In re Estate Kibet Arap Kimaron alias Kimuron (Deceased) (Succession Cause 206 of 2015) [2025] KEHC 9947 (KLR) (10 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9947 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

SUCCESSION CAUSE 206 OF 2015

JK NG'ARNG'AR, J

JULY 10, 2025

IN THE MATTER OF THE ESTATE OF KIBET ARAP KIMARON ALIAS KIBET ARAP KIMURON (DECEASED)

BETWEEN

KIPKORIR ARAP MWEI .... 1ST ADMINISTRATOR

RICHARD KIPKEMOI SIGEI .... 2ND ADMINISTRATOR

AND

GEOFFREY KIPKORIR LANGAT .... 1ST INTERESTED PARTY

RICHARD KIPKIRUI MARISIN .... 2ND INTERESTED PARTY

GEOFFREY CHERUIYOT KIPLANGAT .... 3RD INTERESTED PARTY

JACQUILINE CHEPKIRUI SOI .... 4TH INTERESTED PARTY

RULING

1. The 1st and 2nd Applicant's made an application dated 20th day of May, 2024 where the 1st & 2nd Applicant's Petitioner's sought the following orders; -

    a. Spent

    b. That the Court be pleased to grant an order of stay of execution or proceedings and the operationalization of orders issued from the ruling of this Honorable Court of 30th day of April, 2024, pending the hearing and determination of this application.

    c. That the Court be pleased to grant an order of stay of execution or proceedings and the operationalization of orders issued from the ruling of this Honourable Court on 30th day of April, 2024, pending the hearing and determination of the appeal lodged with the court of appeal.

d. That this Honorable court be pleased to exercise its discretion and grant leave for the 1st & 2nd Administrators/Petitioners to appeal to the court on the Ruling delivered on 30th day of April, 2024.

e. That necessary directions be given.

f. That costs of this application be provided for.

2. The application is supported by an affidavit sworn by Kipkorir Arap Mwei. The 1st and 2nd Applicants, Kipkorir Arap Mwei and Richard Kipkemoi Sigei, seeks leave to appeal against the ruling and decree of Hon. Lady Justice R. Lagat-Korir, delivered on 30th April 2024 in this matter.

3. They claim that the ruling revoked the Certificate of Grant confirmed on 21st September 2016, significantly altering the administration and distribution of the deceased's estate. The Applicants contend that the ruling raises substantial legal issues that merit consideration by the Court of Appeal.

4. The Applicants further seek an order for stay of execution, they argue that the Honorable court was functus officio after confirming the grant and had no jurisdiction to entertain an application for revocation. The revocation was done without review. They aver that Section 76 of the *Law of Succession Act* was wrongly applied, as it only governs revocation of grants of representation, not Certificates of Grant. They claim that if execution proceeds, the estate risks being distributed to third parties, making reversal legally difficult and rendering the appeal nugatory. The Applicants invokes Order 42 Rule 6[2] of the *Civil Procedure Rules*, Section 50 of the *Law of Succession Act*, and Rule 73 of the *Probate and Administration Rules*, seeking reliefs in the interest of justice.

5. The Respondents claim that the applicants have failed to justify their prayer for stay of execution pending appeal as set out in statute. They aver that this is enshrined in law in Order 42 Rule 6 [2] that framed the conditions for stay of execution as follows:

a. That substantial loss may result to the applicant unless the order is made.

b. The application has been made without unreasonable delay.

c. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

6. They claim that substantial loss as condition is the cornerstone and beating heart of any application seeking stay. They claim that despite the weight and importance it holds, the applicants only stated that they will suffer substantial loss and leave it for this court to give meaning to the same for them. They submit that substantial loss has not been satisfied and automatically disqualifies the applicants from getting stay orders.

7. They aver that the application does not meet the threshold set for grant of the prayer sought as proof of substantial loss is lacking as simply stating the same without expounding in detail does not substantiate anything. The first limb is thus not satisfied.

8. They further state that the applicants herein are under the illusion that they are not required to provide security in this instance. They argue that given the decree herein is not a money decree and as such they are exempt from satisfying that condition. This in their view is the most a display of bad faith as it shows the applicants intent on denying the respondent herein the fruits of their judgment. They also noted that the issue of security is entirely at the court's discretion.

