



In re Estate of Kamonde Njoroge alias Kamonde Njroge Gikonyo (Deceased) (Miscellaneous Cause E002 of 2024) [2024] KEHC 16298 (KLR) (20 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16298 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
MISCELLANEOUS CAUSE E002 OF 2024**

CM KARIUKI, J

DECEMBER 20, 2024

**IN THE ESTATE OF KAMONDE NJOROGE ALIAS
KAMONDE NJROGE GIKONYO (DECEASED)**

BETWEEN

LUCINIAH MUTHONI KAMONDE APPLICANT

AND

DOMINIC MACHARIA KAMONDE RESPONDENT

RULING

1. By application dated 19/4/2024 the applicants seeks order:
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of the Appellant/Applicant's appeal to the High Court against the Judgment of 4th March, 2024 in this suit, there be stay of execution of the said Judgment.
 - d. That the costs of this application be provided for.
2. It is supported by grounds on application as follows;
 - i. That the court in Nyahururu Chief Magistrate's Succession Cause No. E191 of 2021 delivered its ruling on 4th March, 2024.
 - ii. That the applicant being aggrieved by the whole ruling of 4/3/2024 filed a Memorandum of Appeal dated 4/4/2024 desirous of appealing the said decision.



- iii. That the trial court upheld the Certificate of Confirmation issued by the Court in Succession Cause E191 of 2021 on 23/5/2022 and subsequently revoked and/or set aside the Certificate of Confirmation issued in Nyahuru Chief Magistrate Succession Cause No. E347 of 2021 thereby disinheriting the applicant and all her children of the estate the late Kamonde Njoroge Alias Kamonde Njoroge Gikonyo (Deceased).
 - iv. That the applicant has an arguable appeal based on the following principal grounds: -
 - a. That the respondent herein was not eligible for appointment as administrator in respect to the estate of Kamonde Njoroge Alias Kamonde Njoroge Gikonyo by dint of the priority enumerated under section 66 of the Law of Succession Act.
 - b. That the trial court dismissed the Applicant's Summons for Revocation annulling the grant issued to respondent despite proving to the court that a legitimate grant had been issued to the applicant herein on 25th April, 2022 in Nyahuru Chief Magistrate Succession Cause E347 of 2021 in respect to the estate of Kamonde Njoroge Alias Kamonde Njoroge Gikonyo.
 - c. That the obtained grant was by means of untrue allegations of a fact essential in point of law to justify the grant on the part of the respondent by concealing the information that the applicant was the deceased's widow and that the mode of distribution disinherited the rightful beneficiaries to the estate including ALL the children of the deceased but in lieu, the suit land referenced as LR. Nyandarua/Milangine/197 was distributed to total strangers.
 - d. That the trial court failed to consider the applicant's stance through various documentary evidence that Kamonde Njoroge And Kamonde Njoroge Gikonyo (deceased) is one and the same person and that the same was not at issue enough to dismiss the applicant's summons for revocation of grant in the court's view that the applicant was purportedly referring to a different deceased person.
 - e. That by upholding the confirmed grant issued to the respondent on 23rd May, 2022, the same disinherited the rightful beneficiaries and subsequently grave error of Judgment occasioned by unjustifiably revoking and/or setting aside the grant issued to the Applicant in Nyahuru Chief Magistrate Succession Cause No. 347 of 2021 on 25th April, 2022.
 - v. That the applicant is in possession and occupation of the suit land which portion she cultivates and has assorted food crops growing thereon.
 - vi. That the applicant and her children stand to suffer substantial loss as they will be left homeless and destitute if the ruling of this court is executed within the pendency of her appeal.
 - vii. That this application is timeous and the granting of stay of execution of the said Judgment in favour of the applicant shall facilitate the exercise of her right of appeal.
 - viii. That the applicant is willing to give security for the due performance of the said ruling as may be ordered, which guarantee shall be proven upon request by this Honorable Court.
3. It is supported by the affidavit of Lucinah Muthoni Kamonde which reiterates the grounds sworn on 19/4/2024.
 4. The respondent affidavit sworn 6/5/2024 states as follows:



