



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Kibore Arap Kurgat (Miscellaneous Succession Cause
85 of 1999) [2022] KEHC 16867 (KLR) (23 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16867 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS SUCCESSION CAUSE 85 OF 1999
RN NYAKUNDI, J
DECEMBER 23, 2022**

BETWEEN

MARTHA CHEPCHUMBA KURGAT RESPONDENT

AND

JOHN ADORI WASORE APPLICANT

AND

KAPSAGAWAT PRIMARY SCHOOL INTERESTED PARTY

**HERMAN AGAROMBA (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF JORAM OPATI MULIMI) INTERESTED PARTY**

RULING

1. The applicant approached this court vide a notice of motion dated October 13, 2022 under certificate of urgency seeking the following orders;
 1. That this application be certified urgent and heard ex-parte in the first instance.
 2. That pending hearing interpartes of this application there be stay of execution of judgement dated September 26, 2022 and stay of any activity on the suit land.
 3. That pending hearing and determination of the intended appeal, there be stay of execution of judgement herein dated September 26, 2022 and with stay of any activity on suit land.
 4. That costs be provided for.
2. The application is premised on the grounds set out in the same and the contents of the affidavit sworn in support of said application.



3. The brief facts underlying the application are that this court delivered a judgment dated September 26, 2022 distributing the estate of the deceased that comprised of the parcel of land known as Nandi/Chebilat/517. The applicant being dissatisfied with the judgment and decree of the court lodged a Notice of Appeal and filed the present application.

Applicant's Case

4. It is the applicant's case that the intended appeal has high chances of success especially that the persons who sold the suit land to the 1st interested party had no capacity to do so. Upon purchase of the land, 1 planted blue gum trees on the edges of the land which trees are now quite huge, the interested party cut down some of them before the honourable court stopped the same. Once again in manner of wasting the land, the 1st interested party started constructing pit latrines all over the land before the court stopped them. The applicant is apprehensive that if this honourable court does not stopped execution of the judgement herein, my trees shall be cut down and sold by the 1st Interested party, equally the land shall be wasted by the activities of the 1st interested party.
5. The trees on the subject property have not been valued and the actual value can only be determined by the timber that can be obtained therefrom and the applicant has not found reason to harvest them at the moment. He shall suffer substantial loss if the orders sought are not granted.
6. The judgement herein was delivered on September 26, 2022 and therefore this application is timeous. He is ready and willing to abide by any condition imposed as security for performance of the resultant decree.

Respondent's Case

7. The 1st Interested party/Respondent opposed the application vide a replying affidavit dated November 14, 2022. He contended that the applicant has not satisfied the prerequisite conditions set out under Order 42 Rule 6 of the [Civil Procedure Rules, 2010](#) to warrant the court to exercise its discretion in favour of the Applicant. Further, that the applicant has failed to offer security for the due performance of the appeal and neither has the applicants demonstrated to court what substantial loss it will suffer should the application before court be disallowed.
8. An application for grant of stay of execution pending appeal cannot be granted merely on apprehensions and/or misapprehensions on the part of the Applicant. the respondent deposed that the 1st Interested Party stands to suffer prejudice should this application be allowed while noting that they are successful litigants who are entitled in law to enjoy the fruits of the judgment, all circumstances of this case considered.
9. He urged that the application be dismissed with costs to the respondent.

Issues For Determination

Whether the orders for stay of execution should be granted

10. The nature of succession matters presents a challenge when orders of stay are sought against orders of the court, more so when it concerns a matter that is as old as the present one. I have considered the application, the response thereto, and submissions by both counsels. The conditions for granting of stay of execution pending appeal are well settled. An order for stay is a discretionary remedy. However, the discretion is circumscribed by the conditions set out under Order 42, Rule 6 of the [Civil Procedure Rules](#). These conditions are that;



1. The application should be made without undue delay;
 2. Should show that substantial loss may be suffered by the applicant unless the order is made and finally
 3. That the applicant should offer such security as may be ordered by the court.
11. The Court will not issue any stay orders unless the two grounds set out in sub-rules (a) and (b) of Order 42 Rule 6(2) are satisfied. Rule 6(2) provides that:
- 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.”
12. In granting stay of executions, such orders are purposed 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. That notwithstanding, 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.
13. In the present suit, the applicant is apprehensive that the respondents will cut down the trees on the premises and the same will amount to substantial loss. In the case of *Adah Nyabok v Uganda Holding Properties Limited (2012)*, in which Mwera J (as he then was) stated that:
- Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal”
14. In *Daniel Chebutul Rotich & 2 Others v Emirates Airlines* Civil Case No 368 of 2001, in which Musinga, J (as he then was) explained substantial loss in the following terms:
- ‘...substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.’
15. I have taken into consideration the age of the matter. Whereas the applicant is well within his rights to appeal there must be a balance struck with the rights of the respondent to enjoy the fruits of the judgment. In the premises, I find that the application for stay is not merited.
16. The application is dismissed, each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIA EMAIL ELDORET THIS 23TH DAY OF DECEMBER, 2022.

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R NYAKUNDI
JUDGE



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