Ngeno & another v Mibei & another (Civil Appeal E032 of 2024) [2025] KEHC 5609 (KLR) (6 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5609 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CIVIL APPEAL E032 OF 2024

JK NG'ARNG'AR, J

MAY 6, 2025

BETWEEN

PHILIP KIPKURUI NGENO ..... 1ST APPLICANT

LILIAN CHEPKORIR ..... 2ND APPLICANT

AND

WINNIE MIBEI ..... 1ST RESPONDENT

BETTY CHEMUTAI ..... 2ND RESPONDENT

RULING

1. The Applicants filed their Notice of Motion Application dated 20th December seeking the following Orders:

   I. Spent.

   II. Spent

   III. Spent.

   IV. That pending the hearing and determination of the Appeal filed herein, this Honourable Court be and is hereby pleased to issue an order of stay of execution of the Ruling dated 17th December 2024 in so far as the distribution of Land Parcels No. Kericho/Tegat/306 and Kericho/Tegat/1020 is concerned.

   V. That pending the hearing and determination of the Appeal filed herein, the Honourable Court be and is hereby pleased to order that the status quo obtaining prior to the delivery of the Ruling on 17th December 2024 being that the 1st Appellant is in occupation and use of 3.5 acres of Land Parcels No. Kericho/Tegat/306 and Kericho/Tegat/1020 be maintained by the parties.

VI. That costs of this Application be provided for.

2. The Application was brought under Order 42 Rule 6 of the Civil Procedure Rules. The Application was premised on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Philip Kipkurui Ngeno on 20th December 2024.

3. I hereby proceed to briefly summarize the grounds of the Application, the response and the parties' written submissions in the succeeding paragraphs.

The Applicants' case.

4. The Applicants stated that they were issued with a Grant as Administrators of the estate of Kipngeno Arap Mibei [deceased] on 28th June 2021 and later filed Summons for Confirmation of the Grant dated 25th January 2023. They further stated that the 1st Respondent filed an Affidavit of Protest and the Protest was heard through viva voce evidence.

5. It was the Applicants' case that the trial court delivered its Ruling on 17th December 2024 and after being dissatisfied with the said Ruling, lodged a Memorandum of Appeal dated 20th December 2024. It was their further case that the Application had been brought without undie delay and that their Appeal had a high chance of success.

6. The Applicants stated that the balance of convenience weighed in their favour as they were likely to be thrown out or evicted from Land Parcels Kericho/Tegat/1020 and Kericho/Tegat/306. They further stated that they were willing to deposit security and abide by any conditions that this court may set.

7. It was the Applicants' case that the Respondents had shown intentions of executing the Ruling of the trial court and it was prudent for this court to stay the Ruling to safeguard the substratum of their Appeal.

8. In their written submissions dated 18th February 2025, the Applicants submitted that the 1st Applicant currently occupies about 3.5 acres of Kericho/Tegat/306 and in the Ruling by the trial court dated 17th December 2024, the entire parcel was distributed to the 1st Respondent who was married and had her home elsewhere. They further submitted that the 2nd Applicant who was unmarried resided in Kericho/Tegat/1020 and the parcel was given to Tecla Mibei who already had a home in Kericho/Tegat/1685.

9. It was the Applicants' submission that they would suffer substantial loss if they were evicted from Kericho/Tegat/306 and Kericho/Tegat/1020 as they had nowhere else to go. They relied on Jason Ngumba Kogu & 2 others v Intra Africa Assurance Company Limited [2014] eKLR and New Stanley Hotel Limited v Arcade Tobacconists Limited Civil Case No. 2260 of 1982.

Response

10. The 1st Respondent filed a Replying Affidavit dated 31st January 2025 and stated that the Application lacked merit and was an abuse of the court process as it was not a suitable case for the application of Order 42 Rule 6 of the Civil Procedure Rules. That the fact that the 1st and 2nd Applicants were in occupation of 3.5 acres of Kericho/Tegat/306 and Kericho/Tegat/1020 did not constitute substantial loss as they had been given the lion's share in Kericho/Tegat/1685 and Kericho/Tegat/1020 compared to the rest of the beneficiaries. It was her further case that the Applicants were greedy and selfish.

11. It was the 1st Respondent's case that the fact that execution has commenced or was likely to commence was not substantial loss. That the Applicants have failed to establish how execution of the Ruling

would irreparably damage them or that such damage could not be compensated by way of damages. It was the 1st Respondent's further case that execution was a legal process and if the Applicants were to succeed in their Appeal, the deceased's estate would still be available for redistribution.

12. The 1st Respondent stated that the Appeal raised no arguable issues and had a low chance of success. That the Applicants' right of appeal must be balanced against the judgment holder's right of enjoying the fruits of her judgment.

