



REPUBLIC OF KENYA



KENYA LAW
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**Artan & 2 others v Artan & another (Succession Appeal E002 of 2020)
[2023] KEHC 25809 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25809 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
SUCCESSION APPEAL E002 OF 2020
AK NDUNG’U, J
NOVEMBER 22, 2023**

BETWEEN

HUSSEIN MOHAMED ARTAN 1ST APPLICANT

ISMAEL MOHAMED ARTAN 2ND APPLICANT

YASSIN MOHAMED ARTAN 3RD APPLICANT

AND

YUSUF MOHAMED ARTAN 1ST RESPONDENT

FATUMA MOHAMED ARTAN 2ND RESPONDENT

RULING

1. This ruling concerns the Notice of Motion herein dated 20/06/2022 seeking the following orders;
 - i. Stay of execution of the orders issued on 21/10/2021 and orders given on 18/01/2022 in Nyeri Kadhi’s succession Cause No 11 of 2019 in the Matter of the Estate of Mohamed Artan Ismael and Halima Mohamed Artan (Deceased) pending hearing of the appeal.
 - ii. An injunction restraining the Respondents from transferring, wasting, renting, selling, charging or in any way interfering with the occupation of the Applicants over land parcel No un surveyed Commercial C9 Plot No K Nanyuki Municipality registered in the name of Halima Mohamed Dirie (Deceased) pending hearing of the appeal.
 - iii. An order conserving the entire estate of the late Mohamed Artan Ismael & Halima Mohamed (Deceased) pending the hearing and determination of the appeal.
 - iv. An injunction barring Respondents from transferring land parcel un surveyed commercial C9 Plot No K Nanyuki Municipality pending hearing of the appeal.



2. The application is supported by an affidavit of Hussein Mohamed Artan. He deponed that he is a son of the Deceased herein and in the year 2019, they filed a Succession Cause in Nyeri Kadhi's Court. That the Honourable Kadhi entered judgment and gave orders dated 04/12/2019 in absentia of other beneficiaries and distributed the estate in absentia of the Applicants. The Respondents allocated themselves property in which the 1st Applicant carries on garage business and without the knowledge of the Applicants, acquired eviction order against the Applicants. That the Applicants are not pleased with the allocation and are prejudiced by the orders and are at the verge of being disinherited.
3. The Respondents did not file a response despite being served. The Applicants filed submissions dated 13/07/2023 and argued that the application should be allowed since it is unopposed. It is in the interest of justice that the same be allowed since the Respondents will not suffer any prejudice. That the delay in prosecuting the application was due to the fact that Muslim elders have been trying to reconcile the parties herein.
4. The Applicants did not attach the orders sought to be stayed. I have however perused the trial record and noticed that the orders sought to be stayed were issued on 21/10/2021 by Senior Principal Kadhi Hon. Said Hamisi were issued in favour of the Respondents herein in effect that un-surveyed commercial plot C-9 plot No K Nanyuki Municipality be given to the Petitioners Fatuma Mohamed and Yusuf Mohamed Artan and their Deceased's brothers Hassan Muhamed and Abdul Muhamed and the Respondents (the Applicants' herein) be given the un-surveyed commercial plot No 3 Nanyuki Municipality. The order issued on 18/01/2022 was in respect that the Applicants herein be ordered to vacate the said plot.
5. The principles guiding the grant of stay of execution pending appeal are provided as under Order 42 rule 6(2) of the *Civil Procedure Rules* which states;
 - “(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.”
6. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution 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.”
7. I have applied my mind to the disclosed facts in this matter and in line with the legal principles for grant of a stay of execution, am satisfied that the Applicant would be exposed to substantial loss unless the order is made.
8. With the result that I allow the application dated 20/6/22 and make the following orders;
 - a. A Stay of execution be and is hereby issued of the orders issued on 21/10/2021 and orders given on 18/01/2022 in Nyeri Kadhi’s succession Cause No 11 of 2019 in the Matter of the Estate of Mohamed Artan Ismael and Halima Mohamed Artan (Deceased) pending hearing of the appeal.
 - b. A general conservatory order be and is hereby issued restraining the Respondents from any adverse dealings with the Estate of Mohamed Artan Ismael and Halima Mohamed Artan (Deceased) by way of transfer, sale and/or assignment pending the hearing and determination of the Appeal.
 - c. The Appeal be filed and served within 45 days hereof in default of which the stay order shall lapse.
 - d. Each party to bear its own costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF NOVEMBER, 2023.

A.K NDUNG’U

JUDGE

