



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngari & another v Kabiru (Civil Appeal E031 of 2022)  
[2023] KEHC 24190 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24190 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E031 OF 2022  
FN MUCHEMI, J  
OCTOBER 26, 2023**

**BETWEEN**

**BENSON GICHIRA NGARI ..... 1<sup>ST</sup> APPELLANT**

**JAMES MURIITHI MWANGI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MWANGI NGARI KABIRU ..... RESPONDENT**

**JUDGMENT**

**Brief Facts**

1. The application for determination dated 13<sup>th</sup> May 2022 brought under Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and Rules 49 and 73 of the Probate & Administration Rules seeks for orders of stay of execution of the ruling delivered on 14<sup>th</sup> April 2022 in Kerugoya Chief Magistrates Court Succession Cause No. 398 of 2019 pending the hearing and determination of the appeal.
2. The respondent has filed a Replying Affidavit dated 30<sup>th</sup> May 2022 in opposition to the application.

**The Applicants' Case.**

3. The applicants state that a ruling was delivered on 14<sup>th</sup> April 2022 and being aggrieved by the said ruling they lodged an appeal before this court. The applicants are apprehensive that they stand to be evicted from land parcel number Kiine/Kibingoti/Nguguini/1526 where they have been staying with their families all their lives. It is further stated that the respondent deliberately failed to involve them at the time of filing the petition for letters of administration in relation to the Estate of Ngari Wakanya. The applicants aver that in the event the application is not allowed, they will be rendered homeless and destitute with nowhere to go and yet they have known the suit property to be theirs for over 30 years.



## **The Respondent's Case**

4. The respondent argues that the application is incompetent, bad in law and lacks merit. He further states that the order made on 14<sup>th</sup> April 2022 merely dismissed the applicants' application dated 20<sup>th</sup> August 2021 seeking for review of the ruling delivered by the lower court on 22<sup>nd</sup> June 2021. The said order is therefore negative order and is incapable of being stayed.
5. The respondent states that the grant herein was confirmed on 26<sup>th</sup> January 2005 and a certificate of grant issued. Thereafter, the applicants filed summons for revocation of grant dated 23<sup>rd</sup> January 2009 and the court dismissed the said summons on 22<sup>nd</sup> June 2021 for lack of merit. The applicants did not lodge an appeal against the said orders of 22<sup>nd</sup> June 2021 but filed summons dated 21<sup>st</sup> August 2021 seeking for review of the said orders. The said summons was dismissed vide the ruling dated 14<sup>th</sup> April 2022, which is the subject of this appeal.
6. The respondent contends that the appeal is frivolous and has no chances of success.
7. The applicants filed a supplementary affidavit dated 30<sup>th</sup> November 2022 and state that there is some new and important information that came to their attention which after they exercised due diligence was not within their knowledge and hence why they filed their application for review. It is further averred that the trial magistrate did not give them a chance to be heard and their application was just dismissed. It is against the dismissal that this appeal was lodged.
8. The applicants aver that they are dependants of the deceased and they have filed a letter from the chief supporting their contentions and that evicting them from the land at this stage, will not be in the best interest of justice. They further state that the respondent is against the order for stay so that he can evict them and they have no other place to call home whereas the respondent has his own place to stay. The applicants therefore urge the court to stop the respondent from interfering with the estate of the deceased until the appeal is heard and determined. The applicants contend that no prejudice shall be occasioned to the respondent.

## **The Applicants' Submissions.**

9. The applicants reiterate what they have deposed in their affidavits and submit that the purpose of the application is to preserve the subject matter in dispute and to safeguard their rights on appeal. The applicants submit that they are apprehensive that if execution happens they stand to be evicted and their appeal shall be rendered nugatory. It is further submitted that they have no other place to go and that they have fully developed the land. The applicants state that the appeal has high chances of success. In support of their submissions they rely on the case of *Nicholas Stephen Okaka & Another vs Alfred Waga Wesonga (2022) eKLR*.

## **The Respondent's Submissions**

10. The respondent argues that the application herein is meant to delay the process of completing the administration of the estate of the deceased. The deceased passed away in 1997 and a confirmation of grant was issued to him in the year 2005 to inherit the whole of land parcel number Kiine/Kibingoti/Ngugu-ini/1526. The respondent states that since confirmation, the applicants have filed several applications hoping to achieve a different result but all the applications have been dismissed.
11. The respondent relies on the case of *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others (2007) eKLR* and submits that litigation must come to an end. The applicants seem to want to prolong



the matter with endless applications which clearly amounts to an abuse of the court process. The respondent thus urges the court to put a stop to it and allow him reap the fruits of his success.

12. The respondent relies on the case of Hosea Nyandika Mosagwe & 2 Others vs County Government of Nyamira (2022) eKLR and submits that the impugned ruling is a dismissal order of the applicants' application dated 20<sup>th</sup> August 2021 and by its nature, such an order is incapable of being stayed.

