



In re Estate of Phyllis Wasuna Kamau alias Phyllis Wasuna (Deceased) (Succession Cause 25 of 2019) [2023] KEHC 26733 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26733 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 25 OF 2019
CM KARIUKI, J
DECEMBER 20, 2023
IN THE MATTER OF THE ESTATE OF PHYLLIS WASUNA
KAMAU ALIAS PHYLLIS WASUNA (DECEASED)**

BETWEEN

ZIPPORAH NYAMBURA NJUGUNA APPLICANT

AND

ANDREW GITAU NDUNG’U 1ST RESPONDENT

EDWARD NJUGUNA NDUNG’U 2ND RESPONDENT

(ADMINISTRATORS OF THE ESTATE OF MICHAEL NDUNG’U NJUGUNA)

RULING

1. The Respondents herein, vide the application dated 16th July 2023, sought the following orders: -
 - i. Spent.
 - ii. Spent.
 - iii. Spent.

That the honorable Court to stay execution of its ruling entered on 13th July 2023 pending hearing and determination of the intended Appeal.

The costs of the application are provided for.

2. The application is supported by the grounds on the face of it and the supporting affidavit of even date sworn by Andrew Gitau Ndung’u. He deponed that the honorable Court delivered a judgment on 7th July 2022 and subsequently a ruling on 13th day of July 2023, both of which the Respondents are aggrieved with and intend to mount an Appeal at the Court of Appeal because the learned judge erred in law by arrogating himself jurisdiction contrary to Section 30 of the *Law of Succession Act*



and feigning precedence on jurisdiction. In absent stay orders, the Respondents are likely to suffer irreparable harm, and the intended Appeal, with high chances of success, is rendered nugatory. That grant of the application will not prejudice any party because the application seeks the preservation of the status quo that has subsisted for more than two decades.

3. In response, the Applicant filed a replying affidavit dated 27th July 2023 deponed by Zipporah Nyamburah Njuguna. She stated that she has never benefitted from her mother's estate since her demise as the Respondent has solely benefited from the land, forming the only property of the estate by leasing the same to third parties and selling part of it. She stated that if stay orders are granted in the nature sought by the Applicant, she will continue being excluded from the benefit of the estate, which is prejudicial to her.
4. The Applicant deponed that the application is meant to deny her an opportunity to enjoy the fruits of successful litigation. The Court has a duty to balance the rights of litigants, and it is in furtherance of this duty she urges the Court to allow her to enjoy the fruits of the judgment delivered by the Court. The Respondent asserted that she has no intention of selling her portion of the estate, and as such, there is no irreparable harm that the Respondent stands to suffer, and none has been demonstrated.
5. It was asserted that the estate would still be preserved by an order that the land be subdivided, but the parties would be restrained from disposing of their shares pending the hearing and determination of the intended Appeal.
Applicant's Submissions; It could not be traced in the file when drafting this ruling.
6. Respondent's submissions
7. The Respondents stated that the principles that undergird the grant or denial of a stay of execution pending appeal are stated as provided for in order 42 rule 6 (2) of the *Civil Procedure Rules*, 2010. Further reliance was placed on the case of *Nicholas Stephen Okada & Another v Alfred Waga Wesonga* [2022] eKLR
8. Regarding substantial loss, the Respondents relied on because the impact of the ruling that they intended to impugn before the Court of Appeal was to tinker with the status that has subsisted for over a decade. Reliance was placed on *James Wangalwa & Another vs. Agnes Naliaka Chesoto* [2012] eKLR.
9. It was submitted that the Applicant had admitted the importance of preserving the status quo as a way of preserving the subject matter of the Appeal and urged the Court to restrain the parties from disposing of their respective shares of the property, which, despite enticing, is not appropriate because rights that attend land are not restricted to disposition alone.
10. On security for costs, it was contended that none should be ordered as no decree is due for performance. Moreover, the Applicant has not demonstrated costs they are likely to incur in defending the Appeal, and that said, the Respondent cannot pay the amount. Reliance was placed on *Zakir Kamrudin & Another vs. Mark Odende Onyango t/a Maonde Construction* [2021] eKLR.

Analysis and Determination

11. Having considered the application herein, the affidavits, and the submissions alongside the legal authorities they have relied upon, the main issue for determination is whether the Applicants have met the prerequisite threshold for the grant of stay of execution pending Appeal.



