



REPUBLIC OF KENYA



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**Obando v Juma (Civil Appeal E181 of 2024)
[2025] KEHC 12892 (KLR) (17 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12892 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E181 OF 2024
S MBUNGI, J
SEPTEMBER 17, 2025**

BETWEEN

ESTHER NALIKA OBANDO APPLICANT

AND

KETRUDA ADHIAMBO JUMA RESPONDENT

*(Being an Appeal arising from the Decision of Hon. Atanga Thomas Obutu
Chief Magistrate, Mumias Court Delivered on 7th day of November, 2024)*

RULING

1. The Applicant herein filed the application dated on 8th November .2024 seeking the following orders:
 - a. Spent.
 - b. Spent.
 - c. Spent
 - d. The applicant avers that there be an interim stay of execution of the ruling and orders dated on the 7th. day of October 2024 which was delivered in Mumias PMC SUCC Cause No. 44 Of 2016 (In The Matter Of The Estate Of Chuma Musiani Sipriano Alias Musiani(Deceased) Ketruda Adhiambo Juma =Vs= Esther Naliaka Obando) pending the hearing and determination of that appeal.
 - e. That the costs of that application to be provided for.
2. The application is supported by the ground on the face of the said application and the supporting and a supplementary affidavit of the applicant dated the same date as the application sworn on 16.12.2024.



3. The respondent opposed the application via a replying affidavit sworn by himself on 19th November, 2024.
4. The applicant avers that she was dissatisfied with the decision of the trial magistrate and preferred this appeal via memorandum of appeal dated 7.11.2024 and seek to stay the said judgment on grounds that she will suffer substantial loss unless the order of stay is granted for she will be displaced from L. Parcel No. N. Wanga/indangalasia/18 To No.n. Wanga/mayoni/518 Yet She Is The One Who Is Entitled To Parcel No. N. Wanga/indangalasia/18.
5. Secondly is the stay is not granted the appeal shall be rendered nugatory yet the appeal is agreeable and has overwhelming chances of success for the grant was confirmed without complying with Rule 40 (8) of the Probate and Administration rules which requires of all beneficiaries to be sought and filed.
6. Thirdly , that the application is filed without undue delay .
7. In opposing the Application the respondent deponed that she is the only surviving widow of the deceased and residing on land reference North/wanga/indangalasia/18.
8. The appellant does not and has never resided on land reference North/wanga/indangalasia/18 , save that her husband was buried there, when her husband (the deceased) was still alive.
9. The Applicant has intermeddled with the deceased land by cutting trees and excavating murrum for sale.
10. the deceased owned another parcel of land North/wanga/mayoni/518, wo which the applicant's husband was entitled to a share.
11. The succession cause was determined by witness oral testimony and submissions.
12. The Applicant has intermeddled with the estate of the deceased by cutting trees and extracting murrum.
13. The ruling makes sufficient provision for the Applicant and other beneficiaries from the first house of Mariana Mungona(Deceased).
14. The Respondent has an equal number of children as the first house, a factor the ruling took into consideration.
15. The Applicant stands to suffer no Prejudice as she is well provided for in Land Reference North Wanga/ mayoni/518.
16. The Respondent is an old lady aged 82 years. The appeal and the motion for stay are purely intended to buy time to frustrate her settling her children in the event of her demise before this suit is concluded.
17. I have looked at the application, supporting affidavit and submissions filed by the Respondent. I have also looked at the replying affidavit filed by the respondent. The main issue for determination is whether the application is merited.

Analysis and Determination.

18. The law governing the grant of orders for a stay of execution pending appeal is codified under Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules, which stipulates as follows: -
 1. 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 the application being made, to consider such application and to make such order thereon as may to it seems just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is referred may apply to the appellate court to have such order set aside.

2. No order for a stay of execution shall be made under sub-rule (1) unless—
3.
 - (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.
19. The above provision requires the Applicant seeking orders for a stay of execution to establish that he has a sufficient cause for seeking the orders, that he stands to suffer substantial loss if the orders are not granted, and lastly, that he is willing to furnish security for the due performance of the decree. In addition to the above conditions, an application for a stay of execution pending appeal must be made without unreasonable delay.
20. 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.
 - b. Application has been made without unreasonable delay.
 - c. Security as the court orders for the due performance.
21. The Court of Appeal in *Butt Vs Rent Restriction Tribunal* [1979] stated what ought to be considered in determining whether to grant or refuse a 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 motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse
22. The first condition that the Applicant should meet is if he will suffer substantial loss if the stay orders are not granted.



23. On what constituted substantial loss, it was explained in the case of James Wangalwa & Another v 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.

24. The Applicant avers that she will be evicted from L. Parcel No. N. Wanga/indangalasia/18 if the stay is not granted thus making her suffer substantial loss .
25. If it is true that the Applicant has settled on that particular piece of land obviously if evicted she will suffer substantial loss.
26. The second consideration is whether the application was filed without unreasonable delay.
27. The court in Jaber Mohsen Ali & Another vs. Priscillah Boit& Another E&L No. 200 of 2012[2014] eKLR was of the view that unreasonable delay depends on the circumstances of the case. The court stated:

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land. I note that the judgment was delivered on 23rd July 2024. The memorandum of appeal was filed on 29th July 2024 which was less than a week after the judgment was entered.

28. The appeal was filed on 7th November, 2024 and the application was filed on 8th November, 2024 while the judgment was delivered on 7th November, 2024 almost a difference of one day. This court finds that the appeal and this application for a stay of execution have been filed without undue delay.
29. The last consideration is on the security. In Focin Motorcycle Co. Limited vs Ann Wambui Wangui & Another (2018) eKLR the court stated that:

“Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground.”



29. Security is discretionary and it is upon the court to determine the same. In this case, the applicant is willing to provide security though she has not disclosed which kind of security, she left it to the court to determine the kind of security she can offer.
30. I have perused the memorandum of appeal, the applicant says that the certificate of confirmed grant was issued without complying with the provisions of rule 40(8) of the probate administration rules. This is a question of law for if it is found the law was not followed ,it will mean that the entire proceedings were null and void.
31. The above analysis makes me find that the Applicant has successfully met the requirements of order 42 rule 6(1) and (2) of the Civil procedure Rules, therefore I allow the Application and stay of the execution of the Ruling dated 7th November, 2024 until the hearing and determination of the Appeal. This being a family matter each party shall bear the costs of their Application and further that there is no need for the Applicant to provide a security.
32. Mention 8th October, 2025 for directions on the hearing of the Appeal.
33. Right of Appeal 30 days.

DATED SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 17TH OF SEPTEMBER, 2025.

S.N. MBUNGI

JUDGE

In The Presence Of;

Applicants' Counsel

C/A: Elizabeth Angong'a

Mr. Were for the Appellant present online.

Mr. Mukaya for the Appellant absent.

