



REPUBLIC OF KENYA



KENYA LAW
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**Cheres v Marusoi (Civil Appeal E024 of 2024)
[2024] KEHC 11505 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11505 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E024 OF 2024
JK SERGON, J
SEPTEMBER 26, 2024**

BETWEEN

EDA CHEPNGENO CHERES APPELLANT

AND

RAELI MARUSOI RESPONDENT

(Being an appeal from the ruling of Hon.F.M Nyakundi, Senior, Resident Magistrate delivered on 12th June, 2024 in regard to the rectified certificate of grant dated 21st September, 2023)

RULING

1. The application coming up for determination is a notice of motion dated 18th June, 2024 seeking the following orders;
 - (i) Spent
 - (ii) That this honourable court be pleased to issue conservatory orders as far as dealing or transacting with the subject property in Re Estate of the Late Chumo Maina alia Chumo A. Maina; Succession Cause No. 188 of 2019; Eda Chepngeno Cheres v Raeli Marusoi by the respondent in any way pending the hearing and determination and the appeal.
 - (iii) That as a result there be stay of execution and implementation of the rectified grant dated 21st September, 2023 pending hearing and determination of this application and the appeal.
 - (iv) That the respondent do bear the cost of this application.
2. The application is supported by grounds on the face of it and the supporting affidavit of Eda Chepngeno Cheres the applicant herein.
3. The applicant avers that she filed Succession Cause No. 188 of 2019 in regard to the estate of her deceased father-in-law the Late Chumo Maina alia Chumo A. Maina.



4. The applicant avers that she was issued with a certificate of confirmation of grant on 21st December, 2021 and was intent on distributing shares to the beneficiaries based on the mode of distribution preferred by clan members.
5. The applicant avers that soon thereafter the respondent filed summons for revocation of grant, upon hearing and determination of the application for revocation of the court directed that the applicant and respondent be joint petitioners as opposed to revocation of the grant and that parties agree on the mode of distribution of the estate.
6. The applicant avers that the court ordered that the grant that was issued to her be rectified upon being misled by the respondent who is the 2nd petitioner in the lower court that the parties had agreed on the mode of distribution by attaching a forged consent.
7. The applicant avers that being dissatisfied with the rectified grant, she instructed her lawyers to appeal the decision, however the statutory timelines for appeal had lapsed, therefore the lawyer filed a Misc Civil Application No. 10 of 2023 in the High Court seeking for extension of time to appeal.
8. The applicant avers that the rectified grant was set aside on 13th February, 2024 and parties directed to agree on the mode of distribution, however, the parties failed to agree on a preferred mode of distribution.
9. The applicant avers that she is aggrieved by the fact that on 12th June, 2024 the court delivered a ruling reinstating the rectified grant dated 21st September, 2023, hence necessitating the instant appeal.
10. The applicant avers that she fears if the orders sought are not granted, the respondent will execute the rectified grant and the applicant condemned unheard.
11. The applicant avers that the beneficiaries did not consent to the mode of distribution that resulted in the rectification of the grant.
12. The applicant avers that in the rectified grant there are strangers who were included as beneficiaries of the estate of the deceased.
13. The applicant avers that they have not agreed on 0.5 acres that they stated ought to cover legal expenses as she had incurred more expenses than any other beneficiary given the fact that she filed the succession cause.
14. The applicant avers that it is only fair and in the interest of justice that there be a stay of execution of the implementation of the rectified grant until the appeal has been heard and determined.
15. The respondent filed a replying affidavit in response to the application for stay of execution of the rectified grant pending appeal which was sworn by Raeli Marusoi the respondent, who vehemently opposes the application.
16. The respondent avers that the instant application is time barred and that no time extension was sought and granted.
17. The respondent avers that the applicant has not provided security which is a condition for stay and further that she has not demonstrated prejudice based on the rectified certificate of confirmation of grant, the respondent avers that the mode of distribution as espoused in the rectified grant is fair.
18. The respondent avers that the appellant filed the main succession cause secretly, prosecuted the same until it was confirmed and when the other beneficiaries discovered, they sought for the revocation of the grant.



19. The respondent avers that seeking stay of the enforcement of the rectified certificate of grant is prejudicial to the other beneficiaries.
20. The respondent avers that during confirmation of summons which she filed, the appellant was present she never opposed or filed any protest.
21. The respondent avers legal fees was based on a retainer and therefore do not concern or affect the appellant's beneficial share of the estate.
22. The respondent faulted the appellant for having deliberately lied by concealing filing of the main cause and stifling the enforcement of the rectified certificate of grant to perpetuate acts of fraud on the subject parcel of land, which she had registered in her name absolutely prior to revocation of grant.
23. I have considered the pleadings by both parties and the main issue for determination is whether to grant a stay of the enforcement of the rectified certificate pending hearing and determination of the appeal.
24. Generally, a stay of execution should only be granted where sufficient cause is shown. In *Antoine Ndiaye v African Virtual University* (2015)eKLR 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*..." The principles guiding the grant of a stay of execution pending appeal are well settled under Order 42 rule 6 (2) of the *Civil Procedure Rules* which provides: "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."
25. It is the duty of the applicant in an application for stay of execution to establish that he/she will suffer substantial loss if the orders sought are not granted. In *Machira t/a Machira & Co. Advocates v East African Standard (No 2)* (2002) KLR 63 the Court of Appeal considered as to what amounts to substantial loss and 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 applicant contends that she will suffer substantial loss if the orders sought are not granted as the respondent will execute the rectified grant and the applicant condemned unheard. The respondent on the other hand contends that there is no loss to be suffered as the mode of distribution as espoused in the rectified grant is fair. This Court finds that the applicant has not demonstrated that she will suffer any loss, leave alone substantial loss, if the orders sought are not granted.
26. As to whether the instant application was filed without unreasonable delay. This court has considered that the ruling subject of this suit was delivered on 12th June, 2024 whereas the application for stay was filed on 18th June, 2024. This court finds that the application for stay was filed timeously.
27. The other consideration for an application of stay pending appeal is security. This court has noted that the applicant in this matter has not offered any security. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR the court observed as follows; "Where the applicant proposes to



provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgement. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security.”

28. Generally, the objective of the application of stay of execution pending appeal is to prevent substantial loss from befalling the applicant and the appeal from being rendered nugatory. Therefore the applicant must furnish this court with a lawful and reasonable reason to limit the respondent’s right to immediate realisation of the fruits of judgement in this case implementation of the rectified certificate of confirmation of grant. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR the court observed that; “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 applicant, on her part, stated that the beneficiaries did not consent to the mode of distribution, strangers were included as beneficiaries of the estate of the deceased and that the beneficiaries did not agree on 0.5 acres that ought to cover legal expenses. The respondent on the other hand, averred that the mode of distribution of the estate is fair and non-discriminatory. That seeking for a stay of the enforcement of the rectified certificate of grant is prejudicial to the other beneficiaries and that the legal fees was based on a retainer and therefore do not concern or affect the appellant’s beneficial share of the estate. The respondents were adamant that during the confirmation of summons, the appellant was present and never opposed or filed any protest. In the circumstances, this court finds that the applicant has not demonstrated substantial loss warranting this court to issue orders staying the implementation of the rectified certificate of grant.
29. The upshot is that there is no merit in the application. The same is thereby dismissed with no orders as to costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 26TH DAY SEPTEMBER, 2024.

J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Miruka for the Respondent

Bett for the Appellant

