



**In re Estate of Dinah Malaba (Deceased) (Probate & Administration
18 of 2016) [2024] KEHC 15031 (KLR) (29 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15031 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
PROBATE & ADMINISTRATION 18 OF 2016**

**DK KEMEL, J
NOVEMBER 29, 2024**

IN THE MATTER OF THE ESTATE OF DINAH MALABA (DECEASED)

BETWEEN

WAFULA MALABA PETITIONER

AND

RICHARD WANJALA MALABA 1ST OBJECTOR

PATRICK MALABA KUYA 2ND OBJECTOR

**ANTHONY WAFULA WABUKE ON BEHALF OF EVANS KISEMBE MALABA
(DECEASED) 3RD OBJECTOR**

RULING

1. The Objectors/Applicants herein have filed an application dated 2nd July, 2024 pursuant to Section 47 of the *Law of Succession Act*, Rule 73 of the *Probate and Administration Rules* and Order 42 Rule 6 of the *Civil Procedure Rules*, seeking orders *inter alia*: that an order of stay of execution of the judgement issued on 18th December 2023, and all consequential orders do issue pending hearing and determination of this application; that an order of stay of execution of the judgement issued on 18th December 2023, and all consequential orders do issue pending hearing and determination of their appeal, Kisumu Court of Appeal No. E045 of 2024; that orders of status quo do issue over Land Parcel No. Bokoli/Kituni/344, Land Parcel No. Ndivisi/Mihuu/13, Land Parcel No. Ndivisi/Mihuu/1179 and Land Parcel No. Ndivisi/Mihuu/120; that inhibition orders be placed on the following titles and all subsequent numbers created therefrom on Land Parcel No. Bokoli/Kituni/344, Land Parcel No. Ndivisi/Mihuu/13, Land Parcel No. Ndivisi/Mihuu/1179 and Land Parcel No. Ndivisi/Mihuu/120.
2. The application is premised on the grounds on the face thereof and the supporting affidavit of Patrick Malaba Kuya, the 2nd Objector/Applicant herein sworn on even date. According to his affidavit, the Objectors/Applicants have filed an appeal against the judgment at the Court of Appeal at



Kisumu, being Civil Appeal No. E45 of 2024, which appeal is yet to be heard. That the Petitioner/ Respondent herein is in the process of executing the decree herein and that the Objectors/Applicants are apprehensive that if the orders sought are not issued by this Court before their appeal is heard and determined they will suffer substantial loss and prejudice.

3. The application was opposed by the Petitioner/ Respondent vide a replying affidavit sworn on 16th August 2024, wherein he averred inter alia; that the Objectors application is full of falsehoods and distortion of facts purposely intended to mislead the court and should be rejected with the contempt it deserves; that the Applicants are seeking to drag the court to issues that have been determined; that the Applicants appeal has been filed out of time without seeking the requisite leave and that the Applicants' initial application before the Court of Appeal was rejected on the basis that the purported Appeal was incompetent; that granting an order of stay without an appeal is grave prejudice to the Petitioner/Respondent; that granting a stay will give the Objectors a field day to dispose the estate to the prejudice of the beneficiaries; that the Applicants have been on a selling spree as per the copies of the sale agreements annexed to the replying affidavit; that the third party purchasers have already lodges complaints with the DCI and that investigations are ongoing; that the Applicants have come to court with unclean hands.
4. In response to the replying affidavit, the Objectors/Applicants herein swore a supplementary affidavit on 28th August 2024, wherein it was averred that there was no delay in filing their respective appeal at the Court of Appeal and that the allegations that the Objectors/Applicants herein sold land to 3rd parties are baseless. That the stay is merited so as to preserve the Appeal at the Court of Appeal.
5. It is instructive that prior to taking directions, this court on 19/4/2024 granted prayer No. 5 of the application namely the preservation of the status quo pending determination of the application herein.
6. *Vide* Court directions issued on 19th August 2024, the Parties were ordered to dispense with the application by way of written submissions. Only the Objectors/Applicants complied.
7. It was submitted for the Objectors/Applicants that unless stay is granted the said parcels of land shall be transmitted to the beneficiaries to the estate of the deceased and that the said beneficiaries shall proceed to sell their portions to strangers, making the reclamation process tedious and that their appeal will be rendered nugatory and an academic exercise.
8. On the issue of security, Counsel submitted that the parties herein are brothers and part of the administration of the estate of the deceased thus it should not be an impediment to the parties in accessing justice. Counsel relied on the case of *Westmont Holdings SDN BHD v Central Bank of Kenya & 2 Others* (Petition 16 (E023 of 2021) (2023) KESC 11 (KLR). Counsel argued that their application was filed without undue delay and that they are ready to abide by the conditions to be issued as to security. Counsel urged this Court to issue the prayers sought.
9. I have considered the application, grounds in support of the application, the respective affidavits as sworn and the submissions by the advocates for the Objectors/Applicants. The only issue for determination is whether this application has merit.
10. The principles upon which the Court may grant stay of execution pending appeal are well-settled. These are captured in Order 42 Rule 6 of the *Civil Procedure Rules* which requires an Applicant seeking a stay of execution pending appeal to demonstrate that -
 - (a) Substantial loss may result to the applicant unless the order was made.
 - (b) The application was made without unreasonable delay.



