



REPUBLIC OF KENYA



**KENYA LAW**  
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**Karanja (Suing as the Administrator and on Behalf of the Estate of Karanja Wainaina- Deceased)  
v Mwathi (Civil Appeal E027 of 2023) [2023] KEHC 23561 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23561 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E027 OF 2023  
DO CHEPKWONY, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**MARGARET NJERI KARANJA (SUING AS THE ADMINISTRATOR  
AND ON BEHALF OF THE ESTATE OF KARANJA WAINAINA-  
DECEASED) ..... APPELLANT**

**AND**

**DEBORAH WANJIRU MWATHI ..... RESPONDENT**

**RULING**

1. What is before the court for determination is the Amended Notice of Motion application dated May 24, 2023 seeking the following orders:
  - a. Spent.
  - b. Spent.
  - c. That this honourable court be pleased to grant a stay of execution of the whole judgment, decree and confirmation of grant delivered on January 9, 2023 at Thika Chief Magistrate's Court Succession Cause No. 166 of 2008 in the Matter of the estate of Karanja Wainaina (deceased) between Margaret Njeri Karanja vs Deborah Wanjiku Mwathi and all other consequential orders pending hearing and determination of the Appeal.
  - d. That costs be provided for.



2. The Application is based on the grounds set out on the face of it and the supporting affidavit of Margaret Njeri Wainaina sworn on January 30, 2023. The grounds of the application are as follows:
  - a. The honorable court at Thika Chief Magistrate's Court in Succession cause No. 166 of 2008 delivered its judgment on January 9, 2023 which judgment was delivered in favor of the respondent.
  - b. That the appellant herein, being dissatisfied with the said judgment, has filed an appeal for the said judgment in its totality.
  - c. That the honorable court awarded the respondent a 1 Acre portion out of the suit property being Chania Ngorongo/46 albeit no proof that she was entitled to the said portion.
  - d. That as such, the suit property herein remains exposed and /or unprotected from such adverse actions by the respondent which includes but not limited to sub division/excision of the said 1 Acre, transfer of the same to her name and by extension sale and transfer to third parties rendering the whole appeal nugatory and prejudicing the actual and legal beneficiaries of the estate of the deceased.
  - e. That without there being such stay the appeal will be rendered nugatory as the property is exposed to being disposed off and /or dealt with in a manner detrimental to the interests of the parties.
  - f. The appellant has filed an appeal and within time which appeal has a high probability of success and which ought to be heard and determined for justice to prevail.
  - g. That for all intents and purposes, the respondent will not be adversely affected should the stay be granted as the order will only be limited to the effect of ensuring the suit property is preserved and protected against disposal transfer and/or being dealt with in a manner that would make execution/ distribution, should the appeal succeed, impossible.
  - h. That the appellant is ready and willing to expeditiously prosecute the said appeal herein as evidenced in the annexed Memorandum of Appeal herein.
  - i. It is in the interest of justice that the application herein is allowed as prayed.
3. The respondent herein has filed a replying affidavit of Deborah Wanjiru Mwathi sworn on March 15, 2023 opposing the application. She avers that she is a beneficiary of the estate of the deceased by virtue of having purchased a portion of the land which is the suit property. The respondent states that she has been in occupation of the suit property since 2006 and the stay of execution orders will be prejudicial to her. She therefore urges the court to dismiss the application.
4. The applicant filed a further affidavit sworn on April 17, 2023 holding that the respondent is not a beneficiary of the estate since the alleged sale of the same was null and void as the seller of the property did not have capacity to transact.
5. On June 26, 2023, the parties were directed to dispose of the application by way of written submissions. The Applicant has filed her Submissions dated July 12, 2023 which the court has considered in its determination.



