



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Ieconia Opar alias Opar Odiema (Deceased) (Succession Cause 32 of 2016) [2023] KEHC 27514 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 27514 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
SUCCESSION CAUSE 32 OF 2016
RPV WENDOH, J
MAY 25, 2023**

BETWEEN

PENINA AKINYI OPAR PETITIONER

AND

HEZRON OKECH OPAR OBJECTOR

AND

DENIS ARINGO ODEK INTERESTED PARTY

RULING

1. The Interested Party /Applicant filed the Notice of Motion dated 23/2/2023. He seeks the following orders: -
 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of this application, a Conservatory Order do issue staying execution of the Ruling and Orders of the court issued on 23/2/2023.
 4. That pending the hearing and determination of the intended appeal, a Conservatory Order do issue staying execution of the ruling and orders of the court issued on 23/1/2023.
 5. Costs of this application be provided for.
2. The application is based on grounds found on its face and the supporting affidavit of the interested party Denis Aringo Odek. The interested party deponed that the court delivered a ruling dated 23/1/2023 nullifying the title to the property East/Kakrao/5362; that the interested party is aggrieved by the said ruling and intends to apply against the whole of the said ruling to the Court of Appeal and he has filed a Notice of Appeal; that the interested appeal holds the original title to East/Kakrao/5362



and the nullification paves way for his eviction from the property where he has lived since 2016. The interested party further listed the grounds in his memorandum of appeal and deposed that the appeal shall be rendered nugatory unless a stay of execution is granted.

3. The objector Hezron Opar, opposed the application and filed a replying affidavit dated 10/3/2023. It was deposed that the interested party is a stranger to the estate of the deceased; that the interested party has stated that he purchased the portion of the land from a buyer called Juliet Achieng who is also not a beneficiary of the estate of the deceased; that the said Juliet did not buy the portion from the deceased as it is alleged that she bought it from the petitioner but no such agreement was produced in court; that the interested party's claim is 0.10 Ha from the total estate measuring 4.4 Ha and it would not be fair to halt the succession proceedings because of home.
4. Further, the objector stated that the judgement accords the interested party an opportunity to get his share of the suit land from the person who sold to him being the said Juliet Achieng; that the interested party can sue the said Juliet Achieng for compensation; that the interested party has not demonstrated that he is bound to suffer any substantial loss. The objector asked this court to find that the application for stay of execution orders is not merited.
5. The application was canvassed by way of written submissions. The applicant filed his submissions dated 12/4/2023. On whether the stay of execution should be granted, it was submitted that the purpose of stay of execution is to preserve the substratum of the case as it was held in the case of *Consolidated Marine v Nampijja & Another* Civil App No. 93 of 1989; that the applicant has been in possession of the suit portion for over 6 years and is still in possession to date; that the applicant would suffer substantial loss if stay is not granted.
6. On what amounts to substantial loss, the interested party relied on the findings in *Mukuma v Abuoga* (1988) KLR 645 and *Equity Bank Ltd v Taiga Adams Company Ltd* (2006) eKLR and *Elena D. Korir v Kenyatta University* (2012) eKLR where it was held that preserving the status quo will prevent a loss which would render the appeal nugatory.
7. It was further submitted that court can stay part of the ruling touching on the property East/Kakrao/5362; that the appeal would be rendered nugatory if the interested party is evicted from the property. The interested party stated that he is ready to furnish the court with the title as security for the due performance of any decree of this court.
8. The objector filed his submissions on 24/4/2023. He submitted that the orders of 3/7/2018 which nullified the initial Grant paved way for the decision made on 23/1/2023; that the orders of 3/7/2018 have not been challenged and if there was any loss the interested party had, it was already lost vide the orders of 3/7/2018 and therefore the instant application is an exercise in futility; that the portion purchased by the interested party, it has been demonstrated that it was not bought from the deceased or even the beneficiary but a stranger, Juliet Achieng and hence the interested party is an intermeddler.
9. The objector submitted that at the risk of stalling the succession of the Estate of the Deceased at the expense of the interested party's portion of 0.10 Ha, the estate will be wasted during the pendency of the appeal; that the court is yet to make final orders in the estate hence there is no risk of execution; that the interested party's application is premature as he has an opportunity to prove his entitlement at the confirmation/distribution hearing. The objector urged this court to dismiss the application with costs.
10. I have carefully considered the objector's application dated 23/2/2023, the responses thereto by the respondent and the rival submissions. The main issue for determination are: -



i. Whether the interested party is deserving of stay orders pending appeal.