- a. That the contents of the summons dated 19/4/2024 have been, read and explained to me by my advocates on record and having understood ere same, wish to state as follows:
- b. That the application is an afterthought and an abuse of the Court process as the purported appeal was filed on the very last day available for filing an appeal and the delay has not been explained.
- c. That in response to the application, I wish to rely on my two affidavits filed in Nyahururu C.M. SUCC Cause No. E191 of 2021 on the 31/10/2022 and 20/1/2023 (annexed and marked “DMK1 (a) and (b) are copies of the affidavits).
- d. That I reiterate that L.R. No. Nyandarua /Melangine/197 belonged to my deceased father Kamonde Njoroge Alias Kamondo Njoroge the deceased Nyahururu C.M. SUCC Cause No: E091 OF 2021 and not the applicant’s husband who was known as Boniface Mwangi Kamonde.
- e. That the application in an attempt to disinherit my siblings and filed Succession Cause being succession Cause No: 347 of 2023 of one Kamonde Njoroge Gikonyo alias Kamonde Njoroge whom she stated was her husband and she proceeded to deceive the court in allocating L.R.: Nyandarua/Milangine/197 to herself after she included the Land in the Succession Cause.
- f. That while filing the aforesaid succession cause, the applicant did not present any document to show that her deceased husband was known as Kamonde Njoroge the name included in the cause as an alias and the sole intention of including the said name which indeed my deceased father’s name was to enable her unlawfully acquire the suit Land through the succession cause.
- g. That my deceased brother the applicant’s husband was act known as Kamonde Njoroge which name belongs to my deceased father and copies of his ID, burial permit and death certificate presented in court by the applicant bore the name Kamonde Njoroge Gikonyo. (annexed and marked “DMK2 (a) (b) and (c) are copies of the ID, death certificate and burial permit).
- h. That my deceased father was not known as Kamonde Njoroge Gikonyo and we heard of the name for the first time in court in this suit.
- i. That all the documents in reference to L.R.No. Nyandarua/Milangine/197 bear my father’s name Kamonde Njoroge (annexed and marked “DMK3’ are copies of the records).
- j. That non of the records bear the name Kamonde Njoroge Gikonyo and the applicant in her summon^s for revocation of grant dated and the affidavit thereof admitted that the Land belonged to my father Kamonde Njoroge, annexed and marked “DMK4” is a copy of the application and the affidavit).
- k. That husband was known as Kamonde Njoroge Gikonyo and not Kamonde Njoroge. (Annexed and marked “DMK5” is a copy of the affidavit
- l. That L.R. NO: Nyandarua (. Melangine/197 was equitably distributed to all the beneficiaries of the estate of my father Kamonde Njoroge as per the grant confirmed on the 23/5/2022 including the applicant herein who got an equal share of 2.525 Acres.
- m. That the applicant’s appeal and application are actuated by greed and have no chances of success, as the trial Court correctly held that the estate was equitably distributed and that the Land did not belong to the applicant’s deceased husband but to my father.



- n. That my deceased father died on the 10/4/1989 and it is only fair and just that litigation over his estate comes to an end to enable all the beneficiaries to enjoy the use and occupation of his land as the applicant and her children are denying bonafide beneficiaries' access to the Land citing the present appeal. (annexed and marked "DMX6" is a copy of the death certificate).
 - o. That it is only fair and just that the beneficiaries be allowed to utilize the estate as per the confirmed grant dated 23/5/2022 and determination of the appeal.
5. A supplementary affidavit was filed in reply to replying affidavit.
 6. Parties were directed to canvass application via submission only respondent submissions are on record.

7. Respondent Submissions

8. The order dismissing the summons for revocation of grant is a negative order which cannot be Stayed as sought by the applicant.
9. In the case of *Ngari & Another V Kabiru (Civil Appeal N0 E031 of 2022)* (2003) KEHC 24190 (KLR) the Judge held inter alia as follows: -

“ 19. . The ruling dated 14/4/2022 dismissed the application dated 20th August 2021 and in essence the impugned ruling was a negative order which is incapable of execution. This principle was enunciated by the Court of Appeal in *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)* [2015] eKLR where the court held as follows: -An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence a situation to stay - called a positive order - either an order that has not been complied with or has partly been complied with. (Underlining ours)

20. Similarly in *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others* [2016] eKLR the Court of Appeal expounded on stay of execution stating: -In *Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah* [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows: -The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the Judgment with costs, By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was ■ thus, a negative order which is incapable of execution, save in respect of costs only. The same reasoning was applied in the case of *Raymond M. Omboga vs Austine Pyan Maranga* (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed.

This is what the court had to say on the matter: The order dismissing the application is in the nature of a negative order and is incapable of stay, where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order. The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost.



