



**In re Estate of Kipchumba Toroitich Kiptengwa (Deceased) (Succession Cause 190 of 1998) [2023] KEHC 21822 (KLR) (10 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21822 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 190 OF 1998  
RN NYAKUNDI, J  
AUGUST 10, 2023**

**BETWEEN**

**CHARLES KIMURGOR KIPCHUMBA ..... APPLICANT**

**AND**

**SELINA TINGO KIPCHUMBA ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated June 5, 2023, the Applicant seeks the following orders:
  1. Spent.
  2. That pending the hearing and determination of this application *inter-partes*, this Court be pleased to stay all execution proceedings against the Objector/Applicant.
  3. That this honourable Court be pleased to grant leave to appeal the decision delivered by this honourable Court on December 23, 2022 to the Court of appeal to Objector/Applicant herein.
  4. Costs of this application be cost in the case.
2. The application is premised on the grounds therein and it is further supported by the affidavit sworn by Charles Kimuror Kipchumba on June 5, 2023.

**The Applicant's Case**

3. The Applicant deposed that on December 23, 2022, the Court herein delivered a ruling. The Applicant is aggrieved by the said ruling and seeks to appeal against it.
4. The Applicant further deposed that he has since filed and served the Notice of appeal and the letter bespeaking proceedings and that the proceedings are yet to be supplied.



5. The Applicant seeks leave of Court to appeal against the said ruling. According to the Applicant, he has an arguable appeal and that it is in the interest of justice that he be granted leave to appeal against the said ruling.
6. The Applicant maintains that no prejudice will befall the Respondent as he undertakes to expeditiously prosecute the intended appeal.
7. The Applicant further maintains that unless the motion herein is allowed, he will be condemned unheard.
8. The Applicant further deposed that the Court herein has unlimited discretion to grant stay of execution as well as the orders for leave to appeal to the Court of appeal, issued upon such terms as are just in light of the facts and circumstances of the case.

### **The Respondent's Case**

9. The application is opposed by the Respondent vide her Replying affidavit dated July 3, 2023.
10. In a nutshell, the Respondent opposed the Applicant's motion on grounds that the same did not meet the threshold in so far as the prerequisite of granting stay orders are concerned.
11. The Respondent contends that there has been inordinate delay in bringing this application as the ruling herein was delivered on December 23, 2022 which is over (7) months ago.
12. According to the Respondent has not demonstrated that the intended appeal arises a novel point nor an issue where the law requires clarification that requires and or merits serious judicial consideration at the Court of appeal.
13. The Respondent contends that the issues being canvassed by the Applicant are issues that were directly and substantially in issue in so far as Court of appeal Civil Application No 93 of 2020 between herself and the Applicant and as such litigations ought to come to an end.
14. In the end, the Respondent prayed that the application herein be dismissed with costs.

### **Analysis and Determination**

15. I have considered the application, the grounds thereof, the supporting affidavit and the replying affidavit. The following issues arise for determination: -
  - a. Whether leave to appeal is necessary and or merited?
  - b. Whether execution of the ruling herein should be stayed pending appeal.
16. The debate on whether leave is necessary before filing appeal from the High Court exercising its original jurisdiction in succession cases is not quite closed. Although there seems to be a dichotomy of opinion and two schools of thought on the necessity of leave to appeal in succession matters, insistence has been that appeal from the decision of the High court in exercise of its original jurisdiction is only with the leave of the court.
17. The first one was well captured in the case of *Rhoda Wairimu Karanja & Another -Vs- Mary Wangui Karanja & Another* [2014 eKLR by the Court of Appeal in these words: -

We think we have said enough to demonstrate that under the *Law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court exercising original jurisdiction



with leave of the High Court or where the application for leave is refused, with leave of this court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes."

18. The reasons for the position taken is explained by the Court of Appeal in the above case thus...: -

We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes."

19. The second, which has its origins in the Anarita Karimi case, was enunciated in the case of *Mary Wangui Karanja & Another -vs- Rhoda Wairimu Karanja & Another* [2014] eKLR, by Musyoka J. to be that:-

...A right of appeal is statutory and since the *Law of Succession Act* has not provided for such a right the same does not exist. "

20. The *Constitution* of Kenya, 2010 however provides for unfettered right of appeal. And such provisions in the *Law of Succession Act* requiring leave to appeal being existing law should be dealt with in accordance with Section 7(1) of the Transitional Provisions in the Sixth Schedule of the *Constitution*: -

7. Existing laws

(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

21. Be as it may, in this case the Court is not in any position or in possession of any material in this case which may make it to appreciate whether there are weighty issues requiring further serious judicial consideration and interrogations. The Applicant talks of having an arguable appeal as has been demonstrated on his Draft Memorandum of Appeal which is not on record and therefore, I have not had the benefit to peruse it.

22. The principles upon which the court may grant stay of execution pending appeal are well-settled.

23. Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* provides as follows:

(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except 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."



24. Grant of stay of execution pending appeal is a discretion of the court. In *Butt v Rent Restriction Tribunal* (1982) KLR the court gave guidance on how such discretion should be exercised and 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.”
25. In *Visbram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the [Civil Procedure Rules](#) is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
26. With the above principles in mind, the first consideration is whether the Applicant has demonstrated the substantial loss he likely to suffer if stay orders are granted.
27. As to what substantial loss is, it was observed in [James Wangalwa & Another vs. Agnes Naliaka Cheseto](#) [2012] eKLR, that:
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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.”
28. In the present case, the Applicant seeks stay of execution of the ruling that was delivered on December 23, 2022. The Applicant save for mentioning that he intends to appeal against the said ruling has not demonstrated to this Court the substantial loss he is likely to suffer if stay orders are not granted. It is the duty of the Applicant in an application for stay of execution to establish that he/she will suffer substantial loss if the orders sought are not granted.



29. The other consideration is security. In the case of *Arun C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates* (2014) eKLR the court held that:

The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

30. In the present case, the decree is not a money decree and thus no need to provide security for due performance.

31. Lastly, the application has to be brought without unreasonable delay. The ruling herein was delivered on December 23, 2022, the application herein was filed on June 7, 2023. I cannot tell when the notice of appeal was filed by the Applicant as there is none on record. Be as it may however, the delay in bringing this application is for (7) months. The Applicant has not tendered any reasons whatsoever explaining the delay herein. In my view the delay in the instant case is inordinate.

32. Nevertheless, when it comes to matters distribution in intestate succession, the guiding framework is usually Section 35, 38 and 40 of the *Law of Succession Act*. The spirit behind the said sections is the equal distribution of a deceased person estate. In doing so, there ought to be no classification into categories of male, female, married or unmarried; there ought to be no discrimination against the male or female children of a deceased person; nor discrimination between the married daughters and unmarried daughters of a deceased person.

33. At this juncture, I must remind parties that litigation must always come to an end. I take judicial notice that the matter herein is an old matter that has been pending in Court for over (25) years now. I must also emphasize further that once a Certificate of Confirmation of grant has been issued it has been deemed that all the beneficiaries of deceased then get enjoy their respective shares resulting from the deceased’s estate without any interference from the rest of the beneficiaries.

34. The upshot is that there is no merit in the application dated June 5, 2023. The same is hereby dismissed. This being a family matter there shall be no orders as to costs.

**DATED SIGNED AND DELIVERED AT EDORET THIS 10<sup>TH</sup> DAY AUGUST 2023**

.....

**R. NYAKUNDI**

**JUDGE**

