



**Mwangi v Kanyi & another; Mugo (Protestor); Kiragu & another (Interested Parties)
(Civil Appeal E015 of 2020) [2023] KEHC 18326 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18326 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E015 OF 2020
RM MWONGO, J
MAY 31, 2023**

BETWEEN

STEPHEN NDEGWA MWANGI APPELLANT

AND

SUSAN WAMBUI KANYI 1ST RESPONDENT

JULIUS KARIUKI MUGO 2ND RESPONDENT

AND

JOSEPHINE MUTHONI MUGO PROTESTOR

AND

JOHN NGARI KIRAGU INTERESTED PARTY

STEPHEN NDEGWA MWANGI INTERESTED PARTY

RULING

1. The applicant has applied by notice of motion dated 16th December, 2020, for stay of execution of the lower court's judgment dated 6th November 2020 in Gichugu PM Succ No 171 of 2018 by GK Odhiambo. The application is filed pursuant to sections 1A, B, 3A of the *Civil Procedure Act*, Order 42 Rule 6 of the *Civil Procedure Rules*, and seeks the following orders:
 1. Spent
 2. That there be a stay of execution of the Judgment and subsequent Certificate of Confirmed grant of the Learned Hon. Keyne O. Gweno Magistrate delivered on 23rd November 2020 in Gichugu Misc Succession cause No 171 of 2018 pending the hearing and determination of this application.



3. That there be a stay of execution of the Judgment and subsequent Certificate of Confirmed grant of the Learned Hon. Keyne O.Gweno Magistrate delivered on 23rd November 2020 in Gichugu Misc Succession Cause No 171 of 2018 pending the hearing and determination of this appeal.
 4. That the Honourable Court be pleased to make and grant further orders as may meet the interest of Justice.
 5. Cost be in Cause.
2. The application is based on the following grounds:
- a. Judgment in the above said Succession Cause was delivered on 23rd November, 2020 whereby the appellant was deprived of the properties he had as a bonafide purchaser.
 - b. The applicant was not satisfied with the said Judgment hence lodged this appeal.
 - c. The respondent is in the process of executing the said Judgment and this appeal shall be rendered nugatory.
3. In his supporting affidavit in addition to the grounds, the applicant makes the following substantive averments:
1. That the Judgment in Gichugu Misc Succession No. 171 of 2018 was delivered on 6th November, 2020.
 2. That subsequently a certificate of confirmation of grant was issued
 3. That he had purchased some properties which were subject to the above said Succession Cause being Land Parcels Nos. Gichugu/Settlement/ Scheme/ 3196,3 635 and 3636 as per the above grant but the Learned Magistrate failed to consider my Protest.
 4. That he has filed this appeal challenging the said Judgment.
 5. That the respondent herein is in the process of executing the certificate of confirmation grant.
6. That it would be mete and just if the execution above said is stayed pending the hearing and determination of this appeal.
4. Annexed to the supporting affidavit of the applicant is the judgment of the lower court dated 6th November, 2020.
5. The Respondent/ 1st Petitioner filed a replying affidavit dated 25th January, 2021, with then following major averments:
1. That he opposes the said application and prays that the same be dismissed for lack of merit.
 2. That the applicant had fraudulently transferred the deceased properties and sold the same to other parties after the deceased had passed on.
 3. That the lower court heard the evidence of the District Land Registrar Kirinyaga who also produced the green cards showing that the deceased's land parcels had been transferred after passing on.
 4. That the Applicant had not filed any succession cause before transferring the parcels into his names.



