



**In re Estate of Kabiti Mwhatiri (Deceased) (Civil Appeal
E020 of 2022) [2022] KEHC 11248 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E020 OF 2022
MM KASANGO, J
JULY 28, 2022**

IN THE MATTER OF THE ESTATE OF KABITI MWIHATIRI (DECEASED)

BETWEEN

JOYCE MUTHONI MWAURA APPELLANT

AND

ALICE WANJIRU KIRATU RESPONDENT

RULING

1. Gatundu Senior Principal Magistrate's Court considered the appellant's protest filed against the proposed mode of distribution of the estate of deceased. The appellant was aggrieved by the Ruling of H.M. Ng'ang'a Principal Magistrate and has filed this appeal.
2. Appellant has filed a chamber summons application dated 16th February, 2022 seeking stay of execution of the order of Gatundu Magistrate's Court pending the hearing and determination of this appeal.
3. The application for stay of execution pending the determination of this appeal is premised on provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#) particularly Order 42 Rule 6(2). That Rules provides:-
 - (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.”
4. The above are the conditions the appellant has to satisfy.



5. There is no doubt that the appellant filed the application without unreasonable delay. The impugned Ruling was delivered on 11th February, 2022 and the application was filed on 18th February, 2022.
6. Has the appellant shown this court that she will suffer substantial loss if stay of execution is not granted? The appellant stated that if stay is not granted the respondent will proceed to distribute the estate as per the Ruling of the trial court. In this regard and perhaps in response to that submission by the appellant I rely on the holding by Justice W.A. Okwany in the case *Pauline Nyanchesa Teya & Another Vs. Milka Kecubo Nyokwoyo* (2016) eKLR thus:-

“37. Secondly, the applicant has not demonstrated that she will suffer any substantial loss that cannot be compensated in damages if the stay of execution orders sought are not granted. The impugned judgment relates to the distribution of the estate of the deceased in which the applicant, among other beneficiaries was granted a share thereof. It is my humble view that in the event the applicant’s intended appeal, if any, succeeds, the estate will still be available for redistribution as the applicant has not demonstrated that any beneficiary is intent on wasting or disposing off the said estate.

38. Thirdly, the applicant has not offered any security for the due performance of the decree as provided for under Order 42 Rule 6 (2) (b) of the Civil Procedure Rules to demonstrate her seriousness or commitment to the intended appeal.”

7. Similarly in this case, the appellant has not shown the respondent intends to waste the estate. The appellant has not offered security.
8. The power to grant stay of execution pending appeal must be balanced with the equal right of the respondent to enjoy the fruits of her judgment.
9. I have considered the application, the affidavit sworn by the parties and the impugned Ruling. I am of the view that no prima facie prejudice will be suffered by the appellant if stay of execution is not granted the appellant failed to establish factors that show that execution will create a state of irreparable damage. The application for that reason will be declined.

Disposition

10. For the reason discussed above, the chamber summons application dated 16th February, 2022 is dismissed. The costs of that application will abide with the outcome of the appeal.

RULING DATED AND DELIVERED AT KIAMBU THIS 28TH JULY, 2022.

MARY KASANGO

JUDGE

In the presence of:-

Coram:

Court Assistant:- Mourice

For Appellant:-

For Respondent:-

Court

Ruling delivered virtually,



MARY KASANGO
JUDGE

