



REPUBLIC OF KENYA



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**Chepchumba v Misoi (Citation Cause E003 of 2021)  
[2022] KEHC 13134 (KLR) (26 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13134 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CITATION CAUSE E003 OF 2021  
EKO OGOLA, J  
SEPTEMBER 26, 2022  
IN THE MATTER OF THE ESTATE OF KIPRONO ARAP MISOI**

**BETWEEN**

**TECLA CHEPCHUMBA ..... CITOR**

**AND**

**JEPKINYOR MISOI ..... CITEE**

**RULING**

1. The applicant approached this court by way of Notice of Motion dated 7<sup>th</sup> September 2021 seeking the following orders;
  1. Spent
  2. Spent
  3. That this Honourable court do order stay of execution of the ruling and order made by this Honourable Court on the day of 9<sup>th</sup> August 2021 pending the hearing and determination of the Citation appeal no. E147 of 2021.
  4. That the appeal herein be heard on priority and the same be heard during the vacation.
  5. That costs of the application be provided for.

The application is based on the grounds set out therein and the contents of the supporting affidavit.

2. The respondent herein instituted a citation cause vide the application dated 19<sup>th</sup> January 2021 and the court granted the orders sought therein which were essentially a temporary injunction against the citee pending the determination of succession proceedings. The court granted the orders sought and in order to enforce these orders the respondent filed an application dated 26<sup>th</sup> May 2021 seeking the help of the OCS Chepterwai police station to provide security. The court allowed the application vide



a ruling dated on 9<sup>th</sup> August 2021. The applicant being dissatisfied with these orders proceeded to file an appeal against the same and the present application

### **Applicant's Case**

3. The applicants' case is that their appeal has high chances of success and the same will be rendered nugatory if the orders sought are not granted. The applicant cited order 42 rule 6 of the [Civil procedure rules](#) 2010 and submitted that the respondent is in the process of leasing land to an unsuspecting third party. The subject parcel is Nandi/surungai/1 which is not registered in the name of the deceased. If the third party leases the land then the substratum of the appeal and citation will be lost.
4. The land in question is in the name of the Wilson K. A Chemwok (deceased) and his estate has never played a part in these proceedings. It was contended that the issue that is likely to be canvassed in the court of appeal is whether it was proper for the superior court to issue orders against the estate of Kiprono Misoi on a property that is forming the estate of a different person. Further, the applicant contended that the court was moved without unreasonable delay as the ruling was delivered on 9<sup>th</sup> August 2021 and the application herein was filed on 10<sup>th</sup> September 2021. The record of appeal was filed on 24<sup>th</sup> August 2021 and the delay of one month was occasioned by the transfer of the Presiding Judge.
5. This being a succession cause, the applicant submitted that security may be untenable. The matter in issue affects the estate more than it does the citee. However, she is willing to provide security as the court may deem fit to order.
6. The applicant cited [Chris Munga N. Bichage vs Richard Nyagaka Tongi & 2 others](#) eKLR in support of the submission that the appeal is arguable with high chances of success. Further, relying on [Halal & Another vs Thornton & Turpin \(1963\) Ltd](#) (1990) eKLR the applicant contended that the appeal will be rendered nugatory if the order for stay of execution is not granted.
7. The applicant produced a copy of the notice of appeal and the memorandum of appeal as evidence that there is an arguable appeal. She maintained that the respondent will not be prejudiced by the orders sought and asked the court to allow the application.

### **Respondent's Case**

8. The respondent filed submissions on 21<sup>st</sup> January 2021. The respondent's case is that the applicant has not shown how he will suffer substantial loss if the orders sought are not granted. The ruling she is challenging on appeal relates to enforcement of injunctive orders which she has not challenged. The orders sought herein are inimical to the injunctive orders given to the respondent. If the orders were granted the court will be sanctioning disobedience of its own orders and encourage the applicant to continue interfering with the orders issued on 22<sup>nd</sup> March 2021 pursuant to the ruling delivered on 15<sup>th</sup> March 2021.
9. The respondent cited [In Re estate of Atanasio karanu](#) (2018) eKLR where the court held;  

The decision of the court on whether substantial loss will occur will depend on the balancing act between the rights of the parties; the applicants'; right to appeal and the right of the respondent to the fruits of his judgment. the onus of proving that substantial loss will occur unless stay is issued rests upon and must be discharged accordingly by the applicant. It is not enough to merely state that loss will be suffered, the applicant ought to show the substantial loss that it will suffer in the event the orders sought are not given.



The respondent urged the application be dismissed and the applicant be ordered to obey the orders issued on 22<sup>nd</sup> March 2021.

## Issues for Determination

### Whether the orders for stay should be granted.

10. The applicant relied on the provisions of order 42 Rule 6 of the Civil Procedure Rules which requires that an applicant 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.
11. The ruling was delivered on 9<sup>th</sup> August 2021 and the application herein was filed on 10<sup>th</sup> September 2021. I find that the application was filed timeously. This being a succession cause, I find that the issue of security will not arise.
12. The issue of substantial loss has been tackled in various decisions. In Machira t/a Machira & Co. Advocates vs East African Standard (No 2) (2002) KLR 63 the Court of Appeal considered as to what amounts to substantial loss and held 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.”
13. I note that the applicant seeks to stay execution of the ruling and order made by this Court on 9<sup>th</sup> August 2021 pending the hearing and determination of the Citation Appeal no. E147 of 2021. The specific orders the applicant is seeking to stay are;
  1. That the OCS Chpeterwai police station do provide security and ensure observance of the orders issued on the 22<sup>nd</sup> day of March, 2021 pursuant to the ruling delivered on the 15<sup>th</sup> day of March 2021.
  2. That costs of the application be in the cause.
14. It is clear that the orders sought to be stayed are those providing security for the enforcement of the orders issued on 22<sup>nd</sup> March 2021 arising from the ruling of 15<sup>th</sup> March 2021. If these orders are stayed it does not prohibit the respondent from enforcing said orders, it only prohibits the OCS Chepterwai police station from providing security for the same. It would be more prudent on the part of the applicant to seek the stay of orders issued on 22<sup>nd</sup> March 2021 as the same were for a temporary injunction against the citee, restraining her from interfering with the citor's use of the land parcel Nandi/surungai/1 pending the determination of the citation. The order the applicant seeks to stay only serves to augment the implementation of the orders issued on 22<sup>nd</sup> March 2021.



15. The applicant has not proved how allowing security for the enforcement of the temporary injunction threatens the substratum of the intended appeal. The applicant has not produced any evidence that the said land is to be sold to a third party as alleged. That notwithstanding, I do take note that the suit land in question is indeed in the name of Wilson K.A Chemwok and not the deceased herein. It is clear from the pleadings and the proceedings that there are issues that need to be determined with regard to the parcels of land forming the estate. The same shall be determined in the citation cause and not at this juncture.
16. From the foregoing, I find and hold that the application lacks merit. The same is dismissed. Parties do bear own costs.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 26<sup>TH</sup> OF SEPTEMBER 2022.**

**E. K. OGOLA**

**\_\_JUDGE**

