



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Anderea M’ikiugu (Deceased) (Succession Cause  
23 of 2005) [2022] KEHC 13891 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 13891 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 23 OF 2005  
TW CHERERE, J  
OCTOBER 19, 2022  
IN THE MATTER OF THE ESTATE OF ANDEREA M’IKIUGU (DECEASED)**

**BETWEEN**

**JUDAH KIUMBE ..... PETITIONER**

**AND**

**TERESIA KANYUAERA THIURU ..... OBJECTOR**

**RULING**

1. By an order dated September 29, 2021, Otieno J made the following orders:
  1. Petitioner was adequately provided for in LR No Ntima/Igoki/1719 which was a gift *inter vivos*.
  2. Deceased estate in LR No Kiirua/Naari/527 be shared equally between Rebecca Naitore, M’Tirimania, Rael Mwari Jason, Damaris Kanoti Mathiu, Joyce Kananu Kaburia, the estate of Abel Mutua (deceased) and the estate of Benjamin Thiuru (deceased).
2. By Chamber Summons dated December 6, 2021 filed on January 20, 2022, Judah Kiumbe (petitioner/ applicant) seeks stay of the order dated September 29, 2021 (referred to at paragraph 1 above) pending the hearing and determination of an intended appeal.
3. The summons is based on grounds on its face. Application is supported by an affidavit sworn by petitioner/ applicant on December 1, 2021 in which he avers that he is aggrieved by the ruling delivered on September 29, 2021 and intends to appeal against it and already filed a notice of appeal on October 13, 2021. He additionally avers that he stands the risk of being evicted from LR No Kiirua/Naari/527 which is the only home he knows.
4. The summons is opposed on the basis of replying affidavits sworn by Rael Mwari Jason (a beneficiary) on February 3, 2022 in which she contends that as at the time of filing the replying affidavit in February



2022 which was 5 months after the impugned ruling, applicant had not filed an appeal. She contends that the application is a ploy to delay execution which prejudices the beneficiaries of the deceased's estate.

5. In the second summons dated September 21, 2022, applicant seeks orders among others an inhibition on LR No Kiirua/naari/7014 to LR No Kiirua/naari/7019 and a declaration that the subdivision of LR No Kiirua/naari/527 was in contempt of court. The summons is supported by applicant's affidavit sworn on September 21, 2022.
6. The summons is opposed on the basis of replying affidavits sworn by Rael Mwari Jason (a beneficiary) on October 10, 2022 in which she contends that on February 22, 2022, court issued an order for subdivision of LR No Kiirua/naari/527 and directed the deputy registrar of the court to sign the transmission documents on behalf of both administrators who are the parties herein. She additionally avers that as at July 4, 2022 when application of that date was filed and an order for *status quo* issued, the land had already been subdivided and mutation forms issued.

### **Analysis and Determination**

7. I have considered the both summons in the light of the affidavits on record and the issue for determination is whether an orders of stay of execution and inhibition order ought to be granted.
8. Grant of stay of execution pending appeal is governed by order 42 rule 6 of the [Civil Procedure Rules](#), the relevant part of which states as follows:
  1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 order set aside.
  2. No order for stay of execution shall be made under sub rule (1) unless—
    1. 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
    2. ....
    3. ....
    4. ....
    5. ....
    6. ....
9. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in order 42 rule 6(2), aforementioned namely:
  - (a) that substantial loss may result to the applicant unless the order is made,
  - (b) that the application has been made without unreasonable delay, and



