



**Kasyuma & 2 others v Mutava & 2 others (Succession Appeal
4 of 2023) [2023] KEHC 26923 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26923 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION APPEAL 4 OF 2023
FR OLEL, J
DECEMBER 18, 2023**

BETWEEN

JOSEPH MUSEE KASYUMA 1ST APPELLANT

JUSTUS MUTETI KASYUMA 2ND APPELLANT

MUTINDA KASYUMA 3RD APPELLANT

AND

PETER MUISYO MUTAVA 1ST RESPONDENT

STELLA NDUNGE MUTAVA 2ND RESPONDENT

BENARD WAMBUA MUTAVA 3RD RESPONDENT

RULING

A. Pleadings

1. For consideration before this court is the Notice of Motion dated 16TH March 2023, brought under Sections 3A of the [Civil Procedure Act](#) Cap 21 Laws of Kenya, Order 42 Rules 6 and 51 (1) of the [Civil Procedure Rules](#), 2010 wherein the Appellants/Applicants sought for various order, the main one being (prayer 3) that:
 - a. That the Honourable court be pleased to stay further proceedings and execution of the ruling of senior principal magistrate court at kithimani delivered on 8th March 2023 in Kithimani SPM Succession cause No E24 of 2020, in the matter of the Estate of Mutava Kioko alias Micheal Mutava Kioko (deceased) pending hearing and determination of the appeal herein
 - b. Costs of this application be provided for.
2. The application is supported by the grounds on the face of the said application and the Supporting Affidavit dated 16th March, 2023 sworn by the 1st appellant Joseph Musee Kasyuma . The Respondents



did oppose this application by filing a replying affidavit sworn by the 1st respondent Peter Muisyo Mutava dated 25th May 2023.

3. The 1st appellant/applicant did depone that they were the children of the late Mutava Kioko, while the respondents are their step brothers and sister. The late Mutava Kioko had two wives, their mother (Mumbi Mutava) was the 1st wife , while the respondents mother (Naomi Mutava) was the 2nd wife. At some point after they had been born their mother had separated from their father and they had grown up living with their maternal grandfather, but before his demise their father had settled them on the parcel known as Ndalani/Ndalani/191, where they had settled since 1992 and built permanent homes thereon.
4. The applicants averred that they had resided in the suit property peacefully and did not have any difference with the respondents until 2020, when a dispute arose as regards who would administer their father's estate. The respondents secretly instituted Kithimani succession cause No 24 of 2020 In the matter of the estate of Mutava Kioko (deceased), without involving them and upon discovery of the same they filed objections proceedings which was dismissed hence this appeal. While the succession process was ongoing, the respondents attempted to sell Ndalani/Ndalani/block 1/191 culminating in the applicants filing ELC Case No 12 of 2020, where status quo orders were granted pending hearing and determination of the objection proceedings.
5. The appeal filed raised weighty issues and unless stay of execution was granted, there was a strong possibility that the respondents would proceed to confirm grant and set in motion the process of changing property to their names to their detriment and render the appeal nugatory and be an academic exercise. The appeal had been filed expeditiously and they were ready and willing to abide by the terms of security as maybe directed. They urged the court to so grant the orders sought as it would not prejudice the respondent and help maintain status quo.
6. The respondent on the other hand did oppose this application and averred that the said application was frivolous, vexatious, scandalous and constituted an abuse of the process of the court. The respondents denied that the applicants were their siblings as the deceased (their father) was married to one wife Naomi Nthoki Mutava- their mother and the said union was monogamous. The applicants had failed to prove their allegation that the deceased was indeed their father and had moved to erected structures within the suit parcel after his death. In that regard the appellants were basically trespassers on the suit property and had no valid claim thereto.
7. Finally, the respondents averred that they were under no obligation to involve the applicant's in the succession process as they were not part of their family and therefore this application lacked merit and ought to be dismissed

B. Determination

8. The court has considered the Application, the Response thereto and both set of submissions filed by the parties and easily discerned that the issue for determination is whether the court should grant an order of stay of execution pending appeal and/or issue an order staying proceedings stayed pending hearing and determination of the appeal filed.
9. Stay of Execution is provided under Order 42 Rule 6 of the [Civil Procedure Rules](#) 2010 as follows;
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except 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 application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an 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 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.”

10. The three conditions to be fulfilled can therefore be summarized as follows;
 - a. that substantial loss may result to the applicant unless the order is made
 - b. application has been made without unreasonable delay
 - c. security as the court orders for the due performance
11. These principles were enunciated in *Butt v 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: -
 - 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 in such a way as not to prevent an appeal.
 - b. 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.
 - c. 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.
 - d. 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.
12. In *Visbram Ravji Halai v Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 42 rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
13. To the foregoing I would add that an order of stay may also be granted for sufficient cause and that the Court in deciding whether or not to grant the stay shall also consider the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, or rule 73 of the *probate and administration rules*



in succession matters to enable court give effect to the overriding objective, while in the exercise of its powers under the [Civil Procedure Act/Succession Act](#) or in the interpretation of any of its provisions. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589.

i. Undue Delay

14. As to whether the Application has been filed without undue delay, judgment appealed against was delivered was on 08.03.2023. The notice of appeal and application for stay pending appeal was filed on the 17.03.2023, which was within one month. This court thus finds that the appeal and this application for stay of execution has been filed without undue delay.

ii. Substantial Loss

15. On the issue of substantial loss, Ogolla, J in *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 stated that:

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”

16. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR the court expressed itself as hereunder:

“No doubt, in law, the fact that the process of execution 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 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 same position was adopted by Kimaru, J in *Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 where he stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”



18. The applicant did depone that they had been on the suit parcel from 2002 and had built their permanent homes therein. Further they deponed that the respondents had attempted to dispose off Ndalani/Ndalani/Block 1/191 and this was stopped by an order of the ELC CASE NO 12 OF 2020, which gave status quo orders pending determination of the objection which had been filed. The respondents did not deny these averments. It is not denied that the property in dispute is estate property where the parties reside. There is a real risk that the same maybe transferred to the respondents to the determinant of the appellants, who have clearly raised arguable issues that must be determined on merit.
19. Finally, in exercising its discretion, the court should always opt for the lower rather than the higher risk of injustice. The orders issued in the ELC case automatically lapsed with the determination of the objection proceedings and the lower risk is to preserve the said estate as the appeal is heard. I thus do find that the applicants have established that indeed they stand to suffer substantial loss unless appropriate orders are granted.

iii. Security

20. As regards deposit of security, the court observed in the case of *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* [2019] eKLR it was held that:-

“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 a 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 decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....

Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

21. The issue of adequacy of security was also dealt with by the Court of Appeal in *Ndubiu Gitabi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them.



So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it”.

22. The applicants did state with regard to the issue of security that, they were ready to abide by any conditions that may be imposed by court.

C. Disposition

23. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful party to the appeal, I do grant prayer (3) of the application dated 16th March 2023 pending hearing and determination of the appeal filed.
24. The appellants will within the next 60 days deposit Kshs 200,000/= in court as security for the appeal.
25. Costs herein will abide the Appeal.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF DECEMBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered On the virtual platform, Teams this 18th Day of December, 2023.

In the presence of:-

Mr. Munguti for Appellant

No appearance for Respondent

Susan/Sam Court Assistant