5. That subsequently the lower court cancelled the said title deeds and land parcels reverted to the original owner.
 6. That after canvassing and deliberations the court distributed the estate of the deceased to the beneficiaries and the Applicants were informed to claim refund of purchase price from the vendors.
 7. That the Applicant should embark on claiming refund of the purchase price but not claim for the land since the law is clear where purchaser is involved in the decease's property.
6. The Protestor filed a replying affidavit dated 1st February, 2021, with the following major averments:
1. That he the only surviving wife of the deceased Mugo Mutamba.
 2. That the said application and the entire appeal is fatally defective grossly incompetent and offends mandatory provisions of the law and the same should be struck out.
 3. That the appellant colluded with the petitioner herein and made the changes on land parcel numbers Gichugu/Settlement/Scheme/3196, 3635 and 3636.
 4. That upon discovery of the said fraud he informed his Advocate on record. She filed an Application in Succession Cause No. 171 of 2018 and subsequently the title deeds were nullified and reinstated to the original owner vide Ruling dated 27th November 2019.
 5. That the Appellants application for stay is an afterthought the matter was fully determined and as per the laws and rules under the succession Act cap 61 of the laws of Kenya.
 6. That the annexed memorandum of appeal does not disclose any ground and hence it has no chances of winning it's a waste of court process.

Applicant's submissions

7. The applicant submits that it would be unfair to the applicant if the orders prayed in his application are not granted without him being heard in this appeal. The grant and the judgment being executed shall automatically render this appeal nugatory as the respondent might dispose/sell of the subject matter properties to third parties.
8. That such action would make this matter complicated by adding other parties to this matter. Thus, that It would be in the best interest of all the parties herein if the orders prayed are granted in order to preserve the estate pending the hearing and determination of this appeal. The applicant stands to lose irreparably as he has invested heavily in the subject matter so that the applicant's rights are safeguarded and the appeal if successful shall not be rendered nugatory.
9. Further he argues that the beneficiaries herein were all aware of the appellant's transactions over the subject matter land to the extent that some of them were witnesses to the said transactions. They used to share the proceeds given by the appellant and they should not be allowed to enrich themselves irregularly from the appellant. The appellant entirely relies on the supporting affidavit and urge the court to also peruse the grounds of appeal herein.
10. Finally, the applicant urges the court to consider that the appeal has very high chances of success and if the orders herein are not granted, the same stands to be rendered nugatory.



Respondent's submissions

11. The respondent submits that the principles which should guide the court in granting the orders of stay of execution are those set out in *Republic-vs-Kenya Anti-corruption commission & 2 others* 2009} KLR 31 where the Supreme Court held:

The applicant needs to satisfy the court first that the appeal or intended appeal is not frivolous, that is to say it is an arguable appeal. Second, the court must be persuaded that were it to dismiss the application for stay and later the appeal or Intended appeal succeeds, the result or success would be rendered nugatory. In order that the Applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb.”
12. In the instant case the Applicant filed an appeal vide a memorandum of appeal dated 4th day of December 2020 and filed on 8th day of December 2020. The Applicant appealed against the judgment of the court dated 6th day of November 2020. The grounds of Appeal therein are basically blaming the trial Magistrate for failing to recognize that the Appellant had purchased the stated properties therein and got registered as the owner.
13. The trial Magistrate had cancelled the said title deed in his ruling dated 27th day of November 2019. The Appellant should have appealed against that order and or ruling of the court dated 27th Day of November 2019 but not the Judgment of the court dated 6th day of November 2020.
14. The court had cancelled the said title deed on 27th day of November 2019 and they all reverted back to the names of the deceased Stephen Muya Mutamba to form part of his estate. The judgment of 6th day of November, 2020 was only dealing with distribution of the estate of the deceased and it was accordingly distributed to the beneficiaries. The Appellant was a purchaser and was not a beneficiary.
15. The respondent humbly submit that the Applicants does not have an arguable appeal since the grounds herein are basically dealing with the orders and ruling of the court dated 27th day of November 2019 which has not been appealed against.
16. On the issue of second limb on whether the appeal herein will be rendered nugatory, we do submit that it should also fail. The judgment herein was pronounced by the court on 6th day of November 2020 and there has been no orders of stay up to date.
17. The grants have already been registered at the lands office and some parties have obtained the title deeds. The parties have taken possession of their properties.
18. The lower court ordered that the Applicant is entitled to refund of the purchase price which he had paid and he can claim the same from the respective parties since the properties has already changed hands there is nothing which will affect the appeal.
19. Order 42 Rule 6 of the [Civil Procedure Rules](#) states as follows:
 - (2) No order for stay of execution shall be made under sub rule (i) 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.
20. The applicant has not demonstrated what substantial loss he is likely to suffer if the application is not allowed. The Applicant has not been utilizing the said parcels and has not built any structures on the said land. He had sold the said parcels to other parties who are not parties to this appeal.