- (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.
11. 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...*”
12. Grant 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 –
- “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.”
13. It has to be noted that the purpose of stay of execution is to preserve the status quo pending the hearing of the appeal. In *RWW v. EKW* [2019] eKLR, it was observed 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.”
14. The above are the principles to bear in mind in determining the application. The first consideration is whether the application was filed timeously. The judgment of the High Court in this matter was delivered on the 18th December 2023, and the notice of appeal filed with the court on the 30th December



2023. The memorandum of appeal was filed with the Court of Appeal on the 21st February 2024. I find that there was no delay in filing the appeal.

15. The Objectors/Applicants contend that they will suffer substantial loss if the orders sought are not granted as the Petitioner/Respondent will begin the execution of the decree issued on 23rd January 2024, meaning that the portions as distributed shall be transmitted to the respective beneficiaries who will end up selling the said portions to strangers thus making their process of reclaiming the said portions tedious in case the Court of Appeal overturns the decision as issued by this Court on 18th December 2023.
16. 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 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.”

17. It is elaborate that this Court made final orders in this matter in respect to confirmation of grant. There indeed exists immediate risk of execution, but I disagree with the submission of the Objector/Applicant that transmission of the parcels as distributed by the Court by the Land Registrar to the respective beneficiaries will cause rude displacement of the Objectors/Applicants from their portions. Also, the Objectors/Applicants allege that the respective beneficiaries of the estate of the deceased will end up selling their shares to third parties making their reclamation, in a situation, they win at the Court of Appeal tedious. The Petitioner/Respondent on the other hand averred that the mode of distribution of the estate is fair and non-discriminatory. The Objectors/Applicants have established that they will suffer loss, especially substantial loss, if the orders sought are not granted.
18. The other consideration is security. In the case of *Arun C. Sharma v. Ashana Raikundalia T/A Raikundalia & 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.”

It is noted that the Objectors/Applicants through the written submissions dated 10th September 2024 asserted that they are ready and willing to abide by the orders issued by this Court in relation to security which is a sign of utmost good faith that the application of stay is not meant to deny the Petitioner/Respondent the fruits of the judgement. It is also noted



that the parties herein are family members and that the dispute involving them should not be polarized to the extent that their filial relations are severely damaged. As regards the issue of stay pending appeal, the parties herein on 19/4/2024 agreed that a status quo be maintained pending determination of this application. I am of the view that the same order of status quo should be maintained pending determination of the appeal at the Court of Appeal. I find no good reason to compel the Objectors/Applicants to furnish security pending the appeal as the order on status quo is quite sufficient in the circumstances. To that extent, the application succeeds.

19. In view of the foregoing observations, it is my finding that the Objectors/Applicants the application dated 2nd July 2024 has merit and that the same is allowed as prayed in terms of prayer (5) only pending the hearing of the Appeal filed in the Court of Appeal. Each party should bear their own costs.

DATED AND DELIVERED AT SIAYA THIS 29TH DAY OF NOVEMBER, 2024

D. KEMEI

JUDGE

In the presence of:

Alovi.....for Petitioner

Wamalwa..... for Objectors

Kizito/Ogendo.....Court Assistant

