



**Wachira v Mugambi (Civil Appeal E020 of 2024)
[2024] KEHC 14826 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14826 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E020 OF 2024**

LW GITARI, J

NOVEMBER 22, 2024

BETWEEN

KENLICK WACHIRA APPELLANT

AND

PITNESS KANYURU MUGAMBI RESPONDENT

RULING

1. The applicant filed a Notice of Motion dated 27/6/2024 under a certificate of urgency seeking orders that the court be pleased to issue a temporary order of stay of execution of the ruling and orders delivered on 12/6/2024 in Chuka M.C.C.C No. E076/2024 pending the hearing and the determination of the appeal filed herein. That there be stay of proceedings in Chuka M.C.C.C No.E076/2024 pending the hearing and determination of this application.
2. It is supported by the affidavit of the applicant of Kenlick Wachira and is based on the following grounds.
3. That the dispute involves the burial of Harriet Ciamati Mugambi who was he wife and beneficiary of the Patriarch namely Mutua Mugambi Arena (deceased). That following the Ruling and orders issued by Hon. O. Kinyua on 12/6/2024 issued injunctive orders against interment on L.R. No. Kiera/E. Magutuni/2275 the applicant has been rendered destitute and the body of his mother remains at the morgue with nowhere to be interred. That the deceased ought to be buried next to her husband as per the wishes of her late husband and the resolution of the Arua Clan who resolved a burial dispute of the family of Mugambi Arewa, on 6/6/2024. That the respondent has relied on Succession proceedings which are yet to be determined in Chuka C.M Succession Cause No.E199/2022. The applicant further states that the applicant was left in the succession and only became aware when the burial dispute, that there was material none disclosure in the successions proceedings and he has instructed his advocate to apply for revocation of the said grant. That there was grave injustice due to none disclosure and the injunction should be lifted as the respondent will not suffer any prejudice. The applicant has reiterated



the grounds in his supporting affidavit. The respondent opposed the application and filed a replying affidavit sworn by Pitness Kanyuru Muami who is the respondent herein. He depones that he opposes the application on the grounds that the averments by the applicant are deliberately grossly untrue, inaccurate and false and authored to mislead the court. He avers that the matter is still pending and he applicant is seeking to be allowed to bury his mother on the land which belongs to the respondent. That the applicant's mother is supposed to be buried on L.R.No.KIERA/E.Magutuni/1301 which is occupied by the applicant and his sister and it is where they reside and hey have their home although it constitutes the Estate of the deceased Mutua Mugambi Arewa. She contends that the deceased Harriet Ciamati Mugambi deserted her deceased husband in 1974 and has not lived on the properties firming the estate of the deceased.

4. That she was not considered during the distribution of the estate but her son who is the applicant was given a portion of and where he lives with her sister. She further submits that the applicant was all along aware of the Succession Cause and signed a consent on the mode of distribution of the estate. She further contends that the deceased Mutua Mugambi was a member of Kanyai clan and not Arua clan and he never subscribed to the Arua clan. She has annexed a letter marked PKM 4 from he said Kenya clan. Hat the Ruling delivered by the magistrate was well reasoned, sound right and proper in the circumstances and he same cannot be faulted. Her prayer that the application be dismissed.

Analysis and Determination:

5. I have considered the application and the supporting affidavit and the submissions. I have also considered the replying affidavit and he submissions by the respondent. The only issue that arises for determination is whether this court should order stay of execution of the Ruling by he learned magistrate dated 12/6/2024. In Chuka Magistrate court Case No. MCCC E076/2024 stay of execution is provided under Order 42 rule 6 of the Civil Procedure Rules 2010 as follows:

“6.

- (1) No appeal or second 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 stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) 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.

- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

6. Under the rule a party seeking stay of execution must satisfy the three conditions which can be summarized as follows:

- a. Substantial loss may result to the applicant unless an order or stay is granted.
- b. That the application has been brought timeously without unreasonable delay.
- c. Security as the court may order

7. In the case of *Butt Vs. Rent Restriction Tribunal 1979 KLR* where the Court of Appeal was dealing with the issue as to what should be considered in determining whether to grant or refuse an application of stay of execution, the court stated:

“The power to grant or refuse an order of stay of execution is discretionary and should be exercised in such a way as not to prevent an appeal. That the court can order security for costs.”

