
 4. 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.
 5. 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.”
16. Sufficient cause must be shown for stay of execution to be granted. Refer to the case of *Antoine Ndiaye v African Virtual University* (2015) eKLR where Gikonyo J opined that:-
- “...stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the *Civil Procedure Rules*...”
17. In the case of *RWW vs. EKW* (2019) eKLR the court in stating that the purpose of stay of execution is to preserve status quo pending appeal held 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.”
18. In the matter herein, the Applicant avers that the Respondents are threatening to demolish his buildings, borehole and car wash as well as evict his tenants which will cause him substantial loss and at the same time render the intended appeal which is arguable with high chances of success, nugatory.



19. The Applicant submitted that the instant application was filed without unreasonable delay and that status quo should be ordered pending the appeal to cushion him from substantial loss in the event the appeal succeeds and his property has been demolished thereby rendering the appeal nugatory. In any case he contended that he was willing to furnish security.
20. In an application for stay, the Applicant is required to establish that he will suffer substantial loss if the orders sought are not granted. Reference is made to the case of *Machira T/a Machira & Co. Advocates V East African Standard* (no 2) (2002) KLR 63 where the Court of appeal in considering what amounts to substantial loss held 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.”
21. The Respondents on the other hand aver that the Applicant is the author of his own misfortunes as he is the one who developed outside his designated area as per the wishes of the deceased and the surveyor’s report adopted by the court. The Applicant was accused of being in contempt of the orders of the court issued on 16th October, 2000 as such cannot play the victim in the instant application. The application was said to be the one frustrating the execution process while denying the Respondents the opportunity to enjoy the fruits of the court’s orders.
22. The Respondents further submit that the Applicant has not demonstrated sufficient cause to warrant the orders sought and that he will not suffer substantial loss. The intended appeal has no chance of success and no security has been offered.
23. Having perused the record, the Applicant did indeed defy the orders of the court issued on 16th October, 2000 when he built on the areas not designated for him hence the order of the court for demolition of properties encroached on other beneficiaries’ shares. The Applicant is dissatisfied with the said ruling as the demolition according to the Applicant, will cause substantial loss to him.
24. This Court opines that as much as the application herein was filed without unreasonable delay, the Applicant has not demonstrated how the demolition of the buildings constructed in the share belonging to the Respondents will cause him substantial loss. In any case, this court does not find that the appeal is arguable so as to be rendered nugatory. Further, the court finds that it’s actually the Respondents who are prejudiced by the Applicant’s actions as they are unable to enjoy the fruits of the judgment. The Applicant being in contempt of court orders cannot seek for status quo pending appeal.
25. In the circumstances, this court finds that the Applicant has not demonstrated that he will suffer substantial loss and that the appeal will be rendered nugatory if stay of execution is not granted.



26. In the matter herein as much as the Applicant alleges that he is ready and willing to furnish security the same has not been offered in the event the intended appeal fails. In the case of *Arun C. Sharma Vs. Ashana Raikundalia T/a Rairundalia & Co. Advocates* (2014) eKLR the court held that:

“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.”

Findings And Determination

27. For the forgoing reasons the application is found to be devoid of merit and the same is dismissed with costs to the Respondents.

Orders Accordingly

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 26TH DAY OF JULY, 2024

A. MSHILA

JUDGE

In the presence of

Mourice – Court Assistant

Tole H/B for Muriuki for the 1st & 2nd respondents

Gichuki for David Mbeke, Grace Njeri

