



**In re Estate of Mbaabu M'abutu (Deceased) (Succession Cause
383 of 2003) [2023] KEHC 21338 (KLR) (10 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21338 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 383 OF 2003
EM MURIITHI, J
AUGUST 10, 2023**

BETWEEN

SAINA KALIMI GEORGE PETITIONER

AND

ADAMSON MUTHURI BABU 1ST RESPONDENT

MUSA MBAABU ALI 2ND RESPONDENT

HENRY MWORIA 3RD RESPONDENT

AND

NURU MBAABU INTERESTED PARTY

RULING

1. Before the Court are three applications, respectively, dated June 5, 2023 application for stay of execution of the ruling of the court dated May 30, 2023 pending appeal therefrom to the Court of Appeal; application dated June 12, 2023 for revocation of the confirmed Grant herein to allow inclusion of James Mwenda in the distribution of the estate as son of deceased beneficiary, child of the Deceased herein; and application for contempt of court dated June 26, 2023 for alleged disobedience of an order for status to be maintained pending hearing of the application for stay of execution.

Application dated June 5, 2023

2. The applicant has filed a Notice of Appeal dated June 2, 2023 and filed on June 13, 2023, and the Court of Appeal is now seized of the appeal in terms of Order 42 rule 6 of the *Civil Procedure Rules* as well as for purposes of the Rule 5 (2) (b) of the *Court of Appeal Rules* for stay of execution pending appeal.
3. The overriding consideration for the grant of stay of execution pending appeal, which is similar to injunction pending appeal, as laid down in *Wilson v Church (No 2) [1879]*, 12 Ch D 454, 458 and



subsequently developed as *Erinford Principles* in *Erinford Properties Ltd v Cheshire County Council* [1974] 2 ALL ER 443 and adopted in *Kenya by Butt v Rent Restriction Tribunal 1979* eKLR and followed in many subsequent decisions such as *Madhupaper International Limited v Kerr* [1985] KLR 840 is that-

' When a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal if successful is not nugatory.'

The ingredients for grant of injunction or stay pending appeal is, therefore, (a) that there is a right of appeal (or leave to appeal has been granted) and (b) Appeal should not to be rendered nugatory, or in the words of Order 42 Rule 6 of the Civil Procedure Rules that the applicant would suffer substantial loss if stay is not granted. The Courts have, therefore, required a demonstration that there is an appeal which is arguable and which, in view of existence of likely substantial loss, would be rendered nugatory, if successful, if stay of execution pending appeal is not granted.

4. However, as Kneller JA in the Court of Appeal decision in *Madhupaper International Ltd v Paddy Kerr* [1985] KLR 846 reiterated echoing by Meggery J in *Erinford* that there will be situations where the grant of injunction pending appeal, or in this case stay of execution, will be refused as likely to cause more hardship than it would avoid:

' There are cases, however, where it would be wrong to grant an injunction pending appeal. These would include where the appeal is frivolous or to grant it would inflict greater hardship than it would avoid. And there will be others which we have not experienced yet.'

5. The court agrees that the likely loss of an inheritance claim, if one is in the circumstances of the case, entitled to it, is a substantial loss, and the court respectfully notes the decisions on substantial loss, namely *Machira v EA Standard* [2002] 2 KLR 54 and *James Ongaro & Anor v Agnes Cheseto* [2018] eKLR, cited by the Counsel Muthomi for Anna Mwari. It is the appellate court to determine whether the appeal raises an arguable case to justify grant of the order of stay.
6. This court should, however, consider also that the grant an injunction or stay of execution should not lead to long delay by the successful applicant to get the appeal filed and heard within reasonable time. The court would in such circumstances be entitled to impose conditions to encourage and facilitate the expeditious filing, hearing and determination of the appeal. This is properly within the provisions of Order 42 Rule 6 (2) which requires an order for security for the due performance of the eventual order that may become binding on the applicant upon appeal.
7. In the context of this case, where the succession proceedings commenced 20 years ago, the court must make provisions for the expedited conclusion of the dispute. Accordingly, noting the jurisdiction of the Court of Appeal as 'the court to which appeal is preferred' to consider and grant a stay of execution (under Rule 5 (2) (b) of the Court of Appeal Rules) in terms of Order 42 rule 6(1) of the Civil Procedure Rules:

' 6.

- (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.'

8. The Court of Appeal is, as the court to which the appeal is preferred, in a singular position while considering the application for stay of execution to determine whether the appeal is arguable and likely to be rendered nugatory, if eventually successful, or frivolous and waste of judicial time.
9. The Court shall, therefore, grant a stay of execution pending appeal; but in order to ensure that the finalization of the matter is not delayed by the successful applicant, the stay is for a limited period of sixty (60) days only and the court shall direct that the applicant in application for stay of execution dated June 5, 2023 herein shall obtain an order for stay of execution before the Court of Appeal within the sixty (60) days.

