



REPUBLIC OF KENYA



KENYA LAW
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**Kiama v Kiama & 3 others (Appeal E018 of 2021)
[2022] KEHC 13100 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13100 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
APPEAL E018 OF 2021
FN MUCHEMI, J
SEPTEMBER 22, 2022**

BETWEEN

WILLIAM WAITHAKA KIAMA APPLICANT

AND

ANN NJOKI KIAMA 1ST RESPONDENT

JANE WANGECHI KIAMA 2ND RESPONDENT

PAULINE WANJIKU KIAMA 3RD RESPONDENT

PAUL NDEGWA KIAMA 4TH RESPONDENT

*(Being an appeal from the judgment and decree of the Honourable R. Kefa SRM,
delivered on 30th June 2021 in Nyeri Chief Magistrate Succession Cause No. 199 of 2018)*

RULING

Brief facts

1. This application dated July 19, 2021 is brought under section 50 of the [Law of Succession Act](#) and rules 49, 59, 73 and 74 of the [Probate and Administration Rules](#) seeking for orders of stay of execution of the judgment delivered on June 30, 2021 in Nyeri CM Succession Cause No 199 of 2018 pending hearing and determination of this appeal.
2. In opposition of the said application, the respondents filed two replying affidavits dated 31st January and May 19, 2022.



The Applicant's Case

3. It is the applicant's case that judgement was delivered on June 30, 2021 and being aggrieved by the decision, the applicant lodged an appeal in this court on July 21, 2021. The applicant contends that there is imminent danger of execution of the decree of the trial court rendering the appeal nugatory.
4. The applicant states that his main ground of appeal is that the 2nd, 3rd and 4th respondents intermeddled with the estate by selling the deceased's LR No Tigithi/Matanya Block 299 about 4 acres and LR No Mwichwiri/Kiamathaga/212 about 2 acres, after the deceased's demise but the trial magistrate did not take this fact into account when she shared the remainder of the estate equally amongst all the deceased's children. As such, the applicant prays that the court allow for stay of execution pending appeal.

The Respondents' Case

5. The respondents contend that they have not and are not on the verge of executing the court's judgment and that the applicant has not supplied sufficient evidence to show that the respondents sold land parcels LR No Tigithi/Matanya Block 299 and Mwichwiri/Kiamathaga/212 as alleged. Further, the applicant is well aware that the said parcels of land were already transferred to other parties by the respondents' parents when they were alive. The said LR No Tigithi/Matanya Block 299 is registered under the Archdiocese of Nyeri and LR No Mwichwiri/Kiamathaga/212 was transferred to other entities.
6. The respondents state that the judgment by the trial court portrayed equality among the deceased's children by equally distributing the properties amongst all the beneficiaries. The applicant does not want equal distribution as he seeks to gain by inflicting pain and torment to them by filing the instant appeal and seeking stay of execution of the trial court's judgment.
7. The respondents' further state that they are entitled to the fruits of the judgment and as such, they believe that the instant appeal is a way of delaying justice and waste of time and resources.
8. Parties elected not to put in written submissions.

Issue for Determination

9. The main issue for determination is whether the applicant has met the prerequisite for grant of stay of execution pending appeal.

Whether the applicant has satisfied the conditions set out in order 42 rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

10. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under order 42 rule 6(2) *Civil Procedure Rules*. Order 42 rule 6 of the *Civil Procedure Rules* stipulates:-
 1. "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 orders set aside.

2. 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 1st 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.

11. Thus under order 42 rule 6(2) of the [Civil Procedure Rules](#), an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

12. These principles were enunciated in [Butt vs Rent Restriction Tribunal](#) [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

1. 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.
2. 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.
3. 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.
4. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. the court in exercising its powers under Order XLI Rule 4(2) (b) of the [Civil Procedure Rules](#), can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

Substantial loss

13. Under this head, an applicant must clearly state what loss, if any, he stands to suffer. This principle was enunciated in the case of [Shell Ltd vs Kibiru and Another](#) [1986] KLR 410 Platt JA set out two different circumstances when substantial loss could arise as follows:-

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the [Civil Procedure Rules](#) was not met. There was no evidence of substantial loss to the



applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts....”

