



**Ngángá v Kareria; Mwari (Interested Party) (Succession Cause
361 of 2014) [2022] KEHC 3386 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 3386 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 361 OF 2014
TW CHERERE, J
APRIL 28, 2022**

BETWEEN

STELLA WAMBUI NGÁNGÁ ADMINISTRATOR

AND

PETER KIOGORA IBARA KARERIA APPELLANT

AND

FAITH MAKENA MWARI INTERESTED PARTY

RULING

1. By an order dated March 31, 2022, this court made orders that:
1. 2nd administrator and interested party are children of the deceased
2. 2nd administrator and interested party are the sole beneficiaries of deceased's estate
3. LR. No. Ntima/Igoki/6058 shall be distributed as consented by the 2nd administrator and interested party follows:
 - a. 1/8 acre to Faith Makena Mwari
 - b. Balance to Stella Wambui Ngángá
4. The 1st administrator shall bear the costs of this summons
5. Mention on May 25, 2022 to confirm compliance with orders (3) above and for further orders
2. By Chamber Summons dated April 8, 2022 and filed on April 11, 2022, Peter Kiogora Ibara Kareria (1st administrator/applicant) seeks a stay of the ruling and order dated March 31, 2022 pending the hearing and determination of this application and the intended appeal.



3. The summons is supported by an affidavit sworn by 1st administrator/applicant on April 8, 2022 and on the grounds That:
 - a. Applicant is aggrieved by the ruling delivered on March 31, 2022 and intends to appeal against it
 - b. Applicant filed a notice of appeal on April 1, 2022
 - c. Applicant might be evicted from deceased's estate where he lives
 - d. Application has been filed without delay
4. The summons is opposed on the basis of replying affidavits sworn by Stella Wambui Ngángá (2nd administrator/respondent) on April 25, 2022 in which she contends that the applicant has not been threatened with eviction. It is the 2nd administrator/respondent's case that applicant has not lived on deceased's estate all his life for he used to work for Central Bank in Nairobi until he retired and has been living in deceased's house on deceased's land yet he owns 1¼ acres next to deceased's estate. She contends that she is the one in use of deceased's estate and is apprehensive that applicant and his sisters might evict her as they have threatened.
5. Faith Makena Mwari (interested party/respondent) by her replying affidavit sworn on April 25, 2022 contends that the Applicant has not met the threshold for grant of an order of stay pending appeal and has not even filed an appeal. She urges the court to find that this application is designed to stagnate the process of execution and goes against the principle that litigation must come to an end.
6. By his supplementary affidavit sworn on April 26, 2022, 1st administrator/applicant denies any attempt to evict the 2nd administrator/respondent and argues that he is likely to suffer irreparable loss if he is evicted.

Analysis and Determination

7. I have considered the summons in the light of the affidavits on record and oral submissions made by counsel, Mr. Thangichia for the 1st administrator/applicant, Mr. Mbaabu for 2nd administrator/respondent and Mr. Ashaba for the interested party/ respondent and the issue for determination is whether an order of stay of execution of the impugned ruling ought to be granted.
8. Grant of stay of execution pending appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules*, the relevant part of which states 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 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 sub rule (1) unless—
 1. 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



2. 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 sub rule (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.
 4. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that court notice of appeal has been given.
 5.
 6.
9. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned namely:
- (a) that substantial loss may result to the applicant unless the order is made,
 - (b) that the application has been made without unreasonable delay, and
 - (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.
10. In *Butt vs. Rent Restriction Tribunal* [1979], the Court of Appeal stated that 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. 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. 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. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
11. As to what substantial loss is, it was observed in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, that:
- “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.”
12. In the instant case, the applicant's only complaint is that he is apprehensive that respondents might evict him from deceased's estate where he lives. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting an order of stay of execution and the party seeking stay bears a specific burden regarding proof of substantial loss.



13. The applicant has not denied that he owns LR. Ntima/Igoki/4477 comprising of 0.498 Ha next to deceased's estate. It therefore goes without saying that the applicant will not be rendered homeless in the event that this court's ruling dated March 31, 2022 is executed for the reason that he owns land where he can settle.
14. Consequently, I find that the applicant has not demonstrated that the distribution of deceased's estate as ordered by the court will occasion him any substantial loss.
15. From the foregoing analysis therefore, the Chamber Summons dated April 8, 2022 and filed on April 11, 2022 is found to have no merit.
16. Nevertheless, in order to preserve the subject matter, it is hereby ordered that upon distribution of deceased's estate comprised in LR. No. Ntima/Igoki/6058, respondents shall not sell, dispose off or in any adverse manner deal with their respective portions pending the hearing and determination of the intended appeal and/or until any and or further orders of this court.
17. This matter shall be mentioned on June 28, 2022 to confirm compliance with order (3) issued on March 31, 2022 and for further orders.

DATED AND DELIVERED IN MERU THIS 28TH DAY OF APRIL 2022

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For 1st Administrator - Mr. Thangichia for Thangichia M. David & Co. Advocates

For 2nd Administrator - Mr. Carlpeters for Carlpeters Mbaabu & Co. Advocates

For Interested Party - Mr. Ashaba for Mutuma Gichuru & Associates