11. Order 42 Rule 6 of the [Civil Procedure Rules](#) provides for the principles to be considered and demonstrated by an applicant before the court can grant stay pending appeal. These are: -
 - a. Substantial loss may result to the applicant unless the order was made;
 - b. The application was made without unreasonable delay; and
 - c. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant.
12. In addition, stay of execution can only be granted where sufficient cause has been shown. In [Antoine Ndiaye v African Virtual University](#) (2015) eKLR Gikonyo J opined that:-

....stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules...”
13. It is also well settled that grant of stay of execution is a discretion of the court. The Court of Appeal in [Butt v Rent Restriction Tribunal](#) (1982) eKLR gave guidance on how such discretion should be exercised when it held that:-
 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 principle 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. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the [Civil Procedure Rules](#), can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
14. The purpose of stay of execution is to preserve the status quo otherwise the intended appeal would be rendered nugatory as it was held in the case of [RWW v EKW](#) (2019) eKLR, that:-

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.”



15. On whether the application was timeously filed; the judgement was delivered on 23/1/2023. The application seeking stay of execution was filed on the same date. The interested party also filed his notice of appeal to the Court of Appeal on 30/1/2023 that is, 7 days from the date of the judgement. The interested party was well within time in filing this application.
16. The interested party contends that he risks being evicted from the portion of land Suna East/Kakrao/5362 and unless the stay of execution is granted, the appeal will be rendered nugatory. to the contrary the objector stated that the application is premature as the interested party still has the opportunity to prove his entitlement to the portion upon confirmation /distribution of the estate.
17. The onus to prove substantial loss rests with the applicant as it was held in the case of *Machira t/a Machira & Co. Advocates v East African Standard* (2002) eKLR as follows:-

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

18. The judgement of 23/1/2023 emanated from the objection proceedings challenging the subdivision of Suna East/Kakrao/13 (suit land) into several parcels of land including the one held by the interested party, Suna East/Kakrao/5362. The court considered the arguments by all parties and made a finding that the suit land should revert to its original title number Suna East/Kakrao/13 and this effectively resulted in the nullification and/or cancellation of all the titles which emerged from the subdivision of the suit title including the interested party’s portion.
19. The cancellation of the interested party’s title, is being challenged before the Court of Appeal. The Interested party is not a dependant of the deceased as envisaged under Section 29 of the *Law of Succession Act*. The land in question was sold by the Petitioner Dapina Opar when she irregularly obtained grant without the involvement of the other dependants and or beneficiaries. By the application dated 9/6/2017 seeking revocation of grant issued to the petitioner on 6/5/2015, the grant was revoked meaning that any actions taken by the petitioner on the suit land were null and void including the sale and subsequent absence of the interested party’s title. That is why this court ordered the title be cancelled and the suit land do revert back to the deceased’s names. So far confirmation has not been done because the court found that all beneficiaries had not been identified by the parties. The Interested party will not suffer any loss because she will benefit from the Petitioners (Seller’s) portion after confirmation or she can sue the Petitioner for refund of her monies. Staying the matter any further is prejudicial to the deceased’s rightful dependants who have been kept out of the estate since 2003. For that reason, I decline to grant order of stay.
20. In the end, I find no merit in the application. It is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 25TH DAY OF MAY, 2023.

R. WENDOH

JUDGE

Ruling delivered in the presence of;

Mr. Awino the Petitioner.

No appearance the Objector/Respondent.



Mr. Obuya holding brief for Mr. Ochieng Oduol
for the Interested Party/Applicant.
Emma / Felix Court Assistant.

