



REPUBLIC OF KENYA



**Maitethia v Mutwiri & another (Family Appeal E012 of 2023)  
[2024] KEHC 775 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 775 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
FAMILY APPEAL E012 OF 2023  
EM MURIITHI, J  
FEBRUARY 1, 2024**

**BETWEEN**

**CLIFFORD MAITETHIA ..... APPELLANT**

**AND**

**STEPHEN MUTWIRI ..... 1<sup>ST</sup> RESPONDENT**

**MARTIN KIMATHI M'MWAMBA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion under certificate of urgency dated 12<sup>th</sup> June 2023 brought under section 47 of the Law of Succession Act, Rules 49 and 73 of the Probate and Administration Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, Section 68 (1) of the Land Registration Act and Article 159 (1) (d) of the Constitution, the appellant seeks that:
  1. Spent
  2. Pending the hearing of this application interpartes, the court be pleased to issue orders of inhibition against Land Parcel Number Nyaki/Nkabune/501 to prevent any transfer of any other dealings.
  3. Spent
  4. This Honorable court be pleased to issue order of stay of the implementation of the court's judgment and made in Meru Chief Magistrate Succession Cause Number 232 of 2018 in the matter of the estate of M'twarugoji M'twaruchiu and further issue orders of inhibition against Land Parcel Number Nyaki/Nkabune/501 pending the hearing and determination of the Appeal.
  5. This Honorable court be pleased to issue further orders as it may deem fit.



6. Costs of this application be provided for.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Clifford Maitethia, the appellant herein, sworn on even date. After the delivery of the impugned judgment on 11/5/2023, the file was taken for typing until 5/6/2023 when it was returned to the registry, hence, his advocate was unable to pay for the proceedings or peruse the copy of the judgment until 9/6/2023. He is apprehensive that the respondents intend to transmit Land Parcel Number Nyaki/Nkabune/501 to themselves without his knowledge, and unless an order of inhibition is issued to prevent any transfers or dealings thereof pending the determination of the appeal, he will suffer irreparable loss if the land is transferred, charged or dealt with in any other manner. Unless stay is granted, the respondents will deal with the land in a manner which is detrimental to him. The application has been made in utmost good faith without any delay and the prayers sought will not in any way prejudice the respondents, who are occupation of the land.
3. The appellant swore a further supporting affidavit on 24/10/2023.
4. The respondents have opposed the application vide a replying affidavit sworn by Stephen Mutwiri, the 1<sup>st</sup> respondent herein on 21/6/2023. He avers that the application is defective, incompetent and has been brought in bad faith to continue depriving him and other beneficiaries the right to enjoy their inheritance for no apparent reason. He avers that the appellant has not given a reason for the delay in lodging the appeal and the instant application, as no letter requesting for any proceedings has been attached. He urges the court to dismiss the application with costs as no proof has been provided to show that the respondents have attempted to implement the grant.

### Submissions

5. The appellant urges that the application was filed without delay on 12/6/2023 approximately one month after the delivery of the impugned judgment, and since the appeal is yet to be determined, there is need to preserve the estate property in the intervening period. He urges the court to balance the conflicting rights of the parties herein by ensuring the property is protected pending the determination of the issues raised in the appeal. He prays for the application to be allowed and cites *Kagaari South Farmers Co-Operative Society Limited and 4 Others v Bernard Mugo & 5 Others* (2016) eKLR.
6. The respondents urge that the appellant has not demonstrated what substantial loss he will suffer if the decree is executed and cite *Hamisi Juma Mbaya v Amakecho Mbaya* (2018) eKLR, *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* (2022) eKLR, *SOC Finac Company Limited v Nephath Kimotho Mutua* (2013) eKLR, *Mohamed Salim t/a Choice Butchery v Nasserpuria Memon Jamat* (2013) eKLR, *Carter & Sons Ltd v Deposit Protection Fund Board & 2 others* CA Nairobi 291/1997, *Kenya Wildlife Service v James Mutembei* (2019) eKLR and *Global Tours & Travels Limited* Nairobi HC Winding up Cause No. 43 of 2000. They urge that the application has been brought in bad faith and with unreasonable delay, and cite *Machira t/a Machira & Company Advocates v East African Standard* (2002) eKLR. They urge that the application ought to be dismissed as the appellant has failed to satisfy the pre-requisite conditions for grant of stay, and cite *David Morton Silverstein v Atsango Chesoni* (2002) eKLR and *Ena Investment Limited v Bernard Ochau Mose & 2 others* (2022) eKLR.



## Determination

7. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, as follows: -

“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 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.

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 Applicant unless the order is made and that the application has been made without unreasonable delay.
  - 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.”
8. This court respectfully agrees with the court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 that the power to grant stay is discretionary and such discretion should be exercised in such a way as not to prevent an appeal.
9. This court notes that the application was filed timeously on 12/6/2023 while the decision sought to be appealed against was made on 11/5/2023. That delay of approximately one month cannot be termed as inordinate and inexcusable.
10. The court notes from the grounds of appeal as raised in the appellant’s memorandum of appeal, and in particular whether or not the appellant’s mother was a daughter to the deceased, that the appeal is indeed arguable, which is not one which must necessarily succeed and neither is it for the court to go into the merits of the intended appeal.
11. The court finds that the fact that the appellant may be completely disinherited in the event of a successful appeal, is indeed substantial loss, to warrant grant of the stay sought.

## Orders

12. Accordingly, for the reasons set out above, the court allows the applicant’s application dated 12/6/2023 in the following terms:
1. An order for stay of execution of the implementation of the Judgment in Meru Chief Magistrate Succession Cause No. 232 of 2018 in the matter of the estate of M’twarugoji M’twaruchiu is hereby issued pending the hearing and determination of the appeal.
  2. An order of inhibition is hereby issued against Land Parcel Number Nyaki/Nkabune/501 pending the hearing and determination of the Appeal.
  3. The Record of Appeal to be filed within 60 days from the date hereof.



4. In the event of default of the aforementioned conditions, the stay of execution shall lapse and be of no effect.
5. The costs of the application shall abide the outcome of the Appeal.

Order accordingly.

**DATED AND DELIVERED ON THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances**

Mrs. Ntarangwi for Appellant

Mr. Thangicia for the Respondent.

