



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**SUCCESSION CAUSE NO 3051 OF 2012**

**IN THE MATTER OF THE ESTATE OF NJOROGE KUNGU (DECEASED)**

**KUNGU MUTHUA.....APPLICANT**

**VERSUS**

**JAMES ICHARIA KUNGU.....RESPONDENT**

**RULING**

Before me is an application by Kungu Muthua, hereafter “the Applicant”, seeking leave for stay of execution of the Ruling of Kimaru J of 26<sup>th</sup> September 2014. In that Ruling, the Court ruled in favour of James Icharia Kungu, hereafter “the Respondent”, ordered as follows:

1. **THAT** the properties that comprise the estate of the deceased shall be inherited as proposed by the Applicant in his application, particularly in paragraph 6 of the affidavit in support of his application for confirmation of grant dated 1<sup>st</sup> March 2013.
2. **THAT** to obviate the necessity of the Applicant making an application to compel the Respondents to execute the necessary conveyancing documents in his favour, the Deputy Registrar of this court be and is hereby authorized to perform the function.
3. **THAT** the applicant shall have the costs of the application.
4. **THAT** leave to appeal be and is hereby granted.
5. **THAT** stay of execution be and is hereby granted for 14 days.

The Court subsequently issued a certificate of confirmation of grant in respect of the estate of the late Njoroge Kungu, hereafter “the deceased”, and directed that the deceased’s estate be distributed as follows:

<b>Beneficiaries</b>	<b>Property</b>	<b>Share of Property</b>
Kungu Muthua	Githunguri/Nyaga/378 ‘A’	1.50 acres

James Muti Njoroge	Githunguri/Nyaga/378 'A'	1.40 acres
Kungu Muthua	Githunguri/Nyaga/378 'B'	Equal shares
James Muti Njoroge	Githunguri/Nyaga/378 'B'	Equal shares
James Icharia Kungu	Githunguri/Nyaga/T.507	Absolutely
James Icharia Kungu	Githunguri/Nyaga/T.510	Absolutely

The Applicant was dissatisfied with both the Court's decision and the mode of distribution of the deceased's estate, and subsequently filed a notice of appeal on 7<sup>th</sup> October 2014. The Applicant moved this Court on 24<sup>th</sup> December 2014 by way of a summons made under the provisions of the **Judicature Act** and **Rule 3(2)** of the **High Court Practice and Procedure Rules** seeking from this Court a granted of stay of execution of against the decision of Kimaru J of 26<sup>th</sup> September 2014. This application was premised, among others, on the ground that unless a stay of execution is granted the Applicant is likely to suffer as the Respondent, in whose favour the impugned orders were granted, would cause himself to be registered as the owner of Githunguri/Nyaga/T.507 and Githunguri/Nyaga/T.510. In the supporting affidavit filed together with his application, the Respondent expressed anxiety that unless the application for stay of execution was heard, his intended appeal would be overtaken by events.

The Respondent opposed as invalid and unnecessary the Applicant's summons for stay of execution in his replying affidavit filed on 6<sup>th</sup> February 2015. He based his argument on the grounds that: the ruling of Kimaru J of 26<sup>th</sup> September 2014 was timely and appropriate; the Applicant had not shown an appeal number to show this Court; and the stay of execution should be dismissed for lack of merit. The Respondent gave evidence that the matter was filed at Githunguri Law Courts as Succession Cause No. 12/93 and the same was decided on 18<sup>th</sup> January 1996. At the instance of the aggrieved party, the matter was appealed to the High Court vide High Court Appeal No. 271/1996, which was decided on 10<sup>th</sup> February 1998 and that decision was never appealed despite the Respondent having been served with a notice of appeal. On the other hand, the Applicant maintained that it was his intention to lodge an appeal and that the same, if granted, would be rendered irrelevant by reason of being overtaken by events.

The main issue for determination in the present case is whether the Applicant has made a satisfactory case to warrant the grant by this Court of a stay of execution of the decision of Kimaru J of 26<sup>th</sup> September 2013. Being a succession matter, it is however useful to set out the relevant provisions of the law of succession on which a stay of execution of a decision of the Succession Court may be founded. Since there is no specific provision for making an application to stay the execution of a decision of the Succession Court, **Rule 49** of the **Probate and Administration Rules** provides:

***A person desiring to make an application to the Court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.***

While the Applicant did not rely on the above provision as the legal basis of his application for stay of execution, it is noteworthy that his application complies with its formal requirements. More importantly, it is useful to state at the outset that this Court has inherent jurisdiction to grant a stay of execution of a decision, and this is provided in **Rule 73** of the **Probate and Administration Rules**:

***Nothing in these Rules shall limit or otherwise the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.***

The above provision should be read together with **Article 165** of the **Constitution** which invests in this Court unlimited original jurisdiction in civil matters, except with regard to matters within the exclusive jurisdiction of the Supreme Court or other courts of concurrent jurisdiction. Hence, this Court finds that it is properly seized of the present matter.