## **The Law**

### **Whether The Applicants Have Met The Prerequisite For Grant Of Stay Of Execution Pending Appeal.**

13. Section 47 of the *Law of Succession Act* gives the court jurisdiction to entertain any application such as the present one which seeks to preserve the status quo pending the appeal. Order 42 Rule 6(2) of the Civil Procedure Rules lays down the conditions which a party must establish in order for this court to order stay of execution. These conditions are:-
  - a. Substantial loss may result to him/her unless the order is made;
  - b. That the application has been made without unreasonable delay; and
  - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
14. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-
  1. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
  2. Secondly, 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 the appeal court reverse the judge's discretion.
  3. Thirdly, 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. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.
16. On the issue of substantial loss, the case of *Re Estate of Wanga Ole Oiyie* [2022] eKLR Gikonyo J. relied on the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR where the court held:-

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.



17. The applicants argue that they stand to suffer substantial loss if stay is granted as they shall be rendered homeless and destitute. It is further stated that the deceased told the applicants to stay on the suit property and they have lived there for over three decades. The respondent argues that the applicants have not demonstrated what substantial loss they stand to suffer as the impugned ruling dated 14/4/2022 is a dismissal order which essentially is a negative order incapable of execution. I have perused the court proceedings and noted that the succession cause was filed in 2003 vide Kerugoya Succession Cause No. 54 of 2003. The grant of letters of administration was issued to the respondent on 3/7/2003 and confirmed on 12/11/2004. The applicants then filed summons for revocation of grant on 16<sup>th</sup> February 2009 in the High Court in Embu being Misc. Succession Application No. 65 of 2009 and subsequently filed an application for stay in the lower court in Kerugoya. The application for stay was allowed on 17<sup>th</sup> April 2009. The matter was then transferred to this court for hearing and determination. The court heard some of the parties but the file was then directed to be heard in the magistrates court vide Succession Cause No. 398 of 2019. The trial court heard the summons for revocation by way of viva voce evidence and on 22<sup>nd</sup> June 2021 the summons was dismissed.
18. On 20/8/2021 the applicants filed an application for review based on the ground that there was discovery of new and important matter of evidence which after exercise of due diligence was not within their knowledge and could not be produced at the time the ruling was passed. The court vide its ruling dated 14/4/2022 dismissed the application on the grounds that the issues raised by the applicants did not amount to grounds of review. The applicants have appealed against the said ruling.
19. The ruling dated 14/4/2022 dismissed the application dated 20<sup>th</sup> August 2021 and in essence the impugned ruling was a negative order which is incapable of execution. This principle was enunciated by the Court of Appeal in *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)* [2015] eKLR where the court held as follows:-

An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.

20. Similarly in *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others* [2016] eKLR the Court of Appeal expounded on stay of execution stating:-

In *Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah* [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:-

The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior court made on 18<sup>th</sup> December 2006. The order of 18<sup>th</sup> December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.

The same reasoning was applied in the case of *Raymond M. Omboga vs Austine Pyan Maranga* (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-

The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there



can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

21. It is not in dispute that the order being a negative order which did not order any of the parties to do anything or restrain from doing anything. The order is incapable of execution and thus the court cannot order stay of execution of that negative order.
22. That notwithstanding, it is my considered view that the applicants have not demonstrated what substantial loss they stand to suffer. The court in its ruling dated 22<sup>nd</sup> June 2021 found that the applicants were not grandchildren or dependants of the deceased and therefore not entitled to inherit from the deceased's estate while the respondent who was a child of the deceased was still alive. As such, the applicants cannot claim that they were left out of the distribution of the estate.
23. Moreover, I have perused the memorandum of appeal and without delving to the merit of the appeal, the applicants do not raise any arguable points of law or fact.
24. The instant application was filed on 16<sup>th</sup> May 2022 whereas the ruling was delivered on 14/4/2022 and therefore it is my view that the application was filed timeously. On the issue of security, it is trite law that security is discretionary and it is upon the court to determine the same. Notably, the applicants have not offered any terms of security to warrant the application for stay.
25. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”
26. The court in granting stay has to carry out a balancing act between the rights of the two parties. The court ought to determine whether there is a just cause for deriving the respondent his right of enjoying the judgment. The respondent argues that the applicants have not satisfied the conditions to warrant them stay of execution. The applicants on the other hand states that their appeal has high chances of success. The succession cause herein was instituted in 2003, which is about 20 years ago. The grant was confirmed in 2004 and the applicants filed their summons for revocation about five (5) years later. Further even after the said summons for revocation was dismissed, the applicants sought review of the said using the same arguments used during the hearing of summons for revocation. It seems that the applicants are making the same arguments but expecting different outcomes. The respondent has not had a chance to enjoy the fruits of his judgment. It is trite law that litigation must come to an end and thus it would be more prejudicial to the respondent if the orders of stay are granted.
27. It is my considered view that the applicants have failed to satisfy the conditions to warrant stay of execution pending appeal. This application must therefore fail.



**Conclusion**

28. I thus hold the opinion that the application dated 13<sup>th</sup> May 2022 lacks merit and it is hereby dismissed with costs.

29. It is hereby so ordered.

**DATED AND SIGNED AT KERUGOYA THIS 26<sup>TH</sup> DAY OF OCTOBER, 2023.**

**F. MUCHEMI**

**JUDGE**

Ruling delivered through video link this 26<sup>th</sup> day of October , 2023

