



**Kanario v Muketha & 6 others (Family Appeal E016 of 2024)
[2025] KEHC 2348 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
FAMILY APPEAL E016 OF 2024
EM MURIITHI, J
FEBRUARY 6, 2025**

BETWEEN

JACINTA KANARIO APPELLANT

AND

FRANCIS MBAYA MUKETHA 1ST RESPONDENT

MARIA JOHN 2ND RESPONDENT

FRIDAH MWENDWA 3RD RESPONDENT

ELOSY GAICHUGI 4TH RESPONDENT

SILAS KINYUA MUGAMBI 5TH RESPONDENT

LAWRENCE KIRIMI MUGAMBI 6TH RESPONDENT

SAMSON MURITHI MUGAMBI 7TH RESPONDENT

RULING

1. By Chamber Summons under certificate of urgency dated 7/11/2024 pursuant to Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* and all the enabling provisions of the law, the Appellant seeks that:

1. Spent
2. There be stay of execution of the judgment delivered on 15th August 2024 against the Petitioner/Applicants in this matter serialized as Meru Chief Magistrates Succession Cause No 312 of 2021 and all other orders resulting therefrom pending the hearing and determination of this application inter-parties.



3. There be a stay of execution of the judgment delivered on 15th August 2024 against the Petitioner/Applicants in this matter and all other orders resulting therefrom pending appeal.
 4. There be a stay of subdivision and/or Survey of the land serialized as Abothuguchi/Kariene/4916 pending the hearing and determination of this application inter-parties.
 5. There be a stay of subdivision and/or Survey of the land serialized as Abothuguchi/Kariene/4916 pending the hearing and determination of the Appeal.
 6. The costs of this application be in the Cause.
2. The application is premised on the grounds on the face of it and supported by an affidavit sworn by the Appellant on even date. She avers that the estate herein relates to her father, and the matter was fully determined on 15/8/2024 despite the other beneficiaries' protest to the mode of distribution. Aggrieved by the said judgment, she has appealed against it, and she stands to suffer great prejudice unless the orders sought are granted. The impugned decision was delivered virtually without leeway to request for stay of execution, and she is in a state of furtive apprehension of imminent threat of being rendered constructively landless. The Respondents will not suffer any real prejudice if stay is granted because her intended appeal has great likelihood of success.
 3. The Respondents opposed the application vide a replying affidavit sworn on 15/11/2024 by the 2nd Respondent. She accuses the Appellant of concealing the existence of some beneficiaries and failing to state what she is aggrieved with in respect to the mode of distribution. She urges the court not to accommodate the Appellant who is an indolent litigant with an insatiable greed pursuing a misguided claim. The application is brought in bad faith and with ulterior motives of prolonging the matter in the hope that she shall pass away. The Appellant is only interested in acquiring her rental houses where she derives income from to sustain herself and the court should come to her aid. The Appellant is keen on destabilizing her family who are content with the mode of distribution, and the court should dismiss the application with costs.
 4. The court directed the parties to file and exchange written submissions in respect to the application, but none had been filed at the time of writing this ruling.

Analysis and Determination

5. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of Order 42 Rule 6 of the Civil Procedure Rules, as follows:

“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.



Substantial loss

6. The cornerstone consideration for granting stay is substantial loss, which has been espoused by the Court of Appeal (Platt, AG JA) in *Kenya Shell Limited v Kibiru Another* (1986) eKLR as follows:

“.....If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”

7. The Appellant contends that she will be rendered constructively landless if stay is denied and her meritorious appeal will be rendered nugatory. In rejoinder, the Respondents urge that they are content with their respective shares of the estate property, and term the Appellant as a disgruntled litigant who is solely motivated by unquenchable greed for the 2nd Respondent's share. In its impugned judgment, the trial court distributed the estate property amongst the Applicant, the 2nd Respondent and Consolata Kiario, with the 2nd Respondent getting a larger share for the reason that she was admittedly utilizing the estate property before the demise of the deceased.
8. This court finds that the Appellant was dully provided for in the impugned decision, and the issuance of stay in the circumstances would have far reaching implications on the other beneficiaries. The Appellant, in her grounds of appeal is not disputing that the persons the estate was distributed to are rightful beneficiaries to the estate, but her only grievance is whether or not the 2nd Respondent was entitled to a share thereof, by virtue of being a spouse to the deceased. This court is minded that if the appeal eventually succeeds and the court finds that the widow was entitled to a life interest as opposed to a distinctive share of the estate, the same can always be reverted back to the deceased for equitable distribution amongst the beneficiaries inclusive of the Appellant.
9. The court does not find that the Appellant will suffer any substantial loss if stay is denied, as the appeal will still be progressed to conclusion. Consequently, this court will not hold the other beneficiaries at ransom at the behest of the Appellant, because her pursuit of her undoubted right to appeal must not trample upon the other equally entitled beneficiaries' right to enjoy the fruits of their judgment.

Delay

10. The court finds that the application herein was filed on 3/9/2024 while the decision sought to be appealed against was delivered on 15/8/2024. That delay of approximately 3 weeks cannot be termed as unreasonable and inordinate.

Security

11. This court is alive to the fact that the subject matter herein is distribution of the estate property and the subsequent issuance of the certificate of confirmation of grant and not a money decree where provision of security for the performance of any decree as may become binding at the determination of the appeal is appropriate.
12. There is a spectre of abuse of the court process by the Appellant, as she filed this application after her earlier application camouflaged as seeking preservatory orders restraining the Respondents from dealing with the estate property pending the hearing and determination of the appeal, was refused. She is now before this court, hoping to have a second bite at the cherry and a favourable outcome, by seeking stay of execution of the impugned judgment pending the hearing and determination of the appeal.



Orders

13. Accordingly, for the reasons set out above, the court finds that the Appellant's application dated 3/9/2024 is without merit and it is dismissed.

14. The applicant shall pay the cost of the application to the respondents.

Orders accordingly.

DATED AND DELIVERED THIS 6TH DAY OF FEBURARY, 2025.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Karanja for Applicant.

Mr. Munene Kirimi for the Respondent.

