



REPUBLIC OF KENYA



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**Baariu v Baariu (Family Appeal E005 of 2024)
[2025] KEHC 3628 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3628 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
FAMILY APPEAL E005 OF 2024
HM NYAGA, J
MARCH 20, 2025**

BETWEEN

HENRY KARIIRA BAARIU APPLICANT

AND

JOHN GITONGS BAARIU RESPONDENT

RULING

1. The application coming for determination is the Notice of motion dated 26th September, 2024, which seeks the following orders:-
 - a. Spent
 - b. Spent
 - c. That the Honourable Court be pleased to issue an order for stay of execution of judgment and decree of the lower court in Maua Chief Magistrate’s Court Succession Cause No. 53 of 2019, dated 3rd April 2024, and all consequential orders issued on 25/9/2024 pending the hearing and the determination of this appeal or until further orders of this court.
 - d. That the costs of this application be provided for.
2. The Application is supported by the grounds set out on its face and the affidavit of the Applicant sworn on even date.
3. In a nutshell, the Applicant states that judgement was delivered in the lower court on 3rd April 2024. That aggrieved by the said judgment, the applicant has preferred the appeal herein. That on 22nd May 2024, the respondent filed an application dated 19th May 2024 to execute the decree and the same was allowed by the lower court on 25th May 2024. That the appeal has come up for directions before the Deputy Registrar and the respondent is fully aware of the same. That the net effect of the lower court proceeding to hear and allow the application for execution while this appeal was pending is to make a



mockery of justice and usurping the powers of this court. That the lower court was made aware of this appeal but still proceeded to issue the orders of execution.

4. The Applicant further avers that he will suffer substantial loss if the orders sought are not granted, and if the execution continues the appeal will be rendered nugatory. That the respondent who is his brother from another house is intent on irregularly taking over his farm which he was given by his father. That his appeal has high chances of success given that some properties were left out during the distribution of the estate.
5. The Respondent opposed application vide a replying affidavit sworn on 4th October 2024.
6. In summary, the Respondent argues that the application is defective. That the application is an abuse of the court process and is contradictory and self-defeating. That the applicant is a co-administrator and cannot be heard to appeal against the same grant that he is meant to implement. That the court was right to call for the equal distribution of the estate. That the applicant's sole intent is to get a lion's share of the estate. That order 42 Rule 6 of the *Civil Procedure Rules* has no application in this matter.
7. Parties appeared in court for directions and they agreed to canvass the application by way of written submissions. It suffices to state that I have duly considered them and will where necessary refer to them.

Analysis and determination

8. The sole issue for determination, in my view, is whether the applicant has laid sufficient grounds to warrant a grant of the orders sought.
9. The question is whether the applicant has met the threshold set out under order 42 Rules 6 of the *Civil Procedure Rules* (CPR). The said Rule states 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. I have noted that the averment that the respondent intends to execute the judgment of the lower court has not been rebutted.
13. As to what amounts to substantial loss, this has been the subject of consideration by courts. In *James Wangalwa & another vs Agnes Naliaka Cheseto* [2012] eKLR, the court stated;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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”
14. I have looked at the memorandum of appeal vis-à-vis the judgment of the lower court. The question is whether the applicant has an arguable appeal. The appellant is aggrieved by the decision of the trial court to apply Section 40 of the *Law of Succession Act* to distribute the estate between the two houses left by the deceased in accordance with the number of children in each house, instead of dividing the same equally between the two houses.
15. 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.



16. An arguable appeal is not that which must succeed. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR the Court described an arguable appeal in the following terms:

“An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.

In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

17. It is my view that there is need to maintain the status quo on the ground pending determination of this appeal.

18. On the question of delay, I note that the judgment was delivered on 3rd April 2024. The memorandum of appeal and the application in question filed on 19th April 2024, within the time prescribed for lodging of appeals. I find that there was no delay in filing the appeal and the application. The application for stay was filed on 26th September 2024, over 6 months after the delivery of the judgment. The applicant states that he opposed the application in the lower court to execute the judgment issued on 25th September, 2024. I find that the application having been brought just a day after the execution was issued was filed without delay.

19. On Security the applicant has not stated that he is willing to provide any. However, being a succession matter, there is really no decree that can be secured by the offer of security.

20. To succeed, an applicant in the circumstances of the applicant herein must satisfy all the three conditions for grant of stay. The court in *Trust Bank Limited vs Ajay Shah & 3 Others*, [2012] eKLR at page 23 stated that: -

“The conditions set out in Order 42 Rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff's Notice of Motion dated 24th April, 2012 it without merit.”

21. I am satisfied that the applicant has satisfied all the three requirements for the grant of a stay of execution.

22. After considering all the factors, I grant the following orders:-

- a. There shall be a stay of execution of the decree of the Lower Court pending hearing and determination of the appeal herein.
- b. The Applicant is to file his record of appeal, if he has not done so, and serve it within 21 days from the date of this ruling.
- c. In default of the order (b) the stay order shall lapse automatically.
- d. Given the nature of the dispute, the appeal shall be expedited to avoid undue prejudice to the parties.
- e. Costs of the application shall abide by the outcome of the appeal.

DATED, SIGNED & DELIVERED AT MERU THIS 20TH DAY OF MARCH, 2025.

H.M. NYAGA



JUDGE

