



REPUBLIC OF KENYA



**In re Estate of Margaret Mwikali John (Deceased) (Succession Cause  
729 of 2019) [2025] KEHC 6300 (KLR) (Family) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6300 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 729 OF 2019  
PM NYAUNDI, J  
MAY 15, 2025**

**RULING**

1. The Application subject of this ruling is Notice of Motion dated 9<sup>th</sup> August 2024, presented by the Applicants herein in which the following orders are sought, that
  1. Spent
  2. A temporary injunction and / or restraining order do issue to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Objectors/ respondents jointly and severally, their respective agents, servants, employees ,assigns and / or personal representatives from alienating, taking possession, transferring, selling, wasting, disposing of either by private treaty or public auction and/ or interfering with the Estate of the deceased person especially motor vehicle registration number KBR 651 X Toyota Lexus pending inter partes hearing and determination of this Application, the intended appeal and/ or further directions
  3. An order of Stay proceedings do issue to restrain the 1<sup>st</sup> Objector/ 1<sup>st</sup> Respondent from prosecuting the Petition filed on 24<sup>th</sup> November 2023 and/ or any further proceedings in this matter pending the hearing and determination of this application, the intended appeal and / or further court directions.
  4. That the costs of this application be in cause.
2. The Applicant challenges the judgment delivered on 27<sup>th</sup> October 2023 and seeks a stay of execution and proceedings, the application is presented under Sections 70, 92 of the *Law of Succession Act* and rules 63, 72 and 73 of the Probate and Administration Rules, Order 40 Rule 1(a), 2(1), 3 and 4 of the Civil Procedure Rules, Sections 1A, 1B, 3 and 3A, 63 (c) and 63 (e) of the *Civil Procedure Act*.
3. The Applicant argues that unless there is a stay of execution and appeal the appeal will be rendered nugatory. He has been compelled to make the application as the respondent through her counsel has demanded possession of the motor vehicle.



4. The 1<sup>st</sup> Respondent opposes the application and has sworn affidavit on 12<sup>th</sup> September 2024. The Respondent is of the view that the applicant ought to have filed objection proceedings instead of presenting the Appeal.
5. The Application was canvassed via written submissions. The Applicant submits that he has met the conditions for grant of an injunction as set out in the locus classicus decision of *Giella v Cassman Brown* 1973 EA 358.
6. The respondent submit that the respondents have not passed the test in the *Giella Case* (Supra) and specifically that they have not established that they have a prima facie case, reference is made to the decision in *Mrao v First American Bank Kenya Limited & 2 Others* [2003] KLR 125. It is their submission that after the revocation of the grant, his actions amount intermeddling with the estate of the deceased.
7. It is submitted further that the applicant has also not met the test for a grant of stay proceedings and reference made to the Court of Appeal decision in *UAP Provincial Insurance Co. v Michael Beckett* Civil Application No. 204 of 2004 (Nairobi, Unreported)
8. The respondent also submits that the application is res judicata as the issues raised were pronounced upon in the judgment.

#### **Analysis And Determination**

9. As I perceive it, the applicant essentially seeks a stay of execution of the judgment as delivered on 27<sup>th</sup> October 2023. He further seeks a stay of proceedings so as to arrest the pending summons for confirmation presented by the respondent herein by virtue of her appointment as administrator of the estate.
10. In *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR), the Court pronounced on the principles to guide a court in an application for stay of execution. Primarily the Court must guard against the intended appeal from being rendered nugatory. The Court had this to say while citing the decision in *Wilson v Church* (No 2) 12 Ch D [1879] 454 at p 459. In the same case, Cotton LJ said at p 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

11. The Court is obligated to at the same time safeguard the interests of the successful litigant with a judgment at hand even as it considers those of the appellant. The decree-holder ought not to be precluded from enjoying the fruits of his/her judgment. This principle was aptly explained in the case of *RWW v EKW* [2019] eKLR, 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.

11. Further, In the case of *Macharia t/a Macharia & Co Advocates v East African Standard*, No 2 [2002] KLR 63, the court observed that:-

To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for



the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.

12. The situation obtaining is that the respondent was issued with grant of letters of Administration on 24<sup>th</sup> July 2024, by law she has the responsibility to collect the assets of the deceased. Affidavit in support of Petition of administration of estate sworn on 17<sup>th</sup> May 2019 listed the assets of the deceased to include inter alia; Motor Vehicle registration Number KBR 651X valued at Kshs 1,500,000.
13. The Applicants continued possession of the vehicle offends Section 45 of the Estate. However, there is an arguable appeal pending before the Court of Appeal. The interest that is at stake is that of the estate. It is not known how long the appeal will take to be determined. The motor vehicle is an asset that will depreciate in value over time.
14. The option that is viable in the circumstances and that balances the interests of all the parties, is to direct that the motor vehicle be sold by the administrator in consultation with the applicant and the proceeds be deposited in a joint interest earning account for the estate with Counsel for the Parties as joint signatories.
15. Accordingly, Stay of Execution and proceedings is granted herein on condition;
  1. Motor vehicle registration number be sold by the administrator in consultation with the applicant within 30 days. In the event the parties are unable to jointly sale the vehicle within the 30 days, the Administrator will independently source a buyer for the vehicle within 14 days of such failure.
  2. The proceeds of the sale be deposited into a joint interest earning account of both the Counsel for the parties.
  3. Each party will bear their own costs.

It is so ordered

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
15<sup>TH</sup> DAY OF MAY, 2025.**

**P. NYAUNDI**

**JUDGE**

In the presence of:

Fardosa Court Assistant

Mwangi for Respondent

