



**In re Estate of Kombo Muramba (Deceased) (Succession Appeal  
E014 of 2024) [2025] KEHC 3354 (KLR) (19 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3354 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION APPEAL E014 OF 2024**

**AC BETT, J**

**MARCH 19, 2025**

**IN THE MATTER OF THE ESTATE OF KOMBO MARAMBA (DECEASED)**

**BETWEEN**

**ALEXANDER KOMBO MARAMBA ..... APPELLANT**

**AND**

**IRENE KATONE ..... RESPONDENT**

**RULING**

1. The Appellant filed an appeal against the ruling of Hon. A. Odawo dated 21<sup>st</sup> August 2024 in which she allowed the Respondent's protest and ordered that L.R. No. Butsotso/Shikoti/18082 and 18084 devolve to the Respondent while L.R. No. Butsotso/Shikoti/16639 be distributed equally among the dependants of the deceased.
2. The Appellant was dissatisfied with the said ruling and filed an appeal. Pending the hearing and determination of the appeal, the Appellant filed an application seeking stay of execution of the ruling delivered on 21<sup>st</sup> day of August 2024 and any consequential orders.
3. The application for stay of execution is supported by an affidavit sworn by the Appellant. He depones that he and his siblings had decided to allocate the land comprised in Parcel Numbers Butsotso/Shikoti/18082 and 18084 as the family grave site and in the event the Appellant executes the ruling, they stand to suffer prejudice as the appeal shall be rendered nugatory. He also depones that his appeal has high chances of success.
4. In opposing the application, the Respondent deponed that the Applicant has failed to fulfil the conditions pre-requisite to grant of stay of execution under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. She avers that the Applicant has not demonstrated the prejudice he would suffer if the orders of stay are not granted nor the substantial loss he would incur. She further states that the Applicant has failed to offer security for due performance of the order that is binding upon him.



5. The application was disposed of by way of written submissions. Both parties filed detailed submissions which I have duly considered.

6. Order 42 Rule (6) of the *Civil Procedure Act* has not been cited in Rule 63 (1) of the Probate and Administration Rules as one of the rules which apply to Succession matters. The Applicant ought to have relied on Rule 49 of the Probate and Administration Rules which provide 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.”

7. Notwithstanding the defect in the Applicant’s application, I shall invoke Article 159 of *the Constitution*, Section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules* and proceed to determine the application.

8. The purpose of an order of stay is to preserve the subject matter pending the hearing and disposal of a case. The Applicant has merely averred that they will “suffer prejudice rendering the substance of the appeal defeated” unless the orders of stay are granted. In *RWW v. EKW* [2019] eKLR, the Court held as follows:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

9. From my perusal of the ruling, I do note that it was not disputed that prior to his death, the deceased had distributed his assets among his sons save for the three parcels of land earlier referred. It is therefore clear that whereas the Applicant and his other siblings had been settled by the deceased, the Respondent’s husband Peter Ndungu Kombo (deceased), had not been catered for.

10. In the case of *James Wangalwa & Another v. Agnes Naliaka Chereto* [2012] eKLR, the court held as follows:-

“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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”



11. The Applicant needed to demonstrate by way of evidence, that if the orders of stay are not granted, it will result in a state of affairs that will irreparably affect or negate the very essential core of a successful appeal.
12. There is no averment that the land may be wasted or sold to strangers nor is there an averment that the Applicant and his other siblings will be rendered destitute in the absence of an order of stay.
13. Having been allocated their portions by the deceased before he died, the Applicant has not demonstrated what prejudice or substantial loss they would suffer if the two parcels of land were transferred to the Respondent, who is a family member and also the last born in the home who is by custom, the one to inherit the family homestead. In any event, if the Applicant succeeds in the appeal, the property would be reverted to the estate of the deceased and redistributed afresh.
14. In my view, the Applicant's argument that time and resources would have gone to waste if the appeal were to succeed after the Respondent has taken over the land is insufficient reason to allow the orders sought.
15. It is my finding and holding that an order of stay, being discretionary, should be granted in a manner that does not place one party at an advantageous position over the other. In this instance, the parties are both beneficiaries of the estate of the deceased who are equally entitled to enjoy the benefits of the said estate. The evidence before the court was that whereas the Applicant had been settled by the deceased, the Respondent had not but was to be settled on the suit property
16. The Applicant has cited the case of *Absalom Dova v. Tarbo Transporters* [2013] eKLR where the Court of Appeal held as follows:-

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”
17. Applying the aforesaid principles, and having carefully reviewed the rival submissions, I find that the appeal will not be rendered nugatory if the order of stay is not granted.
18. I therefore dismiss the application with no order as to costs as this is a matter between members of one family.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19<sup>TH</sup> DAY OF MARCH 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

Mr. Manyoni holding brief for Repha for Appellant

Mr. Momanyi for Respondent

Court Assistant: Polycap

