



REPUBLIC OF KENYA



KENYA LAW
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**Mutoro v Simiyu & another (Civil Appeal E035 of 2024)
[2025] KEHC 8193 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 8193 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E035 OF 2024
MS SHARIFF, J
MARCH 14, 2025**

BETWEEN

ROSE NAVANGALA MUTORO APPELLANT

AND

JENTRIX NEKESA SIMIYU 1ST RESPONDENT

MUTAMBO MAXUEL MUTORO 2ND RESPONDENT

*(Being Appeal from the Ruling of Hon. Viola Yator in Webuye
Senior Principal Magistrate in Civil Suit No. E025 OF 2025)*

RULING

A. Applicant's case

1. The Appellant/Applicant, Rose Navangala Mutoro has moved this court vide a Notice of Motion dated 26.2.2025, brought under the provisions of Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the *Civil Procedure Act*.
2. The application is supported by the affidavit of Rose Nabangala Mutoro, the applicant sworn on even date and the grounds set forth on the face of the application. The applicant craves for the following orders:
 1. Spent
 2. Spent
 3. That there be a stay of the ruling in Webuye SPM MCCC No E025 of 2025.
 4. That the cost of this application to abide the outcome of the appeal.



3. The applicant avers that she has lodged an appeal against the ruling of Hon. Yator SPM delivered on undisclosed date in Webuye SPM CC No. E025 of 2025. That she will stand to suffer irreparable loss pertaining to her matrimonial home standing on parcel Ndivisi/Makuselwa/604 known as Wabukhonyi Farm, which she avers that, is being utilized by the respondent (no disclosure of which respondent) and her children.
4. The applicant maintains that she attaches great sentimental value to parcel Ndivisi/Makuselwa/604 and that damages cannot adequately compensate her for the loss that she stands to suffer were the deceased to be buried elsewhere. The applicant has outlined her supposed loss as hereunder:
 - i. Losing the matrimonial property and my home site I worked hard together with my late husband
 - ii. Losing symbolic and sentimental value of that burials (sic) site which is crucial to my grieving process which can cause permanent emotional distress that cannot be compensated.
 - iii. If, the 3rd wife will be allowed to bury the deceased, I stands (sic) also to have not only lost love to a person I shared life with but also be a person who never had a husband, as burying him at my house compound will be the only way of representing our shared life and love.
5. The applicant further posits that she is apprehensive that the respondents whom she says have exhibited open hostility towards her will interfere with her possession, user and quiet occupation of her home in Wabukhonyi.
6. The applicant has annexed photographs of herself and two copies of searches of parcel No Ndivisi/Makuselwa /604.
7. It is the applicant's position that the respondent (yet again there is no disclosure of which of the respondents she is referring to but presumably it is the 1st Respondent), has not disclosed the type of marriage she underwent with the deceased which would entitle her to exercise priority over the applicant in regard to the burial rights of the wives of the deceased. Further that the applicant is entitled to bury the deceased as that is the prerogative of his first wife and that the 1st respondent had already exercised such a right when she buried her late husband with whom she had begotten some of her children.

B. Respondents' response

8. This application is resisted by the respondents vide a replying affidavit sworn by Jentricks Nekesa Simiyu on 3rd March 2025. It is deponed in the replying affidavit that the appellant is the 1st wife while the 1st respondent is the 3rd wife of the deceased and that the 2nd wife passed on in 1996 and was survived by two issues.
9. The 1st respondent deposes that both her marriage and that of the appellant, were conducted under Bukusu customary law and she has attached an affidavit of marriage sworn by the deceased and herself on 20th May 2006 and a dowry payment agreement dated 30.6.2006.
10. The 1st respondent maintains that the appellant deserted the deceased in the year 2002 and she never returned until the deceased died on 12.2.2025. Further that during the period of the appellant's desertion, the deceased gifted her children namely Caleb Ngichabe (now deceased) and Boniface Nyaranga, one of his properties specifically parcel No. Ndivisi/Makuselwa/277 and when that the appellant resurfaced in 2016 she went to reside with her son Boniface Nyaranga at the said land and that her son constructed a house for her thereon.



11. The 1st respondent deposes that she had been raising the appellant's 6 children and to date 3 of them still live with her.
12. It is deposed by the 1st respondent that the demand that the appellant is currently making; that she (1st respondent) should vacate her house which she built with the deceased since 2003, to enable the appellant move in for purposes of conducting burial rites, is unfair, malicious and against the Bukusu customary law. It is also deposed that the appellant has not been in any communication with the deceased for 23 years and never visited him when he was ailing; she generally did not show any love and affection towards the deceased and that she extinguished her right to bury him by her desertion and uncaring conduct. Further that Bukusu customary laws do not permit a deserter to return and bury the husband that she had deserted in the first place.
13. It is also stated that the 1st respondent and her family paid a hospital bill of Kshs 1.5 million for the treatment of the deceased and that a bill of Kshs 1.1 million is still outstanding at Eldoret Hospital. Further that the respondents and the family of the deceased are currently incurring mortuary bills at Friends Lugulu Mission Hospital Mortuary on a daily basis due to the litigation instituted by the appellant.
14. The respondents maintain that the actions of the appellant are actuated by malice as she attempts to move into parcel NO. Ndivisi/Makuselwa/1606 yet she is living peacefully in parcel No Ndivisi/Makuselwa/277.
15. This application was canvassed by way of oral submissions and this court has considered the application, the replying affidavit and rival submissions of parties and the issue that emerges for determination is whether the appellant has made out a case for grant of orders of stay of execution of ruling of Hon. Yator delivered on 26th February 2025 in Webuye SPM CC No. E025 OF 2025.