The learned judge continued to observe that:-

“It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.

14. Earlier on, Hancox JA in his ruling observed that:-

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would...render the appeal nugatory.

This is shown by the following passage of Cotton LJ in Wilson vs Church (No.2) (1879) 12 ChD 454 at page 458 where he said:-

“I wish to state my opinion that when a party is appealing, exercising his undoubtedly right of appeal, this court ought to see the appeal, if successful, is not rendered nugatory. “

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

15. The applicant states that the grant is likely to be executed by the respondent which will render his appeal nugatory. In this appeal, it is correct to say that if the estate of the deceased is distributed before the appeal is heard, then the appeal may be rendered nugatory which would render the applicant to suffer substantial loss.

16. It is not in dispute that the deceased’s estate was distributed equally among his children including the applicant. If the grant was to be executed, the applicant will not suffer any loss in that he will still be in equal footing with his siblings. The parties who bought the land parcels he is complaining of are in possession of the said land. In the event that the appeal is successful, the said parcels would be additional assets for distribution to the beneficiaries. In my view the applicant has failed to establish that he will suffer substantial loss if the order sought are not granted.

The Application Has Been Made Without Unreasonable Delay.

17. The judgment in Succession No 199 of 2018 was delivered on June 30, 2021 and the present application was filed on July 21, 2021. I find that the application was brought timeously.



Security of costs.

18. The applicant ought to satisfy the condition of security. In the persuasive case of *Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd* [2019] eKLR the court observed:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

19. The requirement for security serves the purpose of securing the costs of the respondent in the event that the appeal is not successful. Additionally, it puts a sense of responsibility on the appellant to fast-track his appeal thus preventing undue delay. Any delay in the appeal continues to cause suffering on the respondents in that they cannot enjoy the fruits of their judgement. It is trite law that even in an appeal of this nature security is necessary to bind the appellant in his course in the appeal and to safeguard loss on part of the respondent in the event that the appeal is not successful.
20. The applicant has not given an offer for security but this court has the discretion to set reasonable terms of security.

The Balance of Convenience

21. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Mohammed Salim t/a Choice Butchery vs Nasserpuria Memon Jamat* (2013) eKLR where the court upheld the decision of *Portreitz Maternity vs James Karanga Kabia* Civil Appeal No. 63 of 1991 and stated that:

“That right of appeal must be balanced against an equally weighty rigid right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

22. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question is whether there is just cause for depriving the respondents their right of enjoying their judgment. The respondents state that the trial court distributed the deceased's estate equally amongst the children of the deceased. It is further contended that the appeal by the applicant does not have high chances of success since land parcels LR No Tigithi/Matanya Block 299 and Mwichwiri/Kiamathaga/212 were already transferred by their parents before their demise and that the applicant failed to present any evidence against the respondent that they had intermeddled with the deceased's estate by disposing of the two parcels of land before the succession proceedings were filed.



23. It is not in dispute that the estate of the deceased was distributed equally among his children, which is the law. This position is not likely to change even if the appeal is successful for the reason that distribution was done in accordance with the law. A successful appeal can only bring an advantage of more land for distribution to all the beneficiaries. As such, it is the respondents who are likely to suffer more than the applicant in the event that the orders are sought herein not granted. This is because the appeal may take long to be determined and the respondents will not enjoy the fruits of judgement in the near future. In my considered view, the balance of convenience does not tilt to the applicant but to the respondents.
24. On perusal of the memorandum of appeal and of the affidavit evidence of the parties, I am not convinced that this appeal has high chances of success however the applicant has a right to lodge his appeal and be accorded a hearing.
25. Consequently, the applicant has failed to demonstrate the requirements of this application for stay. I find not merit in the application and dismiss it accordingly.
26. Due to the nature of this case, I order that each party meets their own costs.
27. It is hereby so ordered.

DATED AND SIGNED AT NYERI THIS 22ND DAY OF SEPTEMBER, 2022.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 22ND DAY OF SEPTEMBER 2022