8. The respondent submits that the matter before the trial court is pending as well as the appeal herein. He submits that the main dispute before the magistrate concerns and or is about where the late Harriet Ciamati Mugambi (deceased) may be buried. The said Harriet Ciamati Mugambi is a co-wife of the respondent and the mother to the applicant herein. That there are two parcels of land, Kiera/E.Magutuni/1301 which was allocated to the appellant and parcel No. Kiera/E. Magutuni/2775 which has always been exclusively occupied by the respondent and which she expects to be registered in her name upon conclusion of Chuka Chief Magistrate Succession Cause No. E199/2022, now at the state of confirmation with no objection having been raised. That it is not true that the deceased has nowhere to be buried as there is parcel No. LR No. Kiera/E. Magutuni/1301 which is occupied by the applicant. The respondent relies on the case of *Machira t/a Machira & Co. Advocates Vs. East African Standard Ltd (2002)eKLR*.

9. On the issue stay where one has filed an appeal and where the appeal may be rendered nugatory, the court stated that, stay is not to be granted except in exceptional circumstances. He also relied on *Kambua Vs. Mutua Civil Appeal No. E215/2023 KLR* and submits that any application as such stage



is to enable judicious hearing and determination of the appeal. It submitted the suit No. E076/2024 is still pending and no substantive orders can be granted as there is an appeal pending. That the applicant submits that there is no property in a dead body and nothing prevents the applicant from burying the deceased on LR. No. KIERA/E. Magutuni/1301 and is unlikely to suffer substantial loss.

10. The applicant submits that the respondent has not come to court with clean hands. He further submits that the learned magistrate misapprehended the principles in the case of Giella Vs. Cassman Brown when it comes to determine whether to grant injunctive orders. That the orders were issued against a beneficiary. I have considered the application. The issue is whether the application meets the threshold for granting stay of execution in line with Order 42 rule 6 Civil Procedure Rules (Supra).
11. I note that the application was filed without undue delay as the ruling was delivered on 12/6/2024.
12. The second consideration is whether applicant is likely to suffer substantial loss. In substantial loss refers to any loss, great or small that is of real worth or value as distinguished from a loss without value or loss that is merely nominal. The loss must be as the world implies, of substantial value. Thus when a party seeks stay of execution, what he seeks to prevent is substantial loss, by preserving the status quo so that the appeal is not rendered nugatory. In James Wangalwa & Another Vs. Agnes Naliaka Cheseto[2012]eKLR, the court stated that:

“The applicant must establish other factors which show that the execution will create a state of affairs that willbably affect or negate the very essential core of the applicant as the successful party in the appeal...”
13. The issue of substantial loss is what has to be prevented by preserving the status quo because such a loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
14. In Century Oil Trading Company Limited (Nairobi) H.C (Milimani) No. 1561/2007 the court stated that:

“The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment”
15. In this application, the applicant has not demonstrated the loss he is likely to suffer if stay of execution of the ruling is not ordered.
16. Although the court is supposed to issue such orders as will ensure that the appeal is heard and determined, the applicant cannot apply for stay of execution without demonstrating that there is a likelihood of substantial loss being occasioned. The granting of stay of execution is on exercise of courts discretion and the court has to consider the special circumstances. The applicant has stated that there is no property in a dead body. With that realization, the issue of substantial loss is moot.
17. In the impugned ruling, the learned magistrate restrained the burial of the deceased Harriet Ciamati Mugambi on land Parcel No. 2275. The ruling was interlocutory as the suit is pending a stay of execution would mean that the deceased can be buried on the said piece of land before the suit is heard and before the appeal filed by the appellant is heard and determined.
18. Granting a stay will result in rendering the appeal nugatory as the appeal seeks to set aside the ruling and to enter judgment dismissing the respondent’s application. There is need to have the appeal on the said ruling heard and determined. As submitted by the respondent, an application at such a stage



should be to enable the judicious hearing and determination of the appeal but not to substantively determine contentious issues.

19. The applicant has not offered to provide security.

Disposition

1. The application for stay of execution is without merits. I dismiss the application.
2. There be stay or proceedings in Chuka MCCC E076/2024 pending hearing and determination of the appeal.
3. Costs in the cause.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 22ND DAY OF NOVEMBER 2024

L.W. GITARI

JUDGE

22/11/2024

The ruling has been read out in open court.

L.W. GITARI

JUDGE