21. The Appellant / Applicant had intermeddled with the estate of the deceased. He had transferred the property of the deceased without filing a succession cause. He acquired those properties fraudulently and deprived the beneficiaries their rightful share.

Protestor's written submissions

Validity of the application

22. The protestor submit that this Application is overtaken by events and hence an abuse of the Court process.

It is trite law that an application Ought to be disposed within sixty (60) days from the date of filing. The application before Court was filed way back 16th December, 2020 to date the appellant have taken no steps to have the same prosecuted hell-bent in delaying justice.

We therefore urge the Honourable Court that application and the appeal be dismissed.

23. The protestor further submits that when an act is found to be void then it is in Law a nullity. *In Re Estate of Isaac Kaburu Marete (Deceased)* 2017eKLR Gikonyo J stated:

“.....Second, any acquisition of land in violation of the Law of Succession Act is unlawful and a finding to that effect by a competent Court brings the acquisition within the claw back provisions of Article 40(6) of the Constitution which declares that the rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

24. In our regard, the appellant has obliged the Court to determine a matter of property which has fraudulently been acquired through false misrepresentation therefore we urge the Honourable Court to disallow the appellant's appeal.

25. It was further submitted that the Learned Magistrate erred in law and in fact by failing to consider that parcel No. Gichugu/Settlement/Scheme/3636 was sold to the appellant by one Asunda Wanjiru Mugo (Deceased) who was registered as the proprietor at the time, and the witnesses to their sale agreement were the 1st and the 2nd respondents thereof and who were the petitioners in the trial court.

26. The protestor submitted that such sale was illegal null and void as it amounted to intermeddling of the estate of the deceased as aforesaid and that the appellant had too colluded and filed fraudulent succession proceedings in the said trial court behind the back of the protestor and therefore the appeal should fail.

27. The next ground of appeal is that the Learned Magistrate erred in law and in fact by not properly directing his mind that the respondents were long aware of the acquisition of land parcel numbers Gichugu/Settlement/Scheme 3196/3636 and 3635 by the appellant as they were witnesses to the sale agreement by the appellant.

28. The protestor submits that the self-confessed acquisition of the suit property resulted from criminal activities and that filing this frivolous application is an abuse of the due process of the Court.

Purchaser for value

29. The appellant stated that the Learned Magistrate erred in law and in fact in failing to consider that the appellant was a bona fide purchaser for value and had already occupied the parcels of land without any objection by the petitioners.



30. The protestor submits that the appellant ought to be held liable for compensation of mesne profits for illegal occupation because stating that he is a bona fide purchaser amounts to intermeddling with the Estate of the deceased.
31. Section 45 of the *Laws of Succession Act* states that
- “Except so far as expressly authorized by this act or by other written law, or by a grant representation under this Act, no person Shall, for any purpose take possession or dispose of or otherwise intermeddle with any free property of a deceased person.”
32. In *Veronica Njeri Wakagoto (Deceased)* (2013) eKLR, Musyoka J. held:
- “the law takes very serious views on intermeddling and makes it a criminal offence.”
33. The protestor submitted that the alleged sale of the deceased property and any purported sale agreement was illegal and urges the court to dismiss the application and appeal.

Issues for Determination

34. Whether the order of stay of execution should be granted.

Analysis and determination

35. The applicant, not being satisfied with the Judgment dated 6th day of November 2020, filed the present application and appeal. The grounds of appeal blame the trial Magistrate for, inter alia, failing to recognize that the Appellant was the bona fide purchaser of the stated properties. Further, he seeks stay of execution of the Judgment and subsequent Certificate of Confirmed herein, pending determination of this appeal.
36. Order 42 Rule 6 of the *Civil Procedure Rules* provides for stay of execution pending appeal. The relevant part of the Rule provides as follows:
- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”