Application for revocation of Grant dated June 12, 2023

10. As observed in *Regine Butt v Haroon Butt & Akhtar Butt, Mombasa HCCC 8 of 2014, [2015] eKLR* this Court prefers a deferential relationship with the higher Court of Appeal as follows:

' Deferential approach to Court of Appeal

This Court adopts a deferential approach to the Court of Appeal where matters arising from or related to proceedings before this court are pending before the Court of Appeal. See *The Defence Forces Council and 6 Ors v Gabriel Kirigha Chawana & 26 Ors.*, Court of Appeal Civil Application No 9 of 2014. The object of this policy is to allow the higher court to consider the matter before it without the embarrassment of altered status quo in the meantime. Once the appellate court is seized of the matter, this court must accept that the Court shall in its wisdom consider all the relevant factors including the pendency of the suit before the High Court, material and submissions made before the court and make orders as appropriate, which bind this Court.'

11. For this reason, the Court of Appeal now being seized of the succession dispute by way of the appeal from the order of this court herein made on May 30, 2023 in which the court declined to revoke the grant confirmed herein, this court cannot proceed with the hearing of another application for revocation which would alter the position of the matter beyond what the Court of Appeal is currently seized. It is only after the Court of Appeal has pronounced itself on the issue of revocation of the Grant upon the previous applications which were the subject of the ruling of May 30, 2023, that this court may, if appropriate, consider the new application for revocation based on the exclusion of the James Mworira, son of deceased heir of the deceased.
12. An order on the application for revocation by the said James Mworira may embarrass the Court of Appeal when it considers the present appeal as its order on the pending appeal may differ, with the position on the ground occasioned by the order of this court on hearing of the later application for revocation in the meantime. The proper course must be to hold the ex post facto application for revocation of the confirmed Grant herein to await the appeal from the decision of the court on the prior application for revocation by ruling of May 30, 2023.



13. Consequently, the application of James Mworira dated June 12, 2023 for revocation of Grant shall be held in abeyance pending the hearing and determination of the appeal from the decision of this court of May 30, 2023.

Application for contempt dated June 26, 2023

14. Consideration of an application for contempt for disobedience of a court order need not await the hearing of the appeal in the matter as contempt of court is an affront to the rule of law and authority of the Court. However, in this case, there contestation as to the situation on the ground and the authority by which the ground at the suit premises may have been interfered with. There was indication that there may have been an order from the Environment and Land Act Meru CMC ELC No E021 of 2022 between Saina Kalemi and Raphael Kimani where the court ordered eviction on plot Ntima Igoki/11645, alleged to be part of suit parcels of land. The Court considers that a visit to the suit parcel of land shall clarify the matter before the determination of the contempt application.
15. All in all, the application for committal for contempt of Court dated June 26, 2023 calls for a visit by the Court to the locus quo. The application for committal for contempt of Court dated June 26, 2023 shall, therefore, be adjourned for further hearing a date to be fixed by the court after the visit to the locus quo.

Orders

16. Accordingly, for the reasons set out above, the Court makes the following orders:
1. The Court grants a stay of execution of the ruling and order of May 30, 2023 for a period of sixty (60) days only to enable the applicant move the Court of Appeal for further orders as necessary.
 2. The Court directs that the applicant in application for stay of execution dated June 5, 2023 shall file an application for stay of execution before the Court of Appeal within sixty (60) days. The order for stay of execution herein granted shall lapse upon expiry of the said period of sixty (60) days, should the Court of Appeal decline to grant stay of execution pending appeal thereof or to give further orders in the matter regarding the status quo on the suit property.
 3. The application of James Mworira dated June 12, 2023 for revocation of Grant shall be held in abeyance pending the hearing and determination of the appeal from the decision of this court of May 30, 2023.
 4. The application for committal for contempt of Court dated June 26, 2023 shall be heard and determined on a date to be fixed by the court after the visit by the Court to the locus quo, mention for directions whereof shall be heard on Monday, September 18, 2023.
17. Costs in the cause.

Order accordingly.

DATED AND DELIVERED THIS 10TH DAY OF AUGUST, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Omari for James Mworira and Henry Mworira.



***Mr. Maranya for Petitioner Musa Mbaabu.**

Mr. Nyenyire for Saina Kalemi and Raphael Kimani.

Mr. Muthomi J. for Ann Mwari.

Mr. Mutegi for Yasin Kimathi.

