



REPUBLIC OF KENYA



KENYA LAW
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**Mwaniki v Mwaniki & another (Succession Appeal E026 of 2023)
[2025] KEHC 394 (KLR) (16 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 394 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
SUCCESSION APPEAL E026 OF 2023
AK NDUNG’U, J
JANUARY 16, 2025**

BETWEEN

BEATRICE WANJUGU MWANIKI APPELLANT

AND

JOSEPHINE WANJIKU MWANIKI 1ST RESPONDENT

GLADYS NYAGUTHII GATHUNGU 2ND RESPONDENT

RULING

1. This ruling resolves the notice of motion herein dated 05/03/2024 brought under section 50 *Law of Succession Act*, Rules 49 and 73 of Probate & Administration Rules for orders that the court do issue stay of execution of the judgment made on 06/09/2023 in Nanyuki CM Succession No. 25 of 2017 pending hearing and determination of the appeal.
2. The application is based on the grounds on the face thereof and supported by an affidavit of Beatrice Wanjugu Mwaniki, the Applicant. She averred that on 06/10/2023, an application was made for stay before the trial court but the trial court declined to give orders of stay. Consequently, the 1st Respondent moved the trial court with an application seeking the court to execute transmission to effect the judgment of the court. That the distribution ordered by the trial court disturbs the ground occupation of the land and that she and her children will be displaced from her area of occupation.
3. She deponed that she has an arguable appeal for the trial court failed to consider the cogent evidence of her contribution towards the acquisition of the property and confirmed an intermeddler as a person entitled to share. That the trial court also ignored a high court order issued as against any alienation and purported to use the proceedings before the tribunal as evidence that the deceased had shared his property whereas the deceased was not available for cross examination. She deponed that she is willing to deposit any security as the court may order and that the Respondents shall not be prejudiced if the application is allowed.



4. The application is opposed. The 1st Respondent filed a replying affidavit dated 08/04/2024 where she averred that a similar application was filed in the lower court and was dismissed for lack of merit and no new grounds have come up to warrant the grant of the orders. That the orders sought are sought in bad faith since the Applicant has not demonstrated what substantial loss she shall suffer if execution proceeds and she is the one who will suffer prejudice as she shall be kept away from the estate. That she has been in occupation of the estate and has never attempted to sell and therefore, the appeal will not be rendered nugatory. That the appeal has no chances of success and application for execution of the court's judgment does not mean that the appeal will be rendered nugatory. She deponed that the Applicant has never set foot on the part of the estate under dispute as she stays in Karatina.
5. The 2nd Respondent filed a replying affidavit dated 30/04/2024 and she averred that no substantial loss will be occasioned since execution of transmission in a judgment is a legal process and the Applicant has not established other factors to show execution will affect the core of the Applicant's successful appeal and any prejudice may be compensated by order of costs. Further, no security has been deposited. That the Applicant's contention that she will be displaced from her area of occupation is not a threshold for stay but proves continued ongoing intermeddling in the estate of the deceased. That she was a bonafide purchaser for value which the Applicant has not disapproved and the issues raised by the Applicant have been dealt with and litigation must therefore come to an end.
6. The application was canvassed by way of written submissions. The Applicant in her submissions argued that the memorandum of appeal raises both matters of evidence and the law especially in regards with jurisdiction which is not frivolous and therefore she has an arguable appeal since she has pleaded on distribution of wealth where the deceased was polygamous, the probative value of the proceedings before the tribunal and whether they constitute evidence of distribution and whether they are admissible in light of want of jurisdiction by the tribunal and the fact that the 2nd Respondent bought land when there was a high court order barring alienation. That if the distribution is done and the appeal is successful, the same will be rendered nugatory. That there is also a likelihood that once the land is subdivided, it can be transmitted to 3rd parties and that will remove the said subject out of reach for successful litigants.
7. The 1st Respondent argued that the Applicant has not satisfied the court that she shall suffer any substantial loss unless the orders sought are made. That she has not demonstrated that she lives on any of the properties and has not controverted the 1st Respondent's averments that she lives in Karatina and that the 1st Respondent is the one in occupation of the estate properties. That she never raised any issue of jurisdiction before the trial court and the appeal filed has no serious point of law to be argued and has no chances for success and shall not be rendered nugatory if the application is dismissed.
8. The 2nd Respondent argued that the trial court dismissed the Applicant's application for stay on account that she had not attached photographic evidence to show that she has developed the land as alleged and therefore, the trial court could not ascertain the loss she could suffer since she lives in Karatina. That the Applicant has not adduced evidence that substantial loss will be occasioned and the fact that she will be displaced from the suit property is not a condition for grant of stay since she has not shown that she has substantially developed the suit property. The Applicant had a duty to demonstrate that she will suffer irreparable loss which cannot be quantified and compensated by an award of costs but has failed to do so. That the appeal has no arguable ground and litigation must come to an end and the 2nd Respondent who was a purchaser must be allowed to enjoy the fruits of the judgment.
9. I have read through the application, the replying affidavits, and I have considered rival arguments by the parties herein.



