



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of James Wamalwa Wangila (Deceased) (Succession Cause
174 of 2014) [2025] KEHC 8771 (KLR) (18 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8771 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 174 OF 2014**

REA OUGO, J

JUNE 18, 2025

IN THE MATTER OF THE ESTATE OF JAMES WAMALWA WANGILA (DECEASED)

BETWEEN

CHRISTOPHER SIMIYU WAMALWA 1ST PETITIONER

WILBERFORCE WANGILA WAMAI 2ND PETITIONER

AND

BEATRICE NANJALA KOLOLI WAMALWA PROTESTOR

RULING

1. A ruling was delivered by this court on 27.2.2025 distributing the estate of the deceased. Christopher Simiyu Wamalwa the 1st Petitioner is dissatisfied with the said Ruling. In his application dated the 11th March 2025 brought under Rules 49,59,63 & 73 of the *Probate and Administration Rules*, Chapter 160 of the Law of Kenya and order 42 Rule 6(2) of the *Civil Procedure (Amendment) Rules* 2010, the applicant seeks the following orders;
 - a. Spent
 - b. That there be an interim stay of execution of the Ruling Order issued on 2722025 pending the hearing and determination of the Application.
 - c. That there be a stay of execution of the Ruling Order issued on 2722025, pending the hearing and determination of the intended appeal.
 - d. That an order of status quo barring and inhibiting the registration of Confirmation of Grant herein be issued pending the hearing and determination of the intended Appeal.
 - e. That leave to Appeal against the Ruling Order of this Hon. Court dated 2722025 be granted to the Petitioners.



f. Costs.

2. In his supporting affidavit dated 11th March 2025, the applicant depones that he is dissatisfied with the entire Ruling Order dated 2722025 and has lodged a Notice of Appeal. Leave to lodge an appeal in the Court of Appeal is a prerequisite in Probate and Administration causes. The intended appeal to the Court of Appeal has overwhelming chances of success, and if the Ruling is not stayed, the intended appeal to the Court of Appeal will be rendered academic, and the estate will be transferred to third parties, particularly plot No. Bungoma Municipality105, valued at over Kshs. 50,000,000-. This would put them in an awkward position, considering that the estate of the deceased is worth over Kshs. 200,000,000-. They are ready and willing to offer any security for due performance as may be directed by the Court. The application has been filed without any inordinate delay, as the Ruling Order was delivered on 2722025. The orders being sought will not in any way prejudice the Petitioner Respondent, as she will have the right to participate in the intended appeal, thus necessitating the inhibition of the issuance of the Confirmed Grant. In his supplementary affidavit dated 12th April 2025, the applicant avers that he has already lodged an Appeal in the Court of Appeal in Civil Appeal No. E076 of 2025.
3. The application was opposed. Beatrice Nanjala Wamalwa 3rd Petitioner Respondent filed grounds of opposition dated 26th March 2025, stating as follows: No appeal has been filed, the proposed appeal as evidenced in the proposed Memorandum of Appeal dated 11th March 2025 has absolutely no probability of success and that the proposed appellant's mode of distribution was vitiated by intermeddling. The inclusion of non-beneficiaries cannot be confirmed.
4. Parties canvassed the application through written submissions. The applicant submits that, pursuant to the leave granted by the court on 1.4.2025, the petitioners have already lodged an appeal at the Kisumu Court of Appeal. The appeal has overwhelming chances of success, and if the stay is not granted, the properties, particularly plot Municipality105, could be transferred to third parties. They would suffer substantial loss and damages. For this argument, the applicant relied on the following cases: *Silverstein v Chesoni* [2002] 1KLR, where the Court of Appeal held that

“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 will render the Appeal nugatory”.

The case of *Harun Gikonyo & Another v Marth Wachuka Kamau* [2022] eKLR, the court held that,

“In my considered view, the Applicants have established substantial loss. If the Judgment of the Subordinate Court were to be executed, it would be tantamount to eviction of the Appellants from the suit property. Thus, Courts have a duty to preserve the status quo, failure of which the Appeal would be rendered nugatory.”

In the *RWW v EKW* (2019) eKLR, the Court held,

“The purpose of an application for stay of execution is to preserve the subject matter in dispute so that the rights of the Appellants, who are exercising the undoubted right of Appeal if successful, are not rendered nugatory.”

Reliance was also made on the following cases: Cotton L.J in *Wilson v Church* (No.2 (1879) 12 Ch), *Butt v Rent Restriction Tribunal* (1982) KLR, and the case of *Clement Wakari Njoroge v Daniel Mwangi Wabome* (2022) eKLR.



5. It is further submitted that the application was made without unreasonable delay; the Ruling was delivered on 27/2/2025 and the application made on 11/3/2025, a period of 12 days. Regarding the issue of security for due performance, it was submitted that the petitioner is ready and willing to offer any security for due performance as the Court may direct. The draft appeal shows that it has an overwhelming chance of success, hence the need to preserve the status quo.
6. Lastly, it was submitted that in considering whether to grant a stay of execution, the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act* should be taken into account. Furthermore, the court is no longer limited to the provisions of Order 4 Rule 6, as it is now enjoined to give effect to the overriding objectives of the *Act* and *Rules* in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions (see the case of *Victory Construction v BM (a minor through next friend one PMM)* [2019] eKLR).
7. The Respondent submitted that an order for a stay of execution cannot be granted in vain. The Memorandum of Appeal filed has absolutely no probability of success. None of the 12 paragraphs of the Memorandum of Appeal can succeed on points of law or fact. The applicant has introduced new evidence at this stage without proper legal channels by stating that plot no. 105 is a commercial plot when it is the home of the Respondent. The Court rightfully rejected the petitioner's mode of distribution as there was intermeddling, which is a criminal offence under section 45 of the *Law Of Succession Act*.

Determination

8. Leave to appeal was granted on April 1st, 2025. The principles upon which this Court may grant a stay of execution pending appeal are well-settled in Order 42 Rule 6 of the *Civil Procedure Rules*, which requires an applicant seeking a stay of execution pending appeal to demonstrate that:
 - a. The application was made without unreasonable delay;
 - b. Substantial loss may result to the applicant unless the order was made;
 - c. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the Applicant.
9. The first consideration is whether the application was filed without unreasonable delay. The Ruling was read on 27/02/2025, and the application was filed on 11/03/2025. The application was made without unreasonable delay.
10. The second consideration is whether the applicant will suffer substantial loss. In *Machira ta Machira & Co. Advocates v East African Standard* (No 2) (2002) KLR 63 the Court of Appeal considered what amounts to substantial loss and held that ;

“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 ... 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 argues that there is a possibility that the property, in particular plot number 105, could be transferred to third parties. The respondent has submitted that the applicant is introducing new evidence that was not before this court. In my view, the applicant has failed to persuade this court that he will suffer substantial loss if a stay order is not granted and that the appeal will be rendered nugatory. Merely stating that a third could buy the property is not convincing; there is nothing to show that the respondent is in the process of disposing of the property she lives in, as was stated in her evidence.
12. On the last limb the applicant merely states that he is ready to offer security for due performance without much commitment. In my view, the applicant's application lacks merit. I set aside the interim order of stay of execution issued on the 12th March 2025 and dismiss the application dated 11th March 2025 with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 18TH DAY OF JUNE 2025.

R.E.OUGO

JUDGE

In the presence of;

Miss Wanyama hb Mr. Bw'Onchiri For the Applicant

Respondent- Absent

Wilkister - CA