The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....
(underlining ours)

21. It is not in dispute that the order being a negative order which did not order any of the parties to do anything or restrain from doing anything. The order is incapable of execution and thus the court cannot order stay of execution of that negative order.
10. The applicant has not demonstrated that she will suffer substantial loss if the stay sought is disallowed. She admitted before the lower court that the estate herein relates to her father in law. She nevertheless claimed that the property being L.R NO: Nyandarua (Milangine/197 belonged to her deceased husband the deceased herein. Her husband and father in law cannot be one and the same person.
11. The respondent on the other hand was able to demonstrate through unchallenged evidence that the deceased in this Succession Cause was indeed his father and that L.R No: Nyandarua Milangine/197 belonged to him and not to his brother the applicant's husband.
12. The deceased herein died on the 10/4/1989 and the applicant intends to continue litigating on the obvious. The estate was equitably distributed with the applicant herein getting a portion of 2.525 acres just like the respondent and the other children of the deceased. The title deeds were issued on the 18/4/2024 and the prayer for stay is to say the least overtaken by events as the certificate of confirmation of grant has already been executed.
13. In the case of Ngari & Another (supra) the court held that: -

26. More this to last page the court in granting stay has to carry out balancing act between the right of the two parties. The court ought to determine whether there is a just cause for deriving the respondent his right of enjoying the Judgment. The respondent argues that the applicants have not satisfied the conditions to warrant them stay of execution. the applicants on the other hand states that their appeal has high chances of success. the succession cause herein was instituted in 2003, which is about 20 years ago. The grant was confirmed in 2004 and the applicants filed their summons for revocation about five (5) years later.

Further even after the said summons for revocation was dismissed, the applicants sought review of the said using the same arguments used during the hearing of summons for revocation. It seems that the applicants are making the same arguments but expecting different outcomes. The respondent has not had a chance to enjoy the fruits of his Judgment. It is trite law that litigation must come to an end, and thus, it would be more prejudicial to the respondent if the orders of stay were granted. “

14. Issues, Analysis And Determination

15. Upon going through the pleadings, the record, affidavits, and the submissions filed, I find the issues are whether the requirements for the grants of stay of execution pending appeal have been established, in the alternative, what are the appropriate orders? and costs.



16. Order 42 Rule 6 of the Civil Procedure Rules in Kenya establishes the conditions for a court to order a stay of execution pending an appeal: An appeal or second appeal does not automatically stay execution or proceedings. The court appealed from may order a stay of execution for sufficient cause. The court to which the appeal is preferred can consider an application for a stay of execution and make an order. A person aggrieved by a stay of execution order made by the court appealed from can apply to the appellate court to have the order set aside. A stay of execution order cannot be made unless the court is satisfied that the applicant may suffer substantial loss if the order is not made. The application for a stay of execution must have been made without unreasonable delay.

The essence of Order 42 Rule 6 is that it is a negative order and cannot be executed.

17. In *RWW vs. EKW* (2019) eKLR where, the court addressed itself as to the purpose of stay of execution pending appeal as hereunder:-

“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..... Indeed, granting or refusing an application for a stay of execution pending appeal is discretionary. When granting the stay, however, the court must balance the interests of the Appellant with those of the respondent.”

18. It is the applicant’s case that she is in possession and occupation of the suit land, which portion she cultivates and has assorted food crops growing thereon. She (Applicant) and her children stand to suffer a substantial loss as they will be left homeless and destitute if the ruling of this court is executed within the pendency of her appeal.

19. On the other hand, the respondent’s case is that The estate was equitably distributed, with the applicant herein getting a portion of 2.525 acres, just like the respondent and the other children of the deceased. The title deeds were issued on 18/4/2024, and the prayer for stay is, to say the least, overtaken by events as the certificate of confirmation of grant has already been executed.

20. Balancing the interests of the parties, since it is not contested, the applicant and her children are in occupation of the suit land and user of same, and that appeal is live, it is she and her children who would suffer irreparably and substantial loss if execution if carried out before appeal, is heard and determined thus the court finds merit in the application and thus makes the orders;

- i. The status quo prevailing will be maintained pending a hearing and determination of the instant appeal.
- ii. The appeal is to be heard on a priority basis.
- iii. Costs in the main cause.

JUDGMENT, DATED, SIGNED, AND DELIVERED AT Nyandarua THIS 20TH DAY OF DECEMBER 2024

.....
CHARLES KARIUKI

JUDGE

