



**Kisaina v Kisaina & 3 others (Succession Appeal 5 of 2023)  
[2024] KEHC 10533 (KLR) (26 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10533 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION APPEAL 5 OF 2023  
SC CHIRCHIR, J  
AUGUST 26, 2024**

**BETWEEN**

**MARK DELDAR KISAINA ..... APPELLANT**

**AND**

**NELSON MARTIN KISAINA ..... 1<sup>ST</sup> RESPONDENT**

**KEFA MUKUSA KISAINA ..... 2<sup>ND</sup> RESPONDENT**

**GRACE MUYOKA NASSIUMA ..... 3<sup>RD</sup> RESPONDENT**

**BEATRICE SAONA KISAINA ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the ruling of the Honourable Magistrate J.R. NDURURI  
(P.M) delivered on 2nd March 2023 and in Kakamega SUCC.NO.195 OF 2020)*

**RULING**

1. What comes up for determination is the Application dated 21/7/2023 seeking for following orders:
  - a). Spent.
  - b). That the Honourable court be pleased to stay the execution of the Ruling and Confirmation of Grant delivered on 2/3/23 and the Confirmation of Grant confirmed on 4/7/2023 and all consequential orders pending the hearing and determination of the Application inter partes.
  - c). That the honourable court be pleased to stay the execution of the Ruling and Confirmation of Grant of the honourable court delivered on 2nd March 2023, and Confirmation of Grant confirmed on the 4th day of July 2023 and all consequential orders pending the hearing and determination of the Appeal.



### **The Applicant's case**

2. The Applicant's case is that he is aggrieved by the ruling of the court delivered on 2/3/2023 and order of 4/7/2023 and he's filed an Appeal against the aforesaid decisions.
3. That unless stay is granted he will suffer irreparable loss; that the ruling was delivered in his absence, that he has an arguable appeal with high chances of success; and that he is ready to comply with any conditions that this Court may set.

### **The Respondents' Case**

4. It is the Respondents' case that contrary to the Applicant's allegations, the Applicant has always been present in Court; that the provisions on liabilities were valid and that, in any event the Applicant got the largest share of the Asset of the Estate.
5. The Application was canvassed by way of written submission.

### **Application's Submissions**

6. The Applicant reiterates the facts in the Affidavit and states that his share of the land was reduced to accommodate liabilities, notwithstanding that he had no responsibility to bear the said liability. He further points out that land parcel No. South Kabras/Chesero/2704 was not included in the assets of the Estates; that the signature appearing on the consent for distribution were forgeries.
7. In view of the foregoing, he submits, the Appeal has high chances of success.

### **Respondent's Submissions**

8. It is the Respondent's submission that the Applicant has not brought forth any evidence to demonstrate that he will suffer substantial loss if the order of stay is not granted; that merely stating that he will suffer substantial loss is not sufficient. That in any event, there was no affidavit of protest filed to the distribution of the Estate by the Applicant.
9. It is further submitted that the Applicant does not deny that the liabilities of the Estate that he has referred to were valid.
10. It is finally submitted that that it has not been demonstrated that the Appeal would be rendered nugatory if stay is not granted.

### **Determination**

11. The conditions upon which a court may grant stay are well-settled. Order 42 Rule 6 makes a requires the Applicant to demonstrate that substantial loss may result unless the order of stay is made; that the Application has been made without undue delay and that such security as as the court orders for the due performance of the decree has been offered by the Applicant.
12. The other requirements are that the Applicant must show that the Appeal would be rendered nugatory , and that the Appeal has high chance of success.
13. It is an undisputed fact that the Application herein has been brought without any delay. The grant arising from the ruling was issued on 4/7/2023 while the present Application was filed on 24/7/2023. There was no delay therefore.



14. On whether the Appeal will be rendered nugatory, I have noted that the orders being appealed against touch on the distribution of the deceased's properties, some to persons who are described as liabilities. If the Appeal was to succeed the reversal of the lower court's orders may entail the taking away of the rights of 3rd parties, who would have purchased the property. It will also entail unnecessary costs and inconveniences to the affected parties. In my view some of the losses that may result cannot be compensated by costs, unlike money decrees.
15. It must be remembered that the main purpose of stay pending appeal is to preserve the subject matter of a suit. In the case of *RWW v EKW* [2019] eKLR, the court held: "The purpose of an Application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the rights of appellant who is exercising the undoubted right of Appeal are safeguarded and the Appeal, if successful is not rendered nugatory. However, in so doing, the court should weigh this Right against the success of a litigant who should not be deprived of the fruits of his or her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by costs."
16. On whether the Appeal is arguable with high chances of success, I have perused the Memorandum of Appeal. The Applicant is raising, among other things, the inclusion of undeserving liabilities and inclusion of non-deserving ones, non-participation by the beneficiaries, the actual acreage of the property distributed and exclusion of land parcel No. S/Kabras/Chesero/2704, from the assets of the Estate.
17. In order not to jeopardise the Appeal, I would not venture into the merits and demerits of the above allegations. However, in my view, they are arguable issues. The Appellant should therefore be allowed to ventilate the same on Appeal.
18. The Applicant has submitted that it is ready to comply with such orders as this court may direct. I have pointed out that this is not a money decree and the value of the property is not ascertainable unless a valuation of the land is carried out. Getting a land valuer to go and value the property will be costly in terms of time lost and the valuation fees. In the circumstances of this case, I find that security need not be provided.
19. In conclusion, the Application is warranted, I hereby make the following orders:
  - a). Pending the hearing and determination of the Appeal herein, there shall be a stay of execution of the lower court judgement delivered on 2/3/2023 and the implementation of the Certificate of Confirmation of Grant issued on 4/7/2023 and/or all consequential orders in Kakamega Chief Magistrates Court SCC No. 195 of 2020.
  - b). Each party to meet their own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI VIA MICROSOFT TEAMS THIS 26TH DAY OF AUGUST 2024**

**S. CHIRCHIR**

**JUDGE.**

In the presence of:

Godwin – Court-Assistant.

Isiaho for Mr. Arunga for the Appellant

Mr. Magina for the Respondent

