



REPUBLIC OF KENYA



**Kabogoro v Mbugua & 3 others (Civil Appeal E045 of 2022)
[2023] KEHC 22784 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22784 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E045 OF 2022
PM MULWA, J
SEPTEMBER 28, 2023**

BETWEEN

JOSPHAT WAWERU KABOGORO APPLICANT

AND

MONICA NJERI MBUGUA 1ST RESPONDENT

JANE NGENDO KIAMANI 2ND RESPONDENT

MARY WANGARI MUNGAI 3RD RESPONDENT

SAMUEL KUNGU GACHUCHU 4TH RESPONDENT

RULING

1. The applicant/appellant has filed a notice of motion dated April 11, 2022, seeking orders of stay of execution of the ruling of Hon Wilson Rading in Kiambu succession cause No 209 of 2003, and the stay of proceedings in Kiambu civil suit No E022 of 2022. The grounds in support of the application are that the applicant had filed an appeal against the ruling of Hon Wilson Rading in Kiambu succession cause No 209 of 2003, and while waiting for the proceedings the 1st respondent obtained an injunction against the applicant/appellant in Kiambu civil suit No E022 of 2022, and therefore, there is a need to preserve the suit premises known as Ndumberi/Riabai/7865 formerly Ndumberi/Riabai/2041 from being alienated, disposed off and or dealt with in a manner that is detrimental to the applicant.
2. The application was opposed by the 1st respondent in a replying affidavit sworn on October 19, 2022 on the grounds that the applicant sold the suit premises Ndumberi/Riabai/7865 formerly Ndumberi/Riabai/2041 as part of his entire beneficial share, the application is an afterthought and brought to deny the 1st respondent access and possession of her rightfully owned parcel. That the applicant relinquished his right to the suit parcel after selling the same to the 1st respondent and the application should be dismissed.



3. The application was canvassed by way of written submissions. the appellant filed submissions on May 15, 2023, while the 1st respondent filed submissions on May 24, 2023.

Appellant/Applicant's Submissions

4. The applicant's counsel submitted the issue in dispute revolves around Ndumberi/Riabai/7865 formerly Ndumberi/Riabai/2041, where the applicant was to inherit a plot measuring 100ft by 100ft. He subsequently sold the 1st respondent part of his share being 50ft by 100ft *vide* a sale agreement dated August 24, 2015. However, the 1st respondent transferred to herself the entire 100ft by 100ft plot thus disinheriting the applicant, and demolished the applicant's house.
5. The 1st respondent dishonestly approached the ELC court and transferred the entire parcel to herself without the consent of the applicant. Counsel urged the court to find the applicant has satisfied the conditions set for a grant of the orders sought as per order 42 rule 6 of the *Civil Procedure Rules*, that the applicant has established that he will suffer a substantial loss as his house has been demolished, the application is brought without undue delay, and there is a need to issue stay orders so that the appeal will not be rendered nugatory.

Respondent's Submissions

6. Counsel for the respondent submitted that the appellant had failed to demonstrate he is deserving of the orders of stay of execution. He stated that every ingredient for granting stay orders as per order 42 rule 6 of the *Civil Procedure Rules* should be proved. That the applicant had failed to prove the substantial loss to be suffered if the ruling dated March 10, 2022 is not stayed.
7. It was submitted that the applicant had encroached on the 1st respondent's property out of sheer greed thus interfering with the quiet possession of her property. That indeed the 1st respondent is to suffer loss as compared to the applicant. And that the applicant had failed to provide security for the stay pending appeal.
8. It was submitted that the applicant had failed to show that the appeal is arguable with a high chance of success and therefore the application ought to be dismissed as it was a delay tactic.

Analysis And Determination

9. I have considered the application, the affidavit in support and the replying affidavit. The issue this court should determine is whether stay orders should be granted. The issue in dispute involved the distribution of the estate of Lucy Nungari Kabogoro where the trial court dismissed the applicant's summons for revocation of the grant dated June 11, 2021. Dissatisfied by the court ruling the appellant filed a memorandum of appeal and subsequently the instant application seeking stay of execution of the ruling.
10. The principles upon which the court may grant stay of execution pending appeal are well-settled in the case of *Antoine Ndiaye v African Virtual University* (2015) Eklr, that an applicant seeking a stay of execution pending appeal ought to demonstrate that -
 - 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 has been given by the applicant.



11. The grant or refusal to grant an order for a stay of execution is the discretionary remedy of the court, the court should grant a stay of execution where it is shown there exist sufficient reasons for doing so. It is trite that the purpose of stay orders is to preserve the suit property. 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. Indeed, to grant or refuse an application for a stay of execution pending appeal is discretionary. The court when granting the stay, however, must balance the interests of the appellant with those of the respondent.”
12. The first consideration to be taken by the court is whether the application was filed timelessly. The ruling sought to be appealed was delivered on March 10, 2022 while the current application seeking a stay of execution was filed on April 11, 2022. In my view, the delay of one month is not inordinate and the same is excusable.
13. On the second issue the applicant seeks to challenge the ruling dismissing the summons for revocation of the grant issued on December 29, 2003, a glimpse of the memorandum of appeal indicates the issues raised therein are arguable. This court does not intend to dwell much on the merit of the memorandum of the appeal at this stage.
14. The third issue is whether the applicant has demonstrated substantial loss to be suffered if the orders of stay are not granted. In the instant suit, the applicant submits the 1st respondent has encroached on his suit premises and demolished his house, and unless a stay order is granted he will suffer substantial loss as he will be rendered homeless. The 1st respondent on the other hand submits the applicant sold the suit property to her and therefore the applicant relinquished his rights of inheritance in the suit premises.
15. The applicant has not provided any security in due satisfaction of an order for granting a stay of execution. However, the court takes note that this is a succession matter and the rights of each beneficiary are taken into consideration. I must consider the right of every beneficiary to inherit the property of the deceased, and in the spirit of article 159, the need to administer justice to all parties. This court will issue the order that status quo be maintained in order to prevent the estate and not render the appeal nugatory.
16. The second prayer for consideration by this court is whether the court should issue an order for a stay of proceedings and all consequential orders in Kiambu civil suit No E022 of 2022 Monica Njeri v Josephat Waweru Kabogo. It is trite law that whether or not to issue an order for a stay of proceedings is a matter of the court’s discretion exercised after due consideration of the merits of the case and the likely effect on the ends of justice. The proceedings seeking to be stayed relates to a dispute of ownership between the applicant and the 1st respondent. I am not persuaded that staying further proceedings in that suit will be in the interest of justice. The applicant having sold part of the property to the 1st respondent is imperative for the court to determine the issue of ownership, before proceeding to make any further orders.
17. The applicant has not demonstrated he will be affected if proceedings in Kiambu civil suit No E022 of 2022 are not stayed. The upshot is that the prayer for a stay of further proceedings in Kiambu civil suit No E022 of 2022 fails.



18. In the circumstances, the application dated April 11, 2022 be and is hereby partly allowed in the following terms:

i. There be a stay of execution of the ruling of Honourable Wilson Rading in Kiambu succession cause No 209 of 2003 pending the hearing and determination of the appeal.

ii. Each party to bear its own costs.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28TH DAY OF SEPTEMBER 2023.

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P.M. MULWA

JUDGE

In the presence of:

Kinyua/ Duale – Court assistants

Mr. Murithi - for Appellant/Applicant

Ms. Ng'ang'a h/b for Ms. Muibu - for 1st Respondent

N/A – for 2nd Respondent