10. The application is brought under section 50 of the [Law of Succession Act](#) and Rule 49 and 73 of Probate & Administration Rules. Rule 49 is in my view wide enough to cover the present application and entertain a remedy of stay of execution of a judgment or decree in succession proceedings. It provides that:

“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.”
11. In addition, the court may draw upon the wide powers in Section 47 of the [Law of Succession Act](#) to entertain any application and to determine any dispute under the [Law of Succession Act](#). The court may also draw upon its inherent jurisdiction to grant appropriate orders under Rule 73 of the Probate and Administration Rules in order to meet the ends of justice and to prevent abuse of process of the court. As such the application is properly before the court.
12. As to whether the Applicant has met the threshold for grant of the orders sought, it is trite law that stay of execution pending appeal is a discretionary power but, which must not be exercised whimsically but judiciously on defined principles and the facts of the case. The objective is to prevent substantial loss from befalling the applicant; ordinarily, it is to prevent the appeal from being rendered nugatory. See *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR where the court held that;

“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.”
13. The Applicant states that she will suffer substantial loss if the stay is not granted for the distribution ordered disturbs the ground occupation of the land and that she and her children will be displaced from her area of occupation.
14. The other condition pleaded by the Applicant is that she has an arguable appeal. The court in *Benedict Ojou Juma & 10 Others v A.J. Pereira & Sons Ltd* [2016] eKLR, held thus;

“The applicant must first satisfy the court that appeal or intended Appeal is not frivolous, that is to say, that it has an arguable Appeal.”
15. The Court of Appeal in *Mwalimu & 6 others v Halal & another* (Civil Application E091 of 2022) [2023] KECA 634 (KLR) held that;

“It is therefore important for the applicant to satisfy the Court that the ground or intended ground is bona fide without satisfying the Court that the said ground will necessarily succeed. As long as the point raised is bona fide and ought to be argued fully before the Court, the same meets the arguability or non-frivolity test.”
16. I have perused the memorandum of appeal attached to the Applicant’s replying affidavit and I do not consider it to be frivolous.
17. I have applied my mind to the facts raised by the parties herein. I have considered the applicable law. Substantial loss is the cornerstone of an application for stay and provision of security is key. The unique nature of the matter before me is that in a succession cause, unlike in a damages claim where one party



is adjudged to pay the other, the contentious issue is only one; whether a party is entitled to a share of the estate and if in the affirmative, what share. In such a situation, there may not be a practical security to offer, with exception of where the asset is cash.

18. If the certificate of confirmation of grant (which loosely is a decree) is executed, distribution done and transmissions of respective shares effected, and noting that the estate herein constitutes land, the beneficiaries would be at liberty to deal with their respective shares in whatever manner they may deem fit including disposal to third parties.
19. Such a scenario would expose the Applicant to substantial loss in that any success in the appeal may end up being a pyrrhic victory or one that would set in motion a multiplicity of suits to revert the estate to its undistributed state.
20. Within this background this court is persuaded that an order of stay is necessary to maintain the status quo. The application has merit.
21. With the result that the application dated 5/3/24 is allowed. I make the following orders;
 - a. A stay of execution of the judgment and orders of court dated 06/09/2023 be and is hereby issued pending the hearing and determination of the appeal.
 - b. Costs to abide the outcome of the appeal.
 - c. The record of appeal be lodged in court within 30 days hereof.
 - d. Mention on 20/2/25

DATED SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF JANUARY 2025.

A.K. NDUNG’U

JUDGE