12. Stay of Execution pending Appeal is governed by order 42, rule 6 of the [Civil Procedure Rules, 2010](#), which provides as follows: -

“(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 an application being made, to consider such application and to make such order thereon as may to it seems just, and any person aggrieved by 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.

(2) No order for a stay of execution shall be made under subrule (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.

(3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

13. Accordingly, under order 42 rule 6(2), an Applicant should satisfy the court that:-Substantial loss may result to him unless the order is made; That the application has been made without unreasonable delay and 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. Similarly, these principles were enunciated in [Butt vs Rent Restriction Tribunal](#) [1979]. The Court of Appeal stated what should be considered in determining whether to grant or refuse a stay of execution pending Appeal. The Court said that:-

- a. The power of the Court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised so as not to prevent an appeal.
- b. Secondly, the general principle in granting or refusing a stay is that 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.
- c. Thirdly, a judge should not refuse a stay if there are reasonable grounds for granting it merely because, in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
- d. Finally, in exercising discretion on whether to grant or refuse an application for stay, the Court will consider the special circumstances and its unique requirements. In exercising its powers under order xli rule 4(2) (b) of the [Civil Procedure Rules](#), the Court can order security upon



application by either party or on its motion. Failure to put the security of costs as ordered will cause the order for the stay of execution to lapse.

15. On substantial loss, the Respondents stated that the impact of the ruling they intend to appeal was to tinker with the status that has subsisted for over a decade. They argued the importance of preserving the status quo as a way of preserving the subject matter of the Appeal and urged the Court to restrain the parties from disposing of their respective shares of the property, which, despite enticing, is not appropriate because rights that attend land are not restricted to disposition alone.
16. Substantial loss was explained in the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, that:-
 - a. "No doubt, in law, that the execution process has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the *CPR*. This is so because execution is a lawful process. The Applicant must establish other factors that show that the execution will create a state of affairs that will irreparably affect or negate the 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. Consequently, it is my view that if this Court were to deny the Respondents the order for a stay of execution, it would place them in a more prejudicial position than the Applicant. While it is unfortunate that the Applicant has had to wait for long to enjoy the fruits of their judgment, I find that the Respondents have adequately demonstrated that they are likely to suffer loss by their contention that by disturbing the existing status quo, they will suffer substantial loss which may not be monetarily equated. In *RWW Vs. EKW* [2019] eKLR the Court enumerated 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 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 an award of costs cannot compensate."
18. Furthermore, in Cotton L J in *Wilson -Vs.- Church (No 2)* (1879) 12ChD 454 at page 458, Hancox JA stated,

"I will state my opinion that when a party is appealing, exercising his undoubted right of Appeal, this court ought to see that the Appeal, if successful, is not rendered nugatory."

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favor without cause."
19. Additionally, I agree with the Respondents that the grant of these stay orders will not prejudice any party because the application seeks the preservation of the status quo that has subsisted for more than two decades. I am also satisfied that the Respondents have demonstrated that the intended Appeal



was arguable and would be rendered nugatory if the stay was not granted and that there has been no inordinate delay in bringing the instant application.

20. On security for costs, it was contended that none should be ordered as no decree is due for performance. Moreover, the Applicant has not demonstrated the costs they will likely incur in defending the Appeal, and the Respondent cannot pay the amount. Reliance was placed on *Zakir Kamrudin & Another vs. Mark Odende Onyango t/a Maonde Construction* [2021] eKLR.
21. In *Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor....The civil process is quite different because the judgment is like a debt; hence, the Applicants become and are judgment debtors concerning the Respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”
22. From the above decision, it is clear that the security issue is discretionary, and the Court must determine the same. Looking at the circumstances of the case as stated by the Respondents, it would be in the interest of justice that security is not be imposed on them for the reasons given.
23. Consequently, taking all the above factors into account and in order not to render the intended Appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find and hold that the Applicants have fulfilled the requirements for the grant of stay of execution pending Appeal as stipulated under order 42 rule 6 of the *Civil Procedure Rules* and therefore Court makes the orders;
 - i. The application, dated 16th July 2023, is meritorious and is hereby allowed to preserve the prevailing status quo, with no orders as to costs.

DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 20TH DAY OF DECEMBER 2023

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C KARIUKI

JUDGE