- (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR
10. As to what is substantial loss, it was observed in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, 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.”
11. In the instant case, the applicant’s only complaint is that he is apprehensive that respondents might evict him from deceased’s estate where he lives. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting an order of stay of execution and the party seeking stay bears a specific burden regarding proof of substantial loss.
12. The Applicant has not denied that he owns LR No Ntima/Igoki/1719. It therefore goes without saying that the applicant will not be rendered homeless in the event that this court’s order dated September 29, 2021 is executed for the reason that he owns land where he can settle.
13. Consequently, I find that the applicant has not demonstrated that the distribution of deceased’s estate as ordered by the court will occasion him any substantial loss.
14. From the foregoing analysis therefore, the chamber summons dated December 6, 2021 filed on January 20, 2022 is found to have no merit.
15. Concerning the summons dated September 21, 2022, the court record reveals that the court by an order dated on February 22, 2022, sanctioned the subdivision of LR No Kiirua/Naari/527 and directed the deputy registrar of the court to sign the transmission documents on behalf of both administrators who are the parties herein.
16. Respondent’s averments that as at July 4, 2022 when application of that date was filed and an order for *status quo* issued, the land had already been subdivided and mutation forms issued have not been controverted. I therefore do not find any basis for applicant’s claim that the subdivision was made in contempt of a court order.
17. From the applicant’s affidavit sworn on September 21, 2022, a third issue that was not raised by either of the parties arises. Whereas the court by the order dated September 29, 2021 directed that Deceased estate in LR No Kiirua/naari/527 be shared equally between Rebecca Naitore, M’Tirimania, Rael Mwari Jason, Damaris Kanoti Mathiu, Joyce Kananu Kaburia, the estate of Abel Mutua (deceased) and the estate of Benjamin Thiuru (deceased), the copies of certificates of official search filed by applicant reveal that the land was not subdivided in terms of the court order but was instead subdivided into 6 portions and title deeds in respect thereof were issued as follows:
1. LR No Kiirua/Naari/7014 in the name of Deputy Registrar Meru Court on behalf of Judah Kiumbe and Teresia Kanyua Thiuru (administrators).



2. LR No Kiirua/naari/7015 to Rael Mwari Jason.
  3. LR No Kiirua/naari/7016 certificate of official search not annexed.
  4. LR No Kiirua/naari/7017 to Rebecca Naitore, M’Tirimania.
  5. LR No Kiirua/naari/7018 in the name of Deputy Registrar Meru Court on behalf of Judah Kiumbe and Teresia Kanyua Thiuru (administrators).
  6. LR No Kiirua/naari/7019 in the name of Deputy Registrar Meru Court on behalf of Judah Kiumbe and Teresia Kanyua Thiuru (administrators).
18. Respondent has not offered any explanation for her failure to comply with the court order concerning subdivision. It is to be remembered that court orders are not made in vain. This was appreciated by Ojwang, J (as he then was) in *B v Attorney General* [2004] 1 KLR 431 that:
- “The court does not, and ought not to be seen to, make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.
19. Court frowns upon parties that do not comply with court orders. If for any reason the respondent had difficulty in complying with the court orders, the honourable thing to do was to come back to court and explain the difficulties faced by the need to comply with the order for the reason that once a court order is made in a suit, the same is valid unless set aside on review or on appeal.
20. From the foregoing, it is hereby ordered:
1. All the 6 titles issued subsequent to subdivision of LR No Kiirua/Naari/527 are hereby cancelled.
  2. The land shall revert to LR No Kiirua/Naari/527 and shall be shared equally between Rebecca Naitore, M’Tirimania, Rael Mwari Jason, Damaris Kanoti Mathiu, Joyce Kananu Kaburia, the estate of Abel Mutua (deceased) and the estate of Benjamin Thiuru (deceased) as ordered by the court on September 29, 2021.
  3. In order to preserve the subject of the intended appeal, it is hereby ordered that upon distribution of deceased’s estate comprised in LR No Kiirua/Naari/527; inhibition shall issue on each of the 6 titles and shall remain in force pending the hearing and determination of the intended appeal and/or until any and or further orders of this court.
  4. Mention on February 15, 2023 to confirm compliance.

**DATED AND DELIVERED IN MERU THIS 19<sup>TH</sup> DAY OF OCTOBER 2022**

**WAMAE T W CHERERE**

**JUDGE**

**Appearances**

**Court Assistant - Morris Kinoti**

**For petitioner/applicant- Mr Mugambi for Muthoga Gaturu & Co Advocates**

**For respondent - N/A**

**For Rael Mwari - Mr Kaimenyi for Kaimenyi Kithinji & Co Advocates**

