



In re Estate of Silvester Kimaru Tororey alias Sylvester Arap Tororey alia Sylvester Kimaru Tororei (Deceased) (Succession Cause 33 of 2016) [2022] KEHC 11761 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11761 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 33 OF 2016
RN NYAKUNDI, J**

JULY 22, 2022

**ESTATE OF SILVESTER KIMARU TOROREY ALIAS SYLVESTER
ARAP TOROREY ALIA SYLVESTER KIMARU TOROREI (DECEASED)**

BETWEEN

MARYGORRETTI CHERUTO CHEPSEBA APPLICANT

AND

FRANCIS MICHELLIS RUTTO 1ST RESPONDENT

MARK KIPLANGAT RUTTO 2ND RESPONDENT

RULING

1. Before me is an application by way of summons dated April 13, 2022 brought by the applicant under rule 73 of the [Probate and Administration Rules 1981](#), seeking for orders that –
 - i. That service of this application be dispensed with in the first instance
 - ii. That there be a stay of execution of the ruling delivered on February 17, 2022 pending the hearing and determination of this application in the first instance.
 - iii. That there be a stay execution of the ruling of this court delivered on February 17, 2022 pending the hearing and determination of an intended appeal as against the said ruling
 - iv. That the applicant be granted leave to appeal to the Court of Appeal as against the ruling delivered on February 17, 2022.
 - v. That the costs of the application be provided for;
2. The application is premised on the grounds that substantial loss will ensue; that sufficient cause exists to warrant the grant of the stay; that the application has been made without undue delay; that no automatic right of appeal exists as against the decision thus leave is necessary and that prima facie



grounds of appeal exists that would merit a serious consideration and pronouncement by the appellate court.

3. The application was supported by an affidavit sworn by the applicant on April 13, 2022 reiterating the grounds of the application.
4. The application is opposed through the replying affidavit of the respondents sworn on June 29, 2022 in which they deponed that; the application before court is incompetent and an afterthought; that after delivery of the ruling on February 17, 2022, they instructed their advocate on record to obtain a certificate of confirmation of grant to enable them conclude the administration and wind up the estate and thus , there is no basis as to why the applicant should be granted stay of execution; that the applicant has not demonstrated through supportive evidence or otherwise that she has an arguable appeal; that the application has been brought in bad faith with the intention to delay the distribution of the estate to the detriment of the other beneficiaries of the estate of the deceased.
5. The court was thus urged to disallow the application to enable the respondents wind up the estate.

Determination

6. I have considered the application before me and the rival affidavits and the only issue for my determination is whether the orders sought should be granted.
7. The principles upon which the court may grant stay of execution pending appeal are well-settled. These are captured in Order 42 Rule 6 of the [Civil Procedure Rules](#) which requires an applicant seeking a stay of execution pending appeal to demonstrate that -
 - (a) Substantial loss may result to the applicant unless the order was made;
 - (b) The application was made without unreasonable delay; and
 - (c) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant.
8. This being a succession cause, I need not to impose a condition on security for due performance and thus I will only address the issue of substantial loss which may result to the Applicant if the orders sought are not granted considering there was no inordinate delay in filing the instant application.
9. The Applicant has explained that she has a *prima facie* appeal and that the value of the Estate has been declared as being Kshs 130,000,000 and the guarantees executed by the Executors Is less that said amount and as such a refund in the event of success of the appeal may be a tall order.
10. The purpose of stay of execution is to preserve the status quo pending the hearing of the appeal as was held in [RWW vs. EKW](#) [2019] eKLR, where the court observed that:

“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 who is 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 cannot be compensated by an award of costs.
11. I have noted from the facts placed before me in the instant application that the issues herein relate to land. It is my view that, if orders of stay are not granted and the said land parcels are distributed, the



appeal will be rendered nugatory should the same be allowed thereby occasioning substantial loss to the applicant

12. Consequently, and for the above reasons, I allow the application and grant prayer (ii) and (iii) herein.

13. The costs of the application will follow the results of the appeal.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 22ND DAY OF JULY, 2022.

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R. NYAKUNDI

JUDGE