As a general rule, an order for stay of execution is a discretionary order and can only issue when the Court seized of the matter has satisfied itself, on the basis of the evidence adduced, that the Applicant stands to suffer irreparable loss and that the application is made without unreasonable delay. This view is well settled in our law and has been clarified by Gikonyo J in the case of **TURBO TRANSPORTERS LTD V ABSALOM DOVA LUMBASI [2012] e KLR**. The applicable law regarding the jurisdiction of this Court to grant a stay of execution is stipulated in **Rule 6 of Order 42 of the Civil Procedure Rules 2010**, which provides:

***1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except insofar 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 –***

***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.***

This Court has considered the applications of both parties and notes that although the Applicant filed a notice of appeal, he has not produced any formal document from the forum to which his intended appeal is preferred; in this case, from the Court of Appeal. The applicable law with regard to an intended appeal to the Court of Appeal is **Rule 5(2)(b) of the Court of Appeal Rules** which provides:

***Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or stay execution but the Court may***

***a. ....***

***b. in any civil proceedings where Notice of Appeal has been lodged in accordance with Rule 75, order stay of execution, an injunction or stay of any further proceedings on such terms as the Court may think just.***

The judgment of the Court of Appeal per Omolo JA in **SAFARICOM LIMITED V OCEAN VIEW BEACH HOTEL LIMITED & 2 OTHERS**, Civil Application No. 327 of 2009 provides useful guidance on the procedural and substantive requirements to be considered by this Court when assessing an application for stay of execution pending appeal to the Court of Appeal:

***At the stage of determining an application under Rule 5(2)(b) there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be an intention to appeal which is manifested by lodging of a Notice of Appeal. If there is no Notice of Appeal lodged, one cannot get an order under Rule 5(2)(b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by the lodgment of the Notice of Appeal, the Court of Appeal would have no business to meddle in the decision of the High Court.***

In the present case, the Applicant has filed a notice of appeal but there is no further evidence by way of a document that has been served on this Court to support the claim by the Applicant that he has in fact lodged an appeal in the Court of Appeal. Nor is there any convincing indication from his evidence to support his case for a grant of stay of execution pending appeal. It is important to recall that even though

an actual appeal has not been lodged by the Applicant, an intention to appeal may be sufficient. However, a notice of appeal is not by itself sufficient; there is need for further evidence of the necessity to disturb a decision of this Court by way of appeal. But the question arises as to how an intention to appeal may be discerned. The answer to this may be discovered by examining the ordinary meaning and object of the word “appeal”. The *Black’s Law Dictionary* 8<sup>th</sup> ed (2004) defines the word “appeal” as follows:

***A proceeding undertaken to have a decision reconsidered by a higher authority; especially the submission of a lower court’s or agency’s decision to a higher court for review and possible reversal ....***

The notice of appeal filed by the Applicant constitutes preliminary evidence of an intention to appeal but much of its convincing force is blunted by the failure to follow it up with the actual appeal. It only discloses the desire to have a decision reconsidered, but it does not make clear the end of having that decision reviewed or possibly reversed. If the Applicant had provided supplementary evidence to demonstrate that he has taken deliberate procedural steps towards appealing the decision of this Court, then there would be no justification in not allowing his application for stay of execution. However, no such evidence was provided. This Court also takes note of the Respondent’s evidence that despite being served with a notice of appeal in respect of this Court’s decision of 10<sup>th</sup> February 1998, no appeal was lodged by the Applicant. While this hardly constitutes a conclusive basis on which to deny the Applicant’s application for stay of execution, it makes apparent the need for further proof that an actual appeal has been or is being lodged. Otherwise, the Respondent may be deprived of his long-awaited victory without justifiable cause. In this regard, the Applicant has failed to comply with implicit requirement of **sub-rule (1) of Rule 6 of Order 42** of the **Civil Procedure Rules** which requires this Court to satisfy itself that the application for stay of execution has been granted or refused by the Court where the intended appeal has been lodged.

Moreover, **Rule 5(2)(b)** of the **Court of Appeal Rules** envisages that an Applicant who seeks to secure a stay of execution should demonstrate an arguable case and show that the intended appeal would be rendered nugatory if the stay is not granted. It is not the place of this Court to speculate on whether such a case has been or has not been made out by the Applicant, but the evidence on record does not support the Applicant’s case.

Be that as it may, this Court is also guided by **sub-rule (2) of Rule 6 of Order 42** of the **Civil Procedure Rules**; it requires the Court to satisfy itself that the Applicant will likely suffer substantial loss unless the execution is not stayed, and that the application was made without unreasonable delay. This Court’s assessment of the grounds for application of stay of execution has not convinced this Court that it makes a sufficient case for the likelihood of substantial loss if the application does not succeed. The only reason advanced by the Applicant to support his claim is on the face of his application; that the Respondent will register himself as the owner of Githunguri/Nyaga/T.507 and Githunguri/Nyaga/T.510. This claim, even if it not improbable, is not of itself a sufficient basis on which to sustain the argument that the Applicant will suffer substantial loss if the stay is not granted.

