



**Kioga & another v Kioga (Civil Appeal E061 of 2022)  
[2023] KEHC 417 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 417 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E061 OF 2022  
EM MURIITHI, J  
JANUARY 26, 2023**

**BETWEEN**

**ERASTUS KIRIMANIA KIOGA ..... 1<sup>ST</sup> APPELLANT**

**EDWARD MWORIA KIOGA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**WINNIE KANANU KIOGA ..... RESPONDENT**

**RULING**

1. By a notice of motion dated October 26, 2022 the appellants seeks an order for stay of execution of judgment in CMCC Succ No 281 of 2017 pending hearing and determination of the appeal.
2. The appeal arises from the judgment of the Senior Principal Magistrate in CMCC Succ No 281 of 2017 of May 6, 2022 in which the court invalidated a purported will of the deceased herein and entered judgment as follows:-

“ 11 Judgment is entered as follows:-

land parcel No Kiirua/Kiirua/705 is shared as follows:-

1. Winnie Kanannu Kioga -0.57 hectares.
2. Fesus Mutwiri Kioga and Samson Kaaria Kioga shall be registered as proprietors to hold 0.57 hectares in trust for the sole benefit of the children of Evangeline.
3. Confirmation of grant is stayed so that the names of the children of Evangeline are availed by parties to this succession cause.”



3. Upon an application for stay of execution dated May 31, 2022, the trial court granted stay on condition that the petitioners [appellants herein] deposit into court security of Kshs 500,000/= within 21 days and in default stay to lapse and execution to proceed as per the orders of the judgement dated May 6, 2022 as modified by the court orders of June 14, 2022 and certificate of confirmation of grant extracted accordingly.
4. The petitioners now urge that they are unable to meet the terms of the stay as they “are retired and elderly without regular source of income to be able to raise Kshs 500,000/= within 21 days or at all.”
5. The respondent urges that the matter is res judicata by notice of the trial court’s ruling which directed the petitioners to deposit 500,000/= in court within 21 days which condition they have not complied with.
6. To be sure, in this case of application for stay of execution under order 42 rule 6 of the *Civil Procedure Rules*, the court to which appeal is preferred has jurisdiction to deal with application for stay of execution of the decision appealed from “whether the application for such stay shall have been granted or refused by the court appealed from.”
7. There is no doubt that the loss of land subject of succession proceedings by the unsuccessful petitioners will be substantial loss.
8. On the question of requirement for security under order 42 rule 6 (2) of the *Civil Procedure Rules*, it is in my respectful view, an issues of the court being satisfied that there is security for the due performance of the decree as may become binding on the applicant upon hearing and determination of the appeal. In the context of succession proceedings where the compliance with the order of the court does not depend on the applicant the maintenance of status quo to preserve this estate asset may suffice. The court’s finding in the circumstances of this case that the eventual execution of the order of the appellate court is secured by the maintenance of the suit property without need for any deposit of monetary sums with court as security.
9. The interests to a share in the estate property by the respondent and other beneficiaries are protected by the protection of the asset for distribution in the meantime, if the appeal from the decision of this trial court is rejected, the suit property will be available for distribution in accordance with the confirmed grant
10. Accordingly, for the reasons set out above, the court seeks the following orders:-
  1. An order for stay of execution of the judgement of the trial court and confirmed grant emanating therefrom is granted.
  2. The status quo at the suit property shall be maintained pending hearing of the appeal, and the order shall be registered against the title of the suit property.
  3. The record of appeal shall be filed within 60 days, and in default the appeal shall lapse all stay of execution shall be discharged.
  4. Costs of the application to abide the outcome of the appeal.

Orders Accordingly.

**DATED AND DELIVERED ON THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**



**Appearances:**

Mr. Gikunda Anampiu Advocate for the 2<sup>nd</sup> Appellant.

Mr. Munyoki Maheli Advocates for the Respondent

