



REPUBLIC OF KENYA



KENYA LAW
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**Kiongo v Karanja & another (Succession Cause 1157 of 1997)
[2022] KEHC 12851 (KLR) (Family) (5 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12851 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1157 OF 1997
MA ODERO, J
AUGUST 5, 2022**

BETWEEN

LILIAN KABURA KIONGO OBJECTOR

AND

MARY WANJIKU KARANJA 1ST RESPONDENT

DANIEL KARANJA MUNGAI 2ND RESPONDENT

RULING

1. Before this Court for determination is the summons dated 29TH November 2021 by which the Applicant Lilian Kabura Kiongo seeks the following orders:-
 - “ 1. Spent.
 2. Spent
 3. That there be a stay of execution of the judgment delivered by this Honourable court on 12th November 2021 and of the Certificate of Confirmation of Grant issued on 12th November 2021 and all consequential orders thereto pending the hearing and determination of the Appeal filed at the Court of Appeal.
 4. That the costs of this application be provided for.”
3. The Application which was premised upon Rule 73 of the *Probate and Administration Rules*, order 42 Rule 6 of the *Civil Procedure Rules* 2010 was supported by the Affidavit of even date sworn by the Applicant.



4. The Respondent/Administrator opposed the application through the Replying Affidavit dated 18th January 2021 sworn by Daniel Karanja Muigai the Co-Administrator. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated 16th May 2022 whilst the Respondent relied upon their written submissions dated 12th May 2022.

Background

5. The Applicants herein filed in the High Court an Affidavit of Protest dated 17th February 2020 objecting to the summons for confirmation of Grant dated 25th September 2018 filed by the Respondents in their capacity as Administrators of the estate of the Deceased Peter Karanja Kiongo alias Wakaruma Kiongo who died intestate on 25th December 1976
6. Vide a judgment delivered on 12th November 2021 this court made the following orders:-
 - “(1) The objection dated 17th February 2020 is dismissed in its entirety.
 - (2) The summons for confirmation of Grant dated 25th September 2018 is hereby allowed as prayed.
 - (3) The estate will be distributed in terms of the consent dated 25th September 2018.
 - (4) This being a family matter I make no orders on costs.”
7. Being aggrieved by that judgment the Applicant filed a Notice of Appeal dated 22nd November 2021. Contemporaneously with that Notice of Appeal the applicant filed this present application seeking a stay of execution of the judgment delivered on 12th November 2021.
8. The Applicant submitted the current application had been filed timeously. That the current status quo in respect to the suit land ought to be maintained pending the hearing and determination of her appeal. That if the stay of execution was not granted the entire appeal may be rendered nugatory. Finally, the Applicant argued that she was apprehensive that she would be evicted from the suit property if no orders for stay were granted. That she stood to suffer substantial loss if the orders were not granted as the appeal had overwhelming chances of success.
9. The Respondents in opposing the appeal submitted that whilst the Applicant was entitled to file an appeal against the judgment, the beneficiaries of the estate were equally entitled to enjoy the fruits of their judgment. It was submitted that the Applicant had only annexed a Notice of Appeal and that the Memorandum of Appeal is yet to be filed.
11. On the question of substantial loss the Respondents argued that the Applicant does not actually reside on the suit land which is LR Kiambaa/Waguthu/352. That the Applicant and her children reside on LR Kiambaa/Waguthu/353, which had been gifted to the Applicant’s late husband. The Respondents stated that the aim of this application was merely to delay the distribution of the estate of the Deceased. That this is a suit which commenced way back in 1997 thus it is the other beneficiaries who stand to suffer irreparable loss if the matter is further delayed. The Respondent urge the court to dismiss this application for stay in its entirety.



Analysis and Determination

12. I have considered the application dated 29th November 2021, the Affidavit filed in Reply thereto as well as the written submissions filed by both parties. The only issue for consideration is whether the stay sought by the Applicant ought to be granted.
13. Stay of execution is a discretionary order, which will be granted by the court when warranted by the circumstances of a particular case. Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) 2010 provides for the conditions under which a stay may be granted as follows:-
 - “No order for stay of execution shall be made under sub rule(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.”
14. In [Butt vs Rent Restriction Tribunal](#) [1979] EA eKLR the court held that –
 - “1. The power of the court to grant or refuse an application for a stay execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. 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 that appeal court reverse the judge’s discretion.
 3. 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.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.”
15. Although Order 4 Rule 6 [Civil Procedure Rules](#) is omitted from the list of orders applicable to Succession matters by virtue of Rule 63(1) of the Probate and Administration Rules, section 47 of the [Law of Succession Act](#) and Order 73 of the Probate and Administration Rules grants this court the power to make such orders as may be necessary for the interests of justice to be met. An order for stay of execution is one such order.
16. The judgment in question was delivered on 12th November 2021 while this application for stay was filed on 29th November 2021. Having been filed approximately two (2) weeks after delivery of the judgment I am satisfied that this application for stay was filed without undue delay.
17. The question of the merits or otherwise of the intended appeal are not within the mandate of this court to decide. That is a matter for the Court of Appeal. Suffice to say the Applicant must demonstrate an arguable appeal, which raises triable issues. Unfortunately since no Memorandum of Appeal has as yet been filed this court is unable to see what issues the Applicant intends to raise in her appeal.



18. The Applicant submits that she is likely to suffer substantial and irreparable loss as in the absence of an order of stay as the Administrators will proceed to distribute the estate of the Deceased, which would lead to the eviction of the Applicant from Plot 352, which is the subject matter of the dispute. However, the mere facts that execution is imminent is not in itself proof of substantial loss. In *James Wangalwa & Anor vs Agnes Naliaka Cheseto* [2012] eKLR the Court stated as follows:-

“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 irreparable affect or negate the very essential core of the Applicant as the successful party in the Appeal. This is what substantial loss would entail.”

19. The applicant claims that her appeal will be rendered nugatory if distribution of the estate proceeds as she will be evicted from Plot 352. Firstly, the Respondents averred that the applicant does not actually reside on Plot 352. That she and her children actually reside on Plot 353 which had been allocated to them. The Respondents aver that the Applicant merely put up a structure on Plot 352 in order to solidify her claim to the suit land.
20. The Applicant did not file a Further Affidavit to challenge these averments. I fail to see what loss the Applicant stands to suffer since she does not reside on the suit land. Moreover, no eviction notice has as yet been issued to the Applicant.
21. I note that the Applicant filed the Notice of Appeal on 22nd November 2022 (see Annexure LKK ‘1’ to the Supporting Affidavit dated 29th November 2021). However to date no Memorandum of Appeal has been filed. Despite the passage of nine (9) months the Applicant is yet to file and serve the substantial appeal. This leads court to wonder whether she does in fact intend to file an appeal.
22. This is a very old Succession matter. It was filed in the year 1997 almost twenty five (25) years ago. Litigation it is said must come to an end. It is in the interests of justice to have this estate finalized. The interest of all beneficiaries must be considered. I am not inclined to keep the matter pending for an appeal, which is yet to be filed.
23. Finally I find no merit in this application for stay. The same is dismissed in its entirety. This being a family matter each side shall met its own costs.

DATED IN NAIROBI THIS 5TH DAY OF AUGUST, 2022.

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MAUREEN A. ODERO

JUDGE

