



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gitonga v Mungania t/a Mungania Auto Spares & another (Succession Cause 12 of 2019) [2025] KEHC 8087 (KLR) (11 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8087 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 12 OF 2019  
SM GITHINJI, J  
JUNE 11, 2025**

**BETWEEN**

**JOSEPH KITHINJI GITONGA ..... PETITIONER**

**AND**

**MARTIN KINOTI MUNGANIA T/A MUNGANIA AUTO  
SPARES ..... 1<sup>ST</sup> APPLICANT**

**SILAS KAIMENYI ..... 2<sup>ND</sup> APPLICANT**

**RULING**

1. For determination is the Notice of Motion dated 10/12/2024 brought under Section 51 of the [Law of Succession Act](#), seeking orders that:
  1. Spent
  2. The honourable court be pleased to grant leave to the applicants to appeal against this court ruling dated 3<sup>rd</sup> October 2024.
  3. The honourable court be pleased to stay execution of the ruling dated 3<sup>rd</sup> October 2024 pending hearing and determination of this application.
  4. Costs be provided for.
2. The application is supported by the affidavit sworn by Martin Kinoti Mungania, the 1<sup>st</sup> Applicant herein on even date. Dissatisfied with the ruling dated 3/10/2024, they seek leave to appeal and stay the execution.
3. In opposing the application, the Respondent swore a Replying Affidavit on 23/12/2024 in which he deposed that the application is incompetent, moot, an afterthought and an abuse of the court process meant to frustrate execution under the guise of an appeal. The impugned ruling was delivered more



than 2 months ago, and the 2<sup>nd</sup> Applicant continues to enjoy the demised premises without paying rent. He is however amenable to grant of stay upon the Applicants depositing Ksh. 1,941,000 and 2,640,000 into an interest earning account of both counsel within 30 days. He is advised by his counsel on record that leave is not required to appeal in view of the promulgation of the Constitution of Kenya, 2010, and thus the application should be dismissed with costs.

4. The application was canvassed by way of written submissions which were duly filed by counsel for both parties.

### **Disposition**

5. I have considered the application, the replying affidavit, the submissions by counsel and the authorities relied on.
6. The sole issue for determination is whether the application is merited.
7. On leave to appeal to the Court of Appeal, Section 7 of the Appellate Court Act expressly grants the High Court power to extend time as follows; “The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired: Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”
8. The Respondent’s contention that the Applicants did not need leave to file their appeal is manifestly unfounded, because there is no automatic right of appeal to the Court of Appeal under section 50 of the Law of Succession Act, as espoused by the Court of Appeal in *Nkoli v Oloparaki & 2 others* (Civil Appeal 63 of 2019) [2023] KECA 1228 (KLR) (6 October 2023) (Judgment), as follows: “As we have already stated, the Law of Succession Act is silent on the right of appeal from a decision of the High Court in exercise of its original jurisdiction. Nevertheless, article 48 of the Constitution on the right to access justice; article 50(1) of the Constitution on the right to a fair hearing and to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body; and, article 164(3) of the Constitution on the right of appeal would provide a solution to this grey area. However, in recognition of the need to filter matters that come to this Court for consideration, the requirement for leave, just as is provided for in respect to appeals on Muslim law under section 50(2) of the Law of Succession Act, ought to be called to play in appeals emanating from the High Court. Whereas a litigant in a succession matter should not be denied the right of appeal, such a right ought to be subjected to scrutiny in order to justify the expenditure of the limited resources on the matter.”
9. The intended appeal arises from the decision of this court delivered on 3/10/2024 where the court found that the Applicants were tenants in the subject property as evidenced by the exhibited photographs, correspondences between the parties herein and bank statements.
10. Ordinarily, leave to appeal to the Court of Appeal will be granted where it has been demonstrated that there is a serious question to be addressed by the appellate court. Although the Applicants have not exhibited a draft memorandum of appeal to gauge the arguability or otherwise of their intended appeal, they have asserted at paragraph 3 of their supporting affidavit that they ceased to be tenants after the demolition of the rented premises.
11. With the Applicants’ concession that they were tenants in the Respondent’s premises, I am not convinced that they have a serious grievance to be considered by the Court of Appeal, and I therefore decline to grant the leave sought. However, the Applicants are at liberty to seek leave in the appellate



court, as was held by the Court of Appeal in *Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another* [2014 eKLR that: "...an appeal will lie to the Court of Appeal from the decision of the High Court exercising original jurisdiction with leave of the High Court or where the application for leave is refused, with leave of this court."

12. On stay of execution, Order 42 Rule 6 of the *Civil Procedure Rules* provides as follows; "No appeal or second appeal shall operate as a stay of execution 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.

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.
  - 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."
13. The application was filed on 10/12/2024 while the ruling sought to be appealed against was delivered on 3/10/2024. That delay of approximately 2 months cannot be termed as inordinate and inexcusable.
  14. The cornerstone consideration in every application for stay is substantial loss. It is said that the Respondent has already commenced the execution process by serving them with a Notice to Show Cause.
  15. It is trite that execution is a lawful process and it does not in itself amount to substantial loss. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR the court (F. Gikonyo J) expressed as follows; "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. 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."
  16. I find that the Applicants have not demonstrated what substantial loss they will suffer if stay is declined. Conversely, the Respondent will suffer substantially by being unnecessarily kept away from the rent proceeds, lawfully accrued, if stay is granted.
  17. Needless to state, the stay sought herein in terms of prayer 2 of the application was to subsist until the hearing of the application.
  18. Having heard the application dated 10/12/2024, I find it in want of merit and it is hereby dismissed with costs to the Respondent.

**DATED AND DELIVERED AT MERU THIS 11<sup>TH</sup> JUNE, 2005**



**S.M. GITHINJI**

**JUDGE**

Appearances:-

Parties absent.

They be served.

