



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Anne Mbula Munyao (Deceased) (Succession Cause
E2513 of 2021) [2023] KEHC 21999 (KLR) (Family) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 21999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE E2513 OF 2021

MA ODERO, J

APRIL 28, 2023

IN THE MATTER OF THE ESTATE OF ANNE MBULA MUNYAO (DECEASED)

BETWEEN

SAMMY KIPCHIRCHIR APPLICANT

AND

OWEN NDETO MUOKI RESPONDENT

RULING

1. Before this court is the notice of motion dated October 12, 2022 by which the Applicant/Objector Sammy Kipchirchir seeks the following orders:-
 - “1. Spent.
 2. This Honourable court be pleased to stay the execution of the order/ruling made by this Honourable court on September 28, 2022.
 3. This Honourable court be pleased to stay the execution of the order/ruling issued by this court on September 28, 2022 pending the hearing and determination of the appeal.
 4. This Honourable court be pleased to deem the draft copy of the memorandum of appeal as duly filed.
 5. That the cost of this application be provided for.”



2. The application was premised upon Section 1A, 1B, 3A of the Civil Procedure Act, Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules 2010](#) and all other enabling provisions of law, and the inherent jurisdiction of the High Court and was supported by the Affidavit of even date sworn by the Applicant.
3. The Executor/Respondent Owen Ndeto Muoki opposed the Application by way of the Replying Affidavit dated October 21, 2022. The matter was canvassed by way of written submissions. The Applicant file the written submissions dated November 21, 2022, whilst the Respondent relied upon his written submissions dated December 8, 2022.

Background

4. This Succession Cause relates to the estate of the late Anne Mbula Munyao (hereinafter ‘the Deceased’) who died on October 5, 2021. A copy of the Death Certificate serial Number 1302024 is annexed to the Petition for Grant of Probate dated December 15, 2021.
5. The Deceased died testate having left behind a written Will dated August 17, 2019. The Applicant Sammy Kipchirchir Sang is the husband of the Deceased whilst the Respondent Owen Ndeto Muoki is a son of the Deceased.
6. Following the demise of the Deceased one Yvonne Njeri Njuguna on December 15, 2021 petitioned the court for Grant of Probate on her capacity as the Executrix named in the written Will. The Applicant as the husband of the Deceased filed Affidavit of Protest dated March 11, 2022 challenging the validity of the written Will. That objection is yet to be heard.
7. Meanwhile on March 8, 2022 the Respondent Owen Ndeto Muoki a son to the Deceased filed an application seeking preservation orders in respect of the estate of the Deceased in particular in respect of the motor vehicle Reg KCZ 325N pending final distribution of the Estate.
8. That application was heard by Hon. Justice Muchelule (as he then was) who in his Ruling dated September 28, 2022 made the following orders:-
 - “ 1) That the application dated March 8, 2022 is allowed and it is hereby directed that Motor vehicle KCZ 325N Toyota Prado V8 shall immediately be handed over by the Respondent to the Executors of the Will of the deceased for preservation.
 - 2) That costs shall be in the cause”
9. The Applicant was aggrieved by this Ruling and filed the present application seeking a stay of said ruling pending the hearing and determination of his appeal.
10. The Applicant submits that the Written Will left by the Deceased was ambiguous. He asserts that being the legal husband of the Deceased he ranks in priority over the Executor named in the Will whom he describes as a stranger.
11. The Applicant states that the vehicle in question though registered in the name of the Deceased was vehicle for family use and he states that he assisted the Deceased in paying off the loan she took to purchase said vehicle.
12. The Respondent on his part submits that having failed to comply with the orders of the court, the Applicant is contemnor who does not deserve the exercise of the court discretion in his favour. That the Applicant has in any event failed to demonstrate what harm he will suffer if vehicle is handed over to the Executors of the estate as directed by the court.



13. The Respondent avers that the vehicle in question was used exclusively by the Deceased and was not for family use as alleged by the Applicant. That in any event the Applicant has his own personal vehicle which he was using before the death of the Deceased. The Respondent urges the court to dismiss this application in its entirety.

Analysis and Determination

14. I have carefully considered the application before this court, the reply filed by the Respondent as well as the written submissions filed by both parties.
15. Order 42 Rule 6 (2) of the *Civil Procedure Rules* provides for guiding principles that one must satisfy before the court can grant a stay of execution, it provides as follows:-

“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.”

16. It is appreciated that stay of execution is a discretionary power however the court in setting out the guidelines for granting a stay, stated in the case of *Butt v Restriction Tribunal* [1979] eKLR as follows:-

- “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 principal 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.” (own emphasis

17. In the case of *Loice Khachendi Onyango v Alex Inyangi & another* [2017] eKLR it was stated:-

“The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 Rule 6 of the Civil Procedure Rules. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly 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.....”



18. The Ruling of this court was delivered on September 28, 2022. The present application was filed on October 12, 2022 barely two (2) weeks after delivery of the Ruling. I therefore find that the application was filed in a timely manner.
19. The Court of Appeal in *RWW v EKW* [2019] eKLR observed as follows:-

“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 weight this right against the success of a litigant who should not be deprived of the fruits of his/her judgement. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
20. The orders made by the court on September 28, 2022 were made in order to preserve the estate of the Deceased pending final distribution. I fail to see what prejudice and/or loss the Applicant stands to suffers if the vehicle in question is preserved.
21. It has been pointed out by the Respondent that the Applicant is yet to surrender the vehicle in compliance with the orders of September 28, 2022. Having himself failed/declined to obey the orders of the court, the Applicant cannot now approach the same court seeking exercise of its discretion in his favour.
22. The vehicle in question is a tangible asset which can be valued. Even if the appeal is eventually decided in the Applicant’s favour then the Executors can be ordered to refund to the Applicant the value of the said vehicle. In the circumstances I find no evidence of irreparable loss to the Applicant if the stay orders ought are not granted.
23. Moreover the Applicant has not availed any evidence to show that he has actually lodged an appeal against the Ruling of September 28, 2022.
24. Finally I find no merit in this application for stay. The application is dismissed in its entirety. Each side to bear its own costs.

DATED IN NAIROBI THIS 28TH DAY OF APRIL, 2023.

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MAUREEN A. ODERO
JUDGE

