



**Kimani & another v Wangari (Family Appeal E029 of 2024)  
[2025] KEHC 8887 (KLR) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8887 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
FAMILY APPEAL E029 OF 2024  
FN MUCHEMI, J  
JUNE 19, 2025**

**BETWEEN**

**ROSE WAHU KIMANI ..... 1<sup>ST</sup> APPELLANT**

**NATASHA MOYA AKINYI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ANNE WANGARI ..... RESPONDENT**

**RULING**

**Brief facts**

1. The application dated 29<sup>th</sup> October 2024 seeks for orders of stay of execution in respect of the ruling in Ruiru CM Succession Cause No. E082 of 2023 delivered on 9<sup>th</sup> August 2024 pending the hearing and determination of this appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 28<sup>th</sup> January 2025.

**Appellants'/Applicants' Case**

3. The applicants state that upon the ruling in Ruiru CM Succession Cause No. E082 of 2023 was delivered on 9<sup>th</sup> August 2025 and they were aggrieved with the said ruling to the extent that they review the mode of distribution as had been earlier agreed upon to make provision of the Estate of Lucy Njoki Kimani and the respondent to be included as a beneficiary of the estate. The applicant further seeks for orders that the court makes a reasonable monetary provision for the respondent to cater for her right to benefit from the Estate of the late Lucy Njoki Kimani.
4. The applicants argue that they stand to suffer substantial loss because if the matter proceeds for distribution, they shall be denied their complete shares of the property which shall be shared to the respondent yet she admitted that she is not a dependent of the deceased. Further, the trial court made



a finding that the respondent was not a biological daughter of the deceased to whom the proceedings relate yet he made an order for monetary provision of the respondent from the Estate of Lucy Njoki Kimani. Additionally, the trial court made an order to include Lucy Njoki Kimani as a beneficiary of the Estate of John Kimani Kangethe yet she was long deceased prior to the institution of the present succession cause from which the appeal emanates from. The applicants further state that the lower court made presumptions that the deceased held the matrimonial property in trust for the respondent's mother when no evidence to that effect was tendered.

### **The Respondent's Case**

5. The respondent avers that she is a daughter of the late Lucy Njoki Kimani prior to the deceased's marriage to John Kimani Kangethe, the deceased herein. Lucy Njoki Kimani and John Kimani Kangethe had two children, the 1<sup>st</sup> applicant and the mother of the 2<sup>nd</sup> applicant. The respondent states that following the ruling delivered on 9<sup>th</sup> August 2024, the trial court found that she was entitled to a share of her mother's share in the Estate of John Kimani Kangethe. The trial court further ordered that the applicants make a reasonable provision for her to cater for her benefit from the Estate of her mother Lucy Njoki Kimani.
6. The respondent states that the applicants intend on disinheriting her from the estate of her late mother. Furthermore, no prejudice will befall the applicants if she is to inherit from the estate of her late mother. The respondent avers that she shall suffer great prejudice as the applicants will benefit from the estate of their father wholly and also their mother solely to her own detriment.
7. The respondent argues that the applicants have not shown any significant loss that they might suffer if the prayers sought are granted.
8. Parties disposed of the application by way of written submissions.

### **The Applicants' Submissions**

9. The applicants rely on Section 29 of the [Law of Succession Act](#) and submit that the respondent is not a dependant of the deceased and the lower court held that the respondent failed to prove her close association with the deceased. It is further argued that the trial court found that the respondent was not a biological daughter to the deceased and was never at any time supported or recognized by the deceased. To support their contentions, the applicants rely on the case of [Beatrice Ciamutua Rugamba vs Fredrick Nkari Mutegi & 5 Others](#) [2016] eKLR.
10. The applicants submit that the respondent is not a wife of the deceased and the legal provisions that the lower court tried to apply are not applicable as the Matrimonial Causes Act relates to parties who are married under any recognized marriage actor custom. In the instant case, all the parties to the marriage are deceased and thus the [Matrimonial Property Act](#) was not applicable. Thus the grant of some reasonable allowance to the respondent by virtue of the [Matrimonial Property Act](#) precisely section 14 of the Act was and is null for purposes and intents and therefore the lower court delved into matters which were beyond it. The applicants argue that the issue of how the respondent's mother had contributed to the acquisition of the said property was and is a moot issue and any claim that may have accrued to her was extinguished by the operation of law once she died and the deceased herein died.
11. The applicants further argue that the issue of matrimonial property was neither pleaded nor raised during the hearing for the lower court to consider. The applicants refer to the case of [Estate of Josepha Torotich Cherono \(Deceased\)](#) (Succession Cause No. 46 of 2020) [2024] KEHC 10003 (KLR) (9 August 2024) (Ruling) and submits that the Success Act is a sui generis act that does not encompass any other



