



REPUBLIC OF KENYA



KENYA LAW
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**Kaura v M’Mwitari (Civil Appeal E13 of 2024)
[2025] KEHC 674 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 674 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E13 OF 2024**

JN NJAGI, J

JANUARY 23, 2025

BETWEEN

KANYUA KAURA APPELLANT

AND

GAKII M’MWITARI RESPONDENT

RULING

1. The matter for determination in the Application dated 10th September 2024, which seeks the following orders: -
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this appeal the court do issue an order of stay of execution of Ruling on 8th August 2024.
 - d. Spent
 - e. That the Honourable court be pleased to order that an inhibition be issued and the same be registered against the parcel of land known as No. Nyaki/thuura/2148 to restrict any dealing or transfer of the said parcel of land pending the hearing and determination of this cause.
 - f. That costs of this application be provided for.
2. The Application is propped by the grounds set out on its face and is supported by the Affidavit of the Applicant sworn on even date.
3. In a nutshell, the Applicant states that she had filed summons for revocation of the grant issued by the Chief Magistrate’s court at Meru in Succession Cause No. 316 of 2026 (Sic). That the matter was heard and the court dismissed her application. That she is aggrieved by the said Ruling and has



filed this Appeal. That the Appeal has a high likelihood of success and unless the orders sought are granted, the appeal shall be rendered nugatory. That the Respondent shall not suffer any prejudice if the applications is allowed.

4. The Respondent opposed the application through a replying affidavit sworn on 29th October 2024.
5. In a nutshell, the Respondent states that the matter related to the estate of her late husband M'Mwitari Mutuara. That the deceased had one parcel of land known as land parcel No. Nyaki/Thuura/972. That he subdivided the said land into 3 parcels namely Nyaki/Thuura/2148, Nyaki Thuura/2149 and Nyaki/Thuura/2150 and gave each of his 3 houses. That each parcel measured 2 acres. That she was given land parcel No. Nyaki/Thuura/2148 while the Applicant was entitled to a share given to their house, namely parcel No. Nyaki/Thuura/2149. That the latter was registered in the name of John Muthama, a brother to the Appellant/Applicants husband , one Domisiano Kaura M'Mwitari. That the said John Muthamia then gave the Applicant's husband land parcel No. Nyaki/Giaki/1504 so as to relinquish his claim in Nyaki/Thuura/149. That the Applicant in occupation of the said land parcel No. Nyaki/Giaki/1504.
6. The Respondent further avers that she had filed Meru C.M. ELC Case No. 205 of 2018 to recover the suit land and the court found that the Applicant's husband had fraudulently transferred Nyaki/Giaki/2148 to one Gerald Mutua Mutea. That the Applicant has no legal interest in the land in dispute and therefore, the appeal has no chance of success.
7. The Respondents avers that she stands to be prejudiced if the orders are granted.
8. Parties were directed to file submissions, which I have considered and will not rehash them herein. I will refer to them where necessary.
9. The Applicant has come under order 42 Rule 6 of the Civil Procedure Rules. The Rule provides 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 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 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 of stay 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 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”

10. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:



- a. Substantial loss may result to him/her unless the order is made;
 - b. That the application has been made without unreasonable delay; and
 - c. 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.
11. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] eKLR where 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: -
- a. 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.
 - b. 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.
 - c. 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.
 - d. 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.
12. On substantial loss, the Applicant states that she stands to be evicted from the land in question if the order of stay is not granted. The applicant cited the case of *RWW vs EKW* [2012] eKLR. She avers that if the eviction takes place, the appeal will be rendered nugatory.
13. The Respondent has submitted that the orders sought by the Applicant will mean that she is denied the fruits of her Judgement in the ELC matter. It is pointed out that the Applicant is already in occupation of parcel No. 1504, so will not suffer any loss.
14. The first question to be answered is whether there is anything to stay in the order granted by the Learned Magistrate. The second one is whether there ought to issue an order of inhibition.
15. In her Ruling the Learned Magistrate dismissed the Applicant's application to revoke the grant. The court did not make any other orders. In my opinion, this is a negative order. It is well settled that when a negative order is issued then there is nothing to stay. In *Kavoshik Panchatia vs Prime Bank Ltd* [2020]eKLR) the Court of Appeal held as follows;

