



Wangari (Suing as the administrator of the Estate of the Late Simion Kuria Kanyori alias Simon P Kuria) v Equity Bank (K) Ltd & 3 others (Civil Appeal E258 of 2024) [2025] KEHC 12699 (KLR) (9 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12699 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E258 OF 2024
FN MUCHEMI, J
SEPTEMBER 9, 2025**

BETWEEN

MARGARET NAOMI WANGARI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE SIMION KURIA KANYORI ALIAS SIMON P KURIA) APPELLANT

AND

**EQUITY BANK (K) LTD 1ST RESPONDENT
EMMAH WANGARI WANGUI 2ND RESPONDENT
RUIRU LAND REGISTRAR 3RD RESPONDENT
THE HON ATTORNEY GENERAL 4TH RESPONDENT**

RULING

Brief facts

1. The application for determination dated 7th April 2025 seeks for orders of stay of execution in respect of the judgment in Thika CMCC No. 432 of 2020 delivered on 20th August 2024 pending the hearing and determination of the appeal.
2. In opposition to the application, the 1st respondent filed a Replying Affidavit dated 12th May 2025.

Appellant’s/Applicant’s Case

3. The applicant states that judgment in Thika CMCC No. 432 of 2020 was entered in favour of the 1st respondent with an order allowing for the exercise of a statutory power of sale of property Title Number Ruiru/Ruiru East Block 4/334 belonging to the deceased, over a charge fraudulently issued to the 2nd respondent unknown to him and without his consent. The applicant states that she sought



stay of the judgment at the lower court but the same was unduly denied in the ruling delivered on 27th March 2025.

4. The appellant states that the actualization of the orders issued by the lower court will divest her of the deceased's property and if the 1st respondent proceeds to execute the decree, the deceased's estate will be prejudiced and suffer loss.
5. The appellant further states that if the orders sought are not granted, her rights to the deceased's estate will be curtailed. In the event stay is not granted, there is every imminent danger that the 1st respondent shall in terms of the orders issued, proceed to exercise the statutory power of sale thereby divesting her of the suit property and render the appeal nugatory. The appellant states that she stands to suffer substantial loss as the 1st respondent shall proceed to sell the subject suit property actualizing the judgment thereby rendering the appeal an academic exercise.
6. The instant application has been made timeously as the orders denying stay pending appeal at the lower court were issued on 27th March 2025, less than 15 days from the said ruling.
7. The applicant avers that the grant of the orders of stay shall not prejudice the 1st respondent as they can still pursue the 2nd respondent for payment of the loan amount with interest accrued to date. Whereas if the property is sold in execution of the judgment, she will never recover her property when the appeal is successful as the respondents would not be able to repay her for such loss of property should the appeal succeed.

The 1st Respondent's Case

8. The 1st respondent states that judgment in the lower court was delivered in its favour and directed that it had a legal and equitable interest in suit property Title Number Ruiru/Ruiru East Block 4(Juja)/334 as a secured creditor and that the formal legal charge dated 21st March 2016 is legal and thus enforceable.
9. The 1st respondent states that the applicant seeks to deny it its right to enjoy the fruits of the judgment considering the applicant had sought for stay of execution of the judgment at the lower court and the same was dismissed vide a ruling dated 27th March 2025.
10. The 1st respondent argues that the applicant has stated that substantial loss would be incurred if the orders of stay are not granted but has not in any way demonstrated how that loss would be suffered and what prejudice would cause to her. The applicant has failed to demonstrate any exceptional circumstances warranting the grant of stay of execution; any substantial loss likely to be incurred or even offered any security pursuant to Order 42 Rule 6 of the Civil Procedure Rules.
11. The 1st respondent states that the applicant has not demonstrated any arguable grounds of appeal nor has she shown how the appeal shall be rendered nugatory in the event that the orders are denied.
12. The 1st respondent avers that granting of the orders would occasion undue prejudice and hardship upon it who has been kept out of the fruits of a lawful judgment.
13. The applicant filed a Supplementary affidavit dated 16th May 2025 and states that the 1st respondent has not demonstrated to the court that it has means and in any event the land is so unique in character and is irreplaceable. The applicant states that she cannot be compensated if the land is sold and the appeal is successful. Further, the land is the deceased's property and it awaits distribution to the lawful beneficiaries.



14. The applicant states that the deceased never took out a loan and neither did he consent to one being taken using his property or even benefited from any loan that may have been taken. The applicant argues that the deceased is merely an innocent owner of property that is subject to the fraudulent activities of the 2nd respondent.
15. The applicant avers that she has an arguable appeal as the deceased was never a party to the charge and neither did he consent to the use of his property to secure a loan or benefit from the supposed loan that was issued by the 1st respondent. The charge was fraudulently taken out by the 2nd respondent yet the deceased's property was used in securing the loan of the subject of the charge by the 1st respondent.
16. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