## Analysis and Determination

6. Having read through and considered the application, response thereto alongside respective affidavits and submissions in support thereof, tis court finds the main issue for determination being whether the court should grant the orders for stay of execution. As a starting point, the law that governs orders of this nature are enshrined under Order 42 of the [Civil Procedure Rules](#) which is not one of the Orders provided for under Rule 63 of the [Probate and Administration Rules](#). However, this court will invoice its adopts the inherent jurisdiction as provided for under Rule 73 of the [Probate and Administration Rules](#). In doing so, the court placed reliance on the case of the [Estate of Kitumbu Nyaga Elijah \(Deceased\)](#) [2021] eKLR, wherein it was:-

“As a rule, in proceedings under the [Law of Succession Act](#), provisions of the Civil Procedure Act and Civil Procedure Rule do not apply as the [Law of Succession Act](#) is sui generis with its own unique and special procedures which regulate proceedings in probate matters. The only provisions of the Civil Procedure Rules which apply to succession proceedings are provided under Rule 63 of the Probate and Administration Rules. (See [Josephine Wambui Wanyoike Margaret Wanjiru Kamau & another](#) [2013] eKLR) they are Orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attendance of witnesses, affidavits, review and computation of time. As such, it is clear that pursuant to the express provisions of the Probate and Administration Rules Order 42 of the Civil Procedure Rules does not apply to succession matters.

However, pursuant to the provisions of section 47 of the [Law of Succession Act](#), this court has jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may be expedient. Further, rule 73 of the Probate and Administrative Rules preserves the inherent jurisdiction of this court while dealing with matters succession. It is my view that notwithstanding Order 42 of the Civil Procedure Rules not being one of those Orders imported by Rule 63(1) of the Probate and Administration Rules, this court has jurisdiction to grant orders of stay of execution while invoking its inherent powers under Rule 73 and make orders in the interest of justice.

7. In regard to the application at hand, the same is provided under Order 42 Rule 6 of the [Civil Procedure Rules](#) which pstates as follows:
- (2) “No order for stay of execution shall be made under sub rule (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”
8. On the purpose of an application for stay of execution pending appeal the court in the case of [RWW v EKW](#) [2019] eKLR, held:

“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.

9. It is trite law that for the court to grant stay of execution order, three conditions must be met:-
  - a. The application has been made without unreasonable delay.
  - b. The applicant will suffer Substantial loss
  - c. The applicant has offered security for due performance of the decree.
10. On the first condition, the judgment herein was delivered on January 9, 2023 and the present application filed on January 30, 2023 before it was amended on May 24, 2023. This court finds that this was timely and without unreasonable delay hence this condition had been fulfilled.
11. On the second condition of substantial loss, the applicant has only stated that she is likely to suffer substantial loss but has not substantiated in which way she stands to suffer loss and of what magnitude. It is not enough for one to simply state that they will suffer loss. The court in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR held,

“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”
12. This court agrees with the above decision in the case of *Kenya Shell (supra)* that without the evidence of the substantial loss a party is likely to suffer, it is difficult to grant the stay orders as there is no reason why the Respondent should be kept away from its judgment.
13. Lastly, is the issue of security for the due performance and it is clear that the applicant has not offered any security in the affidavit in order to fulfil this condition. The issue of security was discussed in the case of *Gianfranco Manentbi & another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, as follows:-

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails...”
14. In this case, the applicant has only fulfilled one out of the three conditions regarding stay of execution orders to issue. However, although the court is not required to interrogate and consider the merits of the appeal in determining whether it will succeed or not at this juncture, it finds that the grounds raised therein and particularly that the sale of the subject property to the respondent being null and void for having been sold by a person without capacity to transact, is an arguable ground of appeal which warrants the protection of the court before it is determined. The court of Appeal in the case of *Joseph Gitabi Gachau & another v Pioneer Holdings (A) Limited & 2 others* [2009] eKLR had this to say on what amounts to arguable appeals:-

...On our part, after considering the rival submissions by the parties, the ruling of the learned Judge below together with pleadings we are satisfied that the appeal is indeed arguable. This, in essence, does



not mean an appeal which must necessarily succeed, but of course, one which ought to be argued fully before the Court.”

15. In the circumstances, the court finds that the Appeal herein is arguable hence and stay of execution orders should issue pending the hearing and determination of the Appeal. In the resultant, the Amended Notice of Motion application dated May 24, 2023 has merit and the same is allowed as prayed.

16 It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS ...29<sup>TH</sup> ... DAY OF ...SEPTEMBER..., 2023.**

**D.O CHEPKWONY**

**JUDGE**

**In the presence of:**

M/S Wangira counsel for Appellants

Court Assistant – Martin