‘The above finding notwithstanding, we cannot lose sight of the fact that the order that the applicants seek to stay is the order of the High Court issued on 24th June 2020 dismissing their application. This is a negative order. We are guided by the decision in the case of *Western College Farts and Applied Sciences vs. Oranga & Others* [1976] KLR 63, the court



whilst considering whether an order of stay can be granted in respect of a negative order and which we fully adopt stated inter alia as follows:-

“ But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”

We reiterate the position taken by the Court in the above case that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants.

16. Flowing from the above I find that there is no order capable of being stayed. Thus prayer 3 of the application cannot be granted.
17. Should an inhibition issue as sought?
18. I perused the lower court record and the judgement in Meru CMC ELC No. 205 of 2018 and the Judgement of the ELC on Appeal in ELC Appeal No. E075 of 2021.
19. It is evident that the subject matter, Parcel No. 2148 was litigated upon in the trial court in the land matter and the ELC Court on appeal. Both courts found in favour of the Respondent herein. The ELC is a court of concurrent jurisdiction with this court. The learned magistrate relied on the two decisions in arriving at his/her decision in the succession cause that is the subject of this appeal.
20. In seeking an inhibition herein, the Applicant is basically out to reverse the findings of the said courts, especially the one of the ELC Court on appeal. It is evident that Land Parcel No. 2148 was registered in the name of the deceased. The Respondent avers that the Applicant who is a wife to one Domisiano, a son of the deceased, has no legal interest in the matter.
21. There is no dispute that the Applicant is the wife of the said Domisiano. She did not come to court in her own right, but did so as a representative of the estate of her late husband who is said to have a claim to the land in question. To that end, she exhibited a grant of letters of administration ad litem. It is on record that the late Domisiano was held to have fraudulently caused the transmission of the parcel of land to himself and then he transferred it to one Gerald Mutua Mutea. As I stated earlier, that transfer was declared illegal by the two land courts. If this court is to grant the orders of injunction, it will be tantamount to reversing the findings of the two stated courts and okaying the illegal transfer conducted by the Applicant’s husband, through the backdoor. As matters stand now the land in question is part of the estate, and not the applicant’s husband. There has been no indication that the respondent wishes to dispose of the land in question. In fact, and in agreement with the respondent, an inhibition as sought is primarily meant to keep the interest of the “buyer” in the unlawful sale alive. As stated that sale was null and void. Thus I do not see any substantial loss will be suffered by the applicant if the inhibition is not granted.
22. Does the Appeal have a likelihood of success?



23. I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case as that is under the purview of the appellate court after hearing the merits of the same.
24. Looking at the matter, and from what I have stated above, I am unable to determine with certainty if the Applicant's appeal has a likelihood of success.
25. On the question of delay, I find that the application was made timeously.
26. As to the question of security, the applicant did not offer any. Even then, the nature of the orders appealed against do not require any such security.
27. Although the application was made without delay, I find that from the foregoing, the factors to be considered herein work against the Applicant.
28. In conclusion, it is my finding that the order of dismissal of the application by the trial magistrate are negative and by their nature and the circumstances herein cannot be stayed. I also find that the inhibition sought will be tantamount to a reversal of the orders of the ELC Court.
29. Therefore, I dismiss the Application with costs.
30. The applicant should proceed with her appeal and prove her claim to a share of the land forming the estate.

DATED, SIGNED & DELIVERED AT MERU THIS 23RD DAY OF JANUARY 2025.

H.M. NYAGA

JUDGE