C. Analysis and determination

C. 1. Legal provisions

16. The current application is premised on the provisions of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which provides as follows:
 1.

“ No appeal or second appeal shall operate as a stay of execution of 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.
 - (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that 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.”

17. The applicant has also invoked the oxygen provisions of sections 1A and 1B, and the inherent jurisdiction of the court vide section 3A, all of the Civil Procedure Code CAP 21 Laws of Kenya.

C. 2. Case law

18. 8.The principles for grant of stay of execution orders were enunciated in the case of Butt –vs- Rent Restriction Tribunal [1979] eKLR where the court stated that:

“The power of the court to grant stay of execution is discretionary and it ought to be exercised in a manner that would not prevent an appeal. In the absence of any other overwhelming hindrance, a stay must be granted so as not to render the appeal nugatory.

Further, that a stay ought not to be refused on ground that a more efficacious remedy is available and that a court must consider the special circumstances and unique requirement. An order for security of costs would ordinarily be made when granting stay of execution.”

19. In the case of Vishram Ravji Halai –vs- Thorton & Turpin, Nairobi Civil Application No. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under (then) Order 41 Rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, the application must be made without delay.

20. It is incumbent upon the appellant to prove that she has approached the court without delay, that she stands to suffer substantial loss if stay is not granted and that she is ready to furnish security for costs.

21. According to the applicant’s supporting affidavit, the impugned ruling was delivered on 26.2.2025. The applicant filed this application on the same date wherefore she approached this court with speed.

22. On the issue of whether the appellant has demonstrated sufficient cause she posits that she has an arguable appeal. It was submitted by her counsel that the trial court made it’s ruling based on submissions of counsel and the affidavit evidence yet the subject matter requires the taking of vivo voce evidence on the issues of alleged desertion of the appellant and on whether she is residing in one of the properties of the deceased known as Musemwa farm. I have perused the Memorandum of Appeal viz aviz the ruling: the latter was not annexed to this application but was rather uploaded together with this application, this court will invoke its inherent jurisdiction and the provisions of article 159 (2) (d) of *the Constitution* of Kenya 2010 to consider the ruling despite the procedurally lapses of the applicant, and I note that the court ordered the respondents and the family members of the deceased to unconditionally allow the appellant, her children, her relatives and representatives to participate in the burial preparations and interment of the deceased at Wabukhonyi Farm. The court also vacated the interims orders of injunction which had barred the defendants from removing the body of the deceased from Friends Lugulu Mission Hospital Morgue. At this juncture I cannot make a finding on the merits of the appeal save to say that it is apparent that the appellant wants to prosecute a succession cause in this appeal given her apprehension that she may stand to lose what she terms as her matrimonial home in Wabukhonyi Farm in the event that stay orders are declined.

23. On whether the appellant will suffer substantial loss, I am unable to fathom how the burial of the deceased on parcel NO. Ndivisi/Makuselwa/1606 will occasion the applicant substantial loss given that the land belongs to the deceased. The trial court has already made a positive order in her favour



- by ordering the respondents to allow her, her children, her relatives and representatives to participate in the burial preparations and the interment of the deceased.
24. It is absurd for the applicant to claim that her reputation as a married woman is at stake yet she admits that she had willfully denied the deceased his conjugal rights on account of his supposed ill health. Ironically the applicant now states that a stay order will assist her maintain her marital status, exemplify the love that she shared with the deceased and help her grieve, yet she has not controverted the evidence put forth by the respondents that she never visited the deceased when he suffered from stroke until he died and she has never contributed a cent towards his treatment. I do find that the applicant has failed to demonstrate that she will suffer substantial loss if stay orders are not granted.
 25. The second order made by the trial court in vacating the interim injunction order was a negative order that is incapable of being stayed.
 26. On the issue of security for cost, the 1st respondent has deponed that the family of the deceased and herself have so far paid Kshs 1.5 million on accrued hospital bill in Eldoret Hospital and that a balance of Kshs 1.1 million is still outstanding. Additionally, mortuary fees are accruing at Friends Lugulu Mission Hospital Mortuary on a daily basis and that the appellant has not paid a dime towards the treatment and now, the preservation of the body of the deceased. It is noteworthy that the appellant has not offered any security for costs yet the morgue costs are accruing at her instance. The submissions of her counsel Mr. Olonyi from the bar that the appellant is willing to furnish security for costs does not constitute an undertaking by the appellant to offer such security. I do find that the applicant is noncommittal on the issue of security for costs and is indifferent towards the economic hardship that the respondents and the family of the deceased are currently facing.
 27. I do find that the respondents are the ones that are suffering substantial loss due to the continued preservation of the cadaver of deceased at Friends Lugulu Mission Hospital Morgue yet they still need to organize to pay up the outstanding medical bill of Kshs 1.1 million.
 28. On the balance I do find that this application is devoid of merit and I disallow it.
 29. Given that the mortuary costs have accumulated at the instance of the appellant I do order that she shall cater for the said mortuary costs and in the event of default then the respondent shall be at liberty to execute.
 30. I also award costs of this application to the respondents, which I assess at Kshs 15,000 payable together with the mortuary costs within 30 days from the date hereof.
 31. This matter shall be mentioned on 19.3.2025 to confirm the mortuary costs.
 32. The appellant is directed to file her record of appeal within 21 days from the date hereof and a compliance date shall be fixed on 19.3.2025.

DELIVERED, SIGNED, AND DATED AT BUNGOMA THIS 14TH DAY OF MARCH 2025.

MWANAISHA S. SHARIFF

JUDGE