13. In her written submissions dated 14th February 2025, the 1st Respondent submitted that the Applicants had failed to show any substantial loss that they would suffer. That the Applicants' concerns were based on speculation rather than evidence. She relied on Machira T/A Machira & Co. Advocates v East African Standard [2002] KEHC 1167 [KLR].

14. It was the 1st Respondent's submission that an order suspending the enjoyment of a successful party's right should be granted in exceptional cases where it was just and fair. That there were no special circumstances to warrant interference with the execution process. It was the 1st Respondent's further submission that the present Application was intended to delay the Respondents from enjoying the fruits of their Judgement.

15. The 1st Respondent submitted that the Applicants had not provided or proposed any form of security and have not demonstrated any willingness to provide such. The 1st Respondent asked this court to dismiss the Application.

16. I have gone through and considered the Notice of Motion dated 20th December 2024, the Replying Affidavit dated 31st January 2025, the Applicants' submissions dated 18th February 2025 and the Respondents' submissions dated 14th February 2025. The sole issue for determination was whether this court should issue stay of execution of the trial court's Ruling dated 17th December 2024.

17. The principles that relate to stay of execution orders are well settled. Order 42 Rule 6 of the Civil Procedure Rules stipulates: -

    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 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 orders set aside.

    2. No order for stay of execution 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 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.

18. Thus, under Order 42 Rule 6[2] of the Civil Procedure Rules, the Applicants should satisfy the court that: -

    i. Substantial loss may result to them unless the Order/Ruling of stay is granted.

    ii. That the Application has been made without unreasonable delay.

iii. The Applicant gives such security as the court orders for the due performance of such Decree or order as may ultimately be binding to them.

19. Regarding the issue of substantial loss, the court in Jason Ngumba Kagu & 2 others v Intra Africa Assurance Co. Limited [2014] KEHC 2183 [KLR] held that: -

> " The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of "the appeal will be rendered nugatory", the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process."

20. Similarly in Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd [in liquidation] [2004] 2 EA 331, the court stated that: -

> " Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal."

21. The Applicants stated that the substantial loss they would suffer is they would be evicted from Kericho/Tegat/306 where the 1st Applicant resides and Kericho/Tegat/1020 where the 2nd Applicant resides. That they have nowhere else to go and reside and that the Respondents who had been allocated the said parcels by the trial court had homes elsewhere. I do not agree with the 1st Respondent's assertion that the Applicants had not demonstrated the substantial loss they would suffer. In my view, the Applicants have demonstrated substantial loss.

22. The above finding is balanced with the fact that the Applicants were dissatisfied with the Ruling of the trial court in which Kericho/Tegat/306 and Kericho/Tegat/1020 were the subject of the Appeal. I have equally perused the Memorandum of Appeal dated 20th December 2024 which raised ten [10] grounds of appeal. It is my finding after going through the grounds of Appeal that the Appeal was arguable. The Court of Appeal in Kiu & another v Khaemba & 3 others [Civil Appeal [Application] E270 of 2021] [2021] KECA 318 [KLR] [17 December 2021] [Ruling] held that: -

> " In law, an arguable appeal/intended appeal is one that need not succeed but one that warrants the court's interrogation on the one hand and the courts invitation to the opposite party to respond thereto."

23. On the issue of unreasonable delay, the trial court delivered its Ruling on 17th December 2024 and the Applicants filed the present Application on 20th December 2024. It is my finding that the Applicants brought the present Application within reasonable time as there was no inordinate delay.

24. Regarding security for the performance of the Decree, Gikonyo J. in the persuasive case of Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others [2014] KEHC 2430 [KLR] held that: -

> " The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.
>
> Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."

25. The Applicants stated that they were willing to provide security. I agree with the Respondents' submission that this court should weigh the Applicant's right of Appeal against their right to enjoy the fruits of their Judgement.

26. In the end after weighing the scales of justice and in the exercise of my discretion, I direct that status quo on Kericho/Tegat/306 and Kericho/Tegat/1020 be maintained pending the hearing and determination of the Appeal. I thereafter grant stay of execution of the Ruling dated 17th December 2024 in Bomet Chief Magistrate's Court Succession Cause Number 46 of 2020 on the following conditions: -

    i. The Applicants shall provide security of kshs. 100,000/- within 14 days.

    ii. The Applicants shall file the Record of Appeal within 30 days.

    iii. Failure to meet the above conditions shall void the stay and status quo orders.

RULING DELIVERED, DATED AND SIGNED THIS 6TH DAY OF MAY, 2025.

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J.K.NG'ARNG'AR

JUDGE

Ruling delivered in the presence of ..... for the Applicants, ...for the Respondents for the Respondent and Siele/Susan [Court Assistant].