17. The applicant relies on Order 42 Rule 6 of the Civil Procedure Rules and the cases of *Nicholas Stephen Okaka & Another vs Alfred Waga Wesonga* [2022] eKLR; *Matata & Another vs Rono & Another* (Civil Appeal E034 of 2024) [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling) and *RWW vs EKW* [2019] eKLR and submits that the ultimate end of orders on stay pending appeal is geared towards preserving the subject matter of the appeal through issuance of orders that do not render the substantive appeal to be in vain.
18. The applicant argues that the appeal is highly arguable and meritorious with a very high chance of succeeding as she has demonstrated that the deceased is the registered owner of the suit property which he never sold, transferred, charged or consented to be charged by the 1st respondent.
19. The applicant submits that if the 1st respondent proceeds to exercise the statutory power of sale, the property will be sold to a third party and thus she will have no property restored to her if the appeal succeeds. The 1st respondent issued a loan to the 2nd respondent who fraudulently used the deceased's property to secure the loan. No relationship or cause of action exists between the applicant and the respondents and no orders were issued against the applicant by the 1st respondent. Thus, the applicant submits that she will be left with no recourse against the third party if stay is not granted and the 1st respondent in execution of the judgment proceeds to sell the suit property.
20. Relying on the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR, the applicant argues that execution will create a state of affairs that will irreparably affect the core of the appeal especially if successful. No costs or damages will be capable of compensating her as the suit property is subject to a confirmed grant where due regard is given to the assets of the estate at distribution. The beneficiaries of the estate stand to be disinherited.
21. The applicant submits that the 1st respondent's ability to restore the property to her is improbable and unknown if the appeal does succeed. The 1st respondent has not demonstrated that they are of means and it shall be nearly impossible to recover the subject property if the appeal succeeds. Relying on the case of *Ena Investment Limited vs Benard Ochau Mose & 2 Others* [2022] eKLR, the applicant submits that the 1st respondent has not rebutted the issue of means or demonstrated their financial capability.
22. The applicant submits that the application has been made timeously having been sought in less than fifteen (15) days from the date of the lower court ruling denying stay of execution.
23. On the issue of security, the applicant submits that she deposited security of Kshs. 300,000/- as directed by the court.



The 1st Respondent's Submissions

24. The 1st respondent relies on Order 42 Rule 6 of the Civil Procedure Rules and the case of *Butt vs Rent Restriction Tribunal* [1979] and submits that the applicant has not met the conditions to warrant stay of execution pending appeal. Relying on the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2021] eKLR, the 1st respondent submits that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect her or alter the status quo to her detriment rendering the appeal nugatory, which she has failed to do. Further, the applicant has not shown how execution of the decree would result in substantial loss as the decree pertains to the enforcement of a valid charge and the suit property was legally used as security for a loan advanced to the 2nd respondent.
25. The 1st respondent argues that the applicant is not the borrower and the loss she claims is speculative. The 1st respondent further submits that the rightful remedy for the loan default is the realization of the charged security and the granting of the orders would occasion undue prejudice and hardship upon it who has been kept out of the fruits of a lawful judgment.
26. Relying on the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR, the 1st respondent submits that the mere act of offering security is not conclusive or sufficient to compel the court to grant stay and in the absence of an arguable appeal or demonstration of substantial loss, its provision cannot cure the deficiencies in the instant application.
27. The 1st respondent refers to the case of *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others* [2013] eKLR and submits that the appeal is not arguable nor does it have high chances of success. The applicant has not pointed out any specific error of law or fact committed by the trial court. The trial court made clear findings based on evidence, including that the charge was legally registered and the 1st respondent had a valid legal and equitable interest. The 1st respondent submits that the appeal appears to be a delaying tactic devoid of merit and a second attempt seeking stay. The 1st respondent submits that the court should not entertain successive applications that are meant to delay justice and frustrate the successful party.
28. Relying on the case of *National Bank of Kenya vs Shimmer Plaza Ltd* [2009] eKLR, the 1st respondent submits that the balance of convenience favours allowing it to execute the decree as the loan remains unpaid.

The Law

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

29. 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 1st 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.
30. 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.
31. 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.

32. The applicant argues that the 1st respondent shall proceed and exercise its statutory power of sale thus selling the suit property rendering her appeal nugatory. Furthermore, if the property is sold in execution of the judgment, the applicant states that she will never recover the property if the appeal is successful as the respondents would not be in a position to repay her for the such loss of property.
33. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show that execution of the orders shall irreparably affect her or will the status quo to her detriment therefore rendering the appeal nugatory. Thus, the applicant raised the issue of the respondents’ financial capabilities and the burden of proof shifted to the respondents to show that in the event the appeal is successful, they would be in a financial position to repay the applicant the value of the suit land. The 1st respondent is a commercial bank and would be in a position to compensate the applicant for loss. However, the issue of fraud is one that requires interrogation by this court. If it is found to be true, the family of the deceased would suffer substantial loss. The applicant has demonstrated the substantial loss in my considered view. It is therefore my considered view that the applicant has demonstrated the substantial loss she stands to suffer.

Has the application has been made without unreasonable delay

34. Judgment was delivered on 29th August 2024 and the applicant filed the instant application on 8th April 2025. It has taken the applicant about 7 months between the date of judgment delivered in the trial



court and the time when she filed the instant application. The applicant has not given any reasons why it took her approximately 7 months to file the present application. It is therefore my considered view that a delay of 7 months is inordinate and inexcusable.

Security of costs

35. 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.

36. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has stated that she deposited security of Kshs. 300,000/- as directed by the court. This is borne by the record in the proceedings of 8th April 2025.

37. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

38. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondents their right of enjoying their judgment. I have perused the grounds of appeal and without going into the merits of the appeal noted that they raise arguable points of law. Therefore, it is my considered view that the applicant has met the threshold of granting stay of execution pending appeal.

39. Accordingly, it is my considered view that the application dated 7th April 2025 has merit and is hereby allowed. Orders for stay pending appeal are hereby granted.

40. The costs of this application shall abide in the appeal.

41. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 9TH DAY OF SEPTEMBER 2025.

F. MUCHEMI

JUDGE