The requirement of proof that the application was brought within reasonable time and without undue delay plays the dual role of protecting the interests of the Applicant and those of the Respondent. It recognizes the Applicant’s right to appeal against the execution of an order with which he feels aggrieved, but it also seeks to protect the interests of the Respondent in whose favour that orders was issued. In the case of **TURBO TRANSPORTERS LTD V ABSALOM DOVA LUMBASI [2013] e KLR**, the Court per Gikonyo J emphasized the relevance of the duration between an impugned decision being issued and the filing of the application for stay of that decision. After filing a notice of appeal on 7<sup>th</sup> October 2014, the Applicant in this case filed his application on 24<sup>th</sup> December 2014 for a stay of execution of the orders issued by this Court per Kimaru J on 26<sup>th</sup> September 2014. That application was lodged over fifty (50) days later, which is hardly a celebration of promptness. However, the record shows that the Applicant had requested to have the proceedings and the orders supplied to him. In the circumstances, it may be fair to give him the benefit of doubt that his application was brought without unreasonable delay. This finding is supported by the fact that the Applicant was prompt in filing his notice of appeal within

eleven (11) days.

On the other hand, this Court must also consider the timing of the application in the broader context of the history of the case, and more particularly in light of the objective sought by the Applicant in asking for a stay of execution. In the case of **M/S PORT REITZ MATERNITY V JAMES KARANGA KABIA Civil Appeal No. 63 of 1997**, the Court observed that:

***That right of appeal must be balanced against an equally weighty 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.***

Thus, in the present case this Court must satisfy itself that the Applicant's application does not have as its main object to frustrate the Respondent's benefit of the outcome of the suit. It will be recalled that the present matter originated from an appeal by the Applicant against a decision of a subordinate court which adopted an award. Despite having participated in the arbitration proceedings and the evidence of the same being on record, the Applicant disowned the award and appealed against it. His appeal was unsuccessful. He subsequently exercised his right to appeal further by filing a notice of appeal and the present application. An examination of the evidence on record makes it difficult for this Court to conclude that the Applicant has a justifiable cause in seeking for a stay the execution. The opposite is less difficult to conclude; that is, the Applicant is keen to scuttle the process of distribution of the deceased's estate as initially agreed by him and upheld by this Court. Instructive guidance on the considerations that the Court must take into account when balancing the Applicant's right of appeal vis-à-vis the Respondent's right to benefit from the decision that is sought to be appealed from can be found in our case law. In the case of **BOARD OF GOVERNORS, MOI HIGH SCHOOL KABARAK & ANOTHER V MALCOLM BELL & OTHERS**, SC Petitions No. 6 & 7 of 2013, where the Supreme Court of Kenya, referring to the South African Supreme Court of Appeal's decision in **New Clicks South Africa (Pty) v Minister for Health and Another 2005 (3) SA 238 (SCA)**, articulated the following general principle concerning the grant of an order of stay pending appeal:

***The advantages and disadvantages likely to follow upon the granting of the order must be weighed. If overall, and with due regard to divergent interests and considerations of convenience affecting the parties, it appears that the advantages would outweigh the disadvantages, the Court would normally grant the application.***

In view of the foregoing, this Court is not satisfied that the Applicant has made a convincing case to sustain his prayer for a grant of stay of execution. This court has the jurisdictional power to grant the prayer sought, but it also has the duty to exercise judicious discretion in that regard. The attendant obligations of this duty are more exacting in this particular case because, being a court of law and equity, this Court must ensure that fairness and justice are integral to the process of decision-making, both in terms of its procedural and substantive aspects. This view finds support in the case of **EQUITY BANK LTD V WEST LINK MBO LTD Civil Appeal No. 78 of 2011** where Musinga JA observed:

***Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met.***

In its analysis of the law and the facts of this case, the Court finds that it would neither be fair nor advance the objects of justice to allow the application for an order of stay of execution pending appeal.

In the premises therefore, this Court orders as follows:

- a. The Applicant's application is dismissed.
- b. The properties that comprise the estate of the deceased shall be inherited as set out in the Ruling of this Court of 26<sup>th</sup> September 2014 and confirmed in the final mode of distribution outlined in the certificate of confirmation of grant in respect of the deceased's estate.

c. The status quo be maintained.

d. Each party is free to apply.

e. No orders as to costs.

It is so ordered.

**DATED AT NAIROBI THIS 24<sup>th</sup> DAY OF MARCH 2015**

**M. MUIGAI**

**JUDGE**