9. They submit that the fact that this is not a money decree does not preclude this court from exercising its discretion and ordering a form of security as the respondent herein has a valid decree in its possession

and has a right to benefit from the same. The Respondents submits that by failing to provide an offer of security the applicants are acting in bad faith and are undeserving of the orders sought.

10. They further submit that the stay orders herein cannot be granted. They claim that the orders sought by the applicants seek of stay have long been implemented with the grant therein being revoked and the cancellation of the irregular titles been effected affirming the original subdivision which they claim to be supported by the various certificates of search eliciting that all the respondents have duly received ad hold legal title to the parcels. They contend that, as such, the court has nothing to stay and the application herein has been overtaken by events.

11. They further state that the respondents are already the registered owners of the suit parcels and reverse or undo the same is not legally founded and serves no purpose and is redundant. It is claimed that the weight of not meeting the threshold of grant of stay of execution they submit that the same cannot be granted. They aver that the application is unmerited and should be struck out with costs to the respondents.

12. The Respondents submit that the arguability of the appeal is lacking as the applicants' draft memorandum of appeal raises no triable issues. They claim that the court had become functus officio thus should not have determined the application for revocation of grant before it.

13. They argue and asks this court to be guided by the principles set down by the provisions of Section 27 of the *Civil Procedure Act* Cap 21 which is to the effect that costs are at the discretion of the court and that they generally follow the event. They also pray that they be awarded the costs of the same.

Determination

14. I have carefully considered the Application, Supporting Affidavit, and the Respondent's Replying Affidavit. The only issue which arise for determination is whether this court should grant stay of execution of the Ruling delivered on 30th April, 2024.

15. Stay of Execution is provided under Order 42 Rule 6 of the *Civil Procedure Rules* 2010 as follows;

> " [1] No appeal or second appeal shall operate as a stay of execution or proceeding 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 order set aside.
>
> [2] No order for stay of execution shall be made under subrule [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."

16. The three conditions to be fulfilled can therefore be summarized as follows;

    a. That substantial loss may result to the applicant unless the order is made. Application has been made without unreasonable delay. Security as the court orders for the due performance

17. These principles were enunciated in *Butt v Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:

    a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.

    b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.

    c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

    d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4[2] [b] of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

Undue Delay

18. As to whether the Application has been filed without undue delay, judgment was entered on 18th January 2024. The memorandum of appeal was filed on 16th February 2024, simultaneously with the current application, all of which were done within one month. This court thus finds that the appeal and this application for stay of execution has been filed without undue delay.

ii. Substantial Loss

19. On the issue of substantial loss, Ogolla, J in *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd [in liquidation]* [2004] 2 EA 331 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.'

20. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR the court expressed itself as hereunder:

> " 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."

12. The same position was adopted by Kimaru, J in *Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi [Milimani] HCMCA No. 1561 of 2007 where he stated that:

> "The word "substantial" cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement."

21. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR the Court of Appeal held thus;

> "Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge."

22. I find that substantial loss has not been exhibited in this matter as no substantial evidence have been tended to warrant the same. I am not essentially persuaded that there can be substantial or irreparable damage this being an immovable property that can always be reclaimed by way of damages.

iii.Security

22. As regards deposit of security, the court observed in the case of *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* [2019] eKLR it was held that:-

> "The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6[1] of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls. Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal. Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event,

the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree."

23. I consider the overriding objective and balance the interest of the parties to the suit while considering the issue of security to be offered. The law is that where the applicant intends to exercise his undoubted right of appeal, and in the event, that he was eventually to succeed, he should not be faced with a situation in which he would find himself unable to get back his/her money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. I find that this is the cornerstone of the requirement for a material security.

24. The issue of adequacy of security was dealt with by the Court of Appeal in *Nduhiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows:

> " The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them.So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it".

Disposition.

1. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, and since based on the grounds of appeal. I do grant stay of execution of the decree herein on condition that the Appellant/Applicant do deposit a sum of Ksh. 200,000 /- to court as security of this Appeal.

2. The above condition is to be met within 45 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.

3. The costs of this Application to abide by the outcome of appeal.

   It is so ordered.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 10TH DAY OF JULY, 2025.

....

HON.J.K. NG'ARNG'AR

JUDGE

Ruling delivered in the presence of Mr Kiletyen for the Applicant and Mr Mugumya for the Respondent. Siele/Susan [Court Assistants].