37. Clearly therefore, it is not the role of the court, when faced with an application for stay of execution, to delve deeply into the substance of the proposed appeal, or to analyse the merits or demerits of the lower court's judgment. This is not the stage at which these issues are dealt with as they concern the appeal proper.
38. In the instant case it is the appellant's case that he had purchased some properties, namely, Land Parcels Nos. Gichugu/ Settlement/Scheme/ 3196, 3635 and 3636 which were subject to the above said Succession Cause being as per the above grant but the Learned Magistrate failed to consider his protest. Since the judgment, the respondent is in the process of executing the certificate of confirmation grant. Thus, it would be mete and just if the execution above said is stayed pending the hearing and determination of this appeal.
39. In *RWW v EKW* [2019] eKLR, the court addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:
- “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.”
40. Thus the focus of a ruling on a stay application concerns what happens or ought to happen in the period intervening between the judgment and the appeal, and whether there is anything that may jeopardise the subject matter pending the proposed appeal.
41. The respondents in their replying affidavit in response to the stay application deponed that the Applicant had not filed any succession cause before transferring the parcels into his names. Subsequently, the lower court cancelled the said title deeds and land parcels reverted to the original owner. Further, after canvassing and deliberations the court distributed the estate of the deceased to the beneficiaries and the Applicants were informed to claim refund of purchase price from the vendors.
42. This, in my view, is the subject matter of the substantive appeal and cannot be an answer to the stay application in terms of the applicant's undoubted right of appeal and to preserve heir pre-judgment rights, if any.
43. The Protestor deponed that the Appellant's application for stay is an afterthought the matter was fully determined and as per the laws and rules under the *Law of Succession Act* cap 61.
44. Further, the protestor submits that the appellant ought to be held liable for compensation of mesne profits for illegal occupation because stating that he is a bona fide purchaser amounts to intermeddling with the Estate of the deceased
45. The applicant submits that he stands to lose irreparably as he has invested heavily in the subject matter so that the applicant's rights are safeguarded and the appeal if successful shall not be rendered nugatory.
46. Further, he submits that the beneficiaries herein were all aware of the appellant's transactions over the subject matter land to the extent that some of them were witnesses to the said transactions. They used to share the proceeds given by the appellant and they should not be let to enrich themselves irregularly from the appellant.



47. There is no doubt that the court has the discretion to grant or refuse to grant an order of stay. The only parameters are that the discretion must be applied judiciously. In *Kenya Power & Lighting Company Ltd v Esther Wanjiru Wokabi* [2014]eKLR, the court held that:

“Order 46 Rule 6(2) lays down the conditions which an applicant must satisfy in order to deserve the orders of stay of execution pending appeal. However, the court stated that it noted that the conditions set out in Order Rule 6 (2) only serve as guidelines which the court can use as beacons in exercising its unfettered discretion in deciding whether or not to grant stay of execution pending appeal depending on the circumstances of each case.”

48. The subject matter which the court could preserve is Land Parcels Nos. Gichugu/ Settlement/Scheme/ 3196, 3635 and 3636. In the lower court, the claim was that the appellant had bought Parcel 3196 from the deceased nine months before the deceased died. As for Parcels 3635 and 3636, it was alleged in the lower court that they were registered to one Stephen Mutamba in 2008, two years prior to the deceased's death on 8/9/2010.

49. The trial court, in a ruling dated 27/1/2019, found that these parcels were fraudulently transferred; and this ruling was confirmed by the judgment impugned herein.

Conclusion and Disposition

50. The court has to balance all the rights of the contestants of the said property. The lower court's determination is not a final judgment. It is subject to appeal. Nothing has been placed before me to demonstrate that substantial loss will definitely not result to the applicant if stay is not granted.

51. I am therefore satisfied that I should order stay of execution, which I hereby do pending hearing of application.

52. In addition, I further order that pending the hearing and determination of this appeal, no transactions whatsoever shall be registered against the properties Land Parcels Nos. Gichugu/ Settlement/Scheme/ 3196, 3635 and 3636.

53. Orders accordingly.

DATED AT KERUGOYA THIS 31ST DAY OF MAY, 2023

.....

R. MWONGO

JUDGE

Delivered in the presence of:

1. Waweru - holding brief for Magara for 1st Respondent
2. Igati Mwai - for Applicant
3. No representation for Ndana
4. Court Assistant, Murage