act. Thus for the lower court to make a determination based on the Matrimonial Property Act was an overreach and a blatant error in law and in principle.

### The Respondent's Submissions

12. The respondent relies on Order 42 Rule 6 of the Civil Procedure Rules and the case of Nesco Services Limited vs CM Construction (EA) Limited (2019) eKLR and submits that the applicants do not stand to suffer any substantial loss as the lower court made provisions for all the children of the deceased. The respondent argues that the application was made with undue delay as the impugned ruling was delivered on 9<sup>th</sup> August 2024 and the application was filed on 31<sup>st</sup> October 2024 which is approximately two months since the delivery of the ruling. It is further argued that the applicants have not offered any explanation for the delay.
13. On the issue of security, the respondent submits that the applicants have not furnished the court with any security. The respondent argues that the applicants intend on frustrating her and occasioning her financial loss.

### The Law

#### Whether the applicants have satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

14. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. 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 1<sup>st</sup> 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.
15. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
  1. Substantial loss may result to him/her unless the order is made;
  2. That the application has been made without unreasonable delay; and
  3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.



16. Substantial loss was clearly explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR:-

“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.

17. The applicants state that they stand to suffer substantial loss as they shall be denied complete shares in their property which shall be distributed to the respondent yet she is not a dependant of the deceased. I have perused the lower court record and noted that the ruling delivered on 9<sup>th</sup> August 2024 directed that the applicants review the mode of distribution to make provision for the Estate of Lucy Njoki Kimani and the respondent be included as a beneficiary of the said estate. It is also noted that the trial court found that the respondent was not a dependant of the deceased herein. Therefore, it is my considered view that the applicants have demonstrated that they shall suffer substantial loss as the respondent is not a dependant of the deceased but the court has made provision for her to be included in the said estate. This in my view will be detrimental to the applicants as the estate in question is that of John Kimani Kangethe and not the respondent’s mother Lucy Njoki Wainaina. Accordingly, it is my considered view that the applicants have proved substantial loss.

#### **Has the application has been made without unreasonable delay**

18. The ruling was delivered on 9<sup>th</sup> August 2024 and the applicant filed the instant application on 31<sup>st</sup> October 2024 which is a duration of approximately two months. It is my considered view that a delay of two months is not inordinate and inexcusable. Thus the application has been filed timeously.

#### **Security of costs**

19. The purpose of security was explained in the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:-

“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 the 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.

20. Evidently, the issue of security is discretionary and it is upon the court to determine whether it should be provided depending on the nature of this case. Considering the fact that the grant is yet to be confirmed in the court below and that the appellants are the indisputable beneficiaries of the estate, this court will waive the requirements of security.
21. Additionally, grant of stay being a discretionary order, the court is expected to balance out the interests of the successful litigant and the applicant’s unfettered right to file an appeal to fully ventilate her



grievances. This was well stated in the case of *M/s Porteitiz Maternity vs James Karanga Kabia* Civil Appeal No. 63 of 1997 where the court held:-

That the right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.

In this appeal, I repeat again that the grant is yet to be confirmed which makes the balancing scale a bit shaky herein.

22. Bearing the said balance in mind and considering the provisions of Order 42 Rule 6 of the Civil Procedure Rules, it is my considered view that the applicants have met the threshold of granting stay of execution pending appeal.
23. I find this application merited and allow it accordingly by granting orders for stay pending hearing and determination of the appeal.
24. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 19<sup>TH</sup> DAY OF JUNE 2025.**

**HON. F. MUCHEMI**  
**JUDGE**

