



**Okemwa & 2 others v Okemwa (Succession Cause E321 of 2015)  
[2024] KEHC 1094 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1094 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
SUCCESSION CAUSE E321 OF 2015  
DKN MAGARE, J  
FEBRUARY 7, 2024**

**BETWEEN**

**MARY KERUBO OKEMWA ..... 1<sup>ST</sup> PETITIONER**

**KEPHA MARITA OKEMWA ..... 2<sup>ND</sup> PETITIONER**

**DINA BOSIBORI OKEMWA ..... 3<sup>RD</sup> PETITIONER**

**AND**

**JANE BOSIBORI OKEMWA ..... PROTESTOR**

**RULING**

1. This is a Ruling in respect of the 1<sup>st</sup> and 2<sup>nd</sup> Petitioner's Application dated 1<sup>st</sup> August 2022 and the Protestor's Application dated 3<sup>rd</sup> March 2022.
2. The Application dated 3<sup>rd</sup> March 2022 sought the following prayers:
  - a. Spent
  - b. Spent
  - c. This Court do Order that Dinah Bosibori Okemwa, Mary Kerubo Okemwa and Kepha Marita Okemwa, the Joint Administrators with the Applicant herein for the estate of the late Johnson Okemwa Nyakundi do execute and/or sign all the relevant instruments required for the Administration of the Estate of Deceased herein to wit, L.R No. 39, L.R No. 42 and Mutation Forms necessary for the Transfer of the parcels of land forming part of the estate of the Deceased to the beneficiaries per the confirmed Certificate of Grant.
  - d. The court be pleased to specify the timelines within which Dinah Bosibori Okemwa, Mary Kerubo Okemwa and Kepha Marita Okemwa are to execute the Transfer and incidental documents.



- e. Alternatively, the Court be pleased to direct the Deputy Registrar of Court to execute the transfer and incidental documents.
  - f. Costs be in the Cause.
3. The 1<sup>st</sup> and 2<sup>nd</sup> Petitioners filed a Replying Affidavit sworn on 11<sup>th</sup> April 2022. They contended that they had obtained leave to lodge appeal out of time and indeed filed Notice of Appeal to the Court of Appeal. They also opposed the Application on the basis that by virtue of the pending Appeal, the Application was untenable.
  4. In the Application dated 1<sup>st</sup> August 2022, the Applicants therein sought are as follows: -
    - a. Spent
    - b. That pending the hearing and determination of the Appeal, there be stay of judgement and decree issued on 29<sup>th</sup> July 2021.
    - c. Costs be in the Appeal.
  5. The material grounds upon which the Application is made are as follows:
    - a. The Applicant is desirous of pursuing the Appeal.
    - b. Execution will cause the transfer to be completed and the Appeal nugatory.
    - c. The Applicant is willing to offer security.
  6. The Respondents filed a Replying Affidavit dated 8<sup>th</sup> September 2022.
  7. They opposed the Application as follows:
    - a. The appeal cannot act as stay of execution.
    - b. The Appeal is not bona fide and arguable.
    - c. The Application should be dismissed as abuse of the court process.

### **Submissions**

8. The Protestor filed submissions on 19<sup>th</sup> August 2022 in respect of both Applications. It was submitted that the Appeal cannot be said to be arguable since no Memorandum of Appeal was attached to the Application.
9. It was submitted that no substantial loss was proved. Reliance was placed on the case of *In re Estate of Wanga Ole Oiyie* (2022) eKLR, as doth:

“... I note that the Applicants are merely obsessed with getting the portions in the estate property it would be a dangerous disposition that occupation of a particular portion of land of the intestate estate should be the sole factor in the disposition of the estate of the deceased...”
10. On absence of substantial loss, they also relied on the case of *In Re Estate of M’thirika Mburire* (2020) eKLR to submit that the Applicant had not proved substantial loss. The Applicant also submitted that the Application was filed after undue delay of 1 year and should be declined. He relied on *Re Este of James Kamau Kagiri* (2021) eKLR.



11. It also submitted that there was no Memorandum of Appeal filed and there was no appeal. they relied on *Re. Estate of Late Jesang Tabarga Tigoi* (2021) eKLR where it was held that since there was not memorandum of appeal filed in court, it was impossible for the court to gauge whether the appeal was arguable.
12. The Applicant also submitted that the Petitioners had failed to execute the necessary documents hence the delay in administration of the estate.
13. It was submitted that the court had inherent powers to make orders for justice.
14. The Applicant submitted that Section 83(g) of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules* mandates the administrators to carry out the roles therein including execution of the documents.
15. They relied *inter alia* on *Re Estate of Wilfred Munene Ngumi (DCD)* [2020] eKLR. The court has been urged to authorize the Deputy Registrar of the court to execute the said documents as doth:

“Section 83(g) of the *Act* mandates administrators of an estate to, within six months of confirmation of grant or longer period as the court may allow, complete the administration of the estate, and to produce to the court a full and accurate account of the completed administration.”

It is evident from the Applicant’s affidavit in support of the application and oral arguments by her Advocate, Mr. Kahiga, that the respondents have refused to sign the necessary documents to facilitate execution of the court’s Judgment/decree.

To prevent abuse of the court process, by the above legal provisions, this court has inherent powers to prevent such abuse. I therefore find, and hold that the petitioner’s summons dated 23/9/2019 and filed on the 25/9/2019 to be merited.”

16. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners filed submissions dated 6<sup>th</sup> and 8<sup>th</sup> November 2023 in respect of the two Application.
17. On the Application dated 1<sup>st</sup> August 2022, it was submitted that the Application was necessary to preserve the subject matter.
18. They relied on the case of *Kenya Revenue Authority v Professor Tom Ojienda* Nairobi Civil Application No. 363 of 2018 to submit that unless stay is granted, the appeal will be rendered nugatory.
19. It was also submitted that there was an arguable appeal and irreparable harm was imminent if execution occurred. Reliance was placed on the case of *Karoline Mwatha Mburu v Athi Water Services Board and Another* Civil Appeal No. 99 of 2019.
20. I was urged to allow the Application.
21. They also filed the submissions dated 8<sup>th</sup> November 2023 in respect of the Application dated 3<sup>rd</sup> March 2023.
22. It was submitted in this regard that it was submitted that the order sought in the Application would not issue because there was an Appeal which would stand to be rendered nugatory after execution.
23. They relied on the case of Misc Application Np. 685 of 2017 *Satya Bhama Gandhi v DPP* to submit that the Application by the Protestor was an abuse of the court process.
24. I was urged to dismiss the Application.



## Analysis

25. The issue before me is whether stay of execution should be granted. If I find in the negative, then I will proceed to determine whether the Application dated 3<sup>rd</sup> March 2022 is merited.
26. On the issue of stay of execution there are principles guiding the grant of a stay of execution pending appeal which are well settled. These principles are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:
- “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.”
27. Flowing from the law, stay of execution may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#).
28. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions.
29. Section 1A(2) of the [Civil Procedure Act](#) provides that
- “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective”
- While under section 1B some of the aims of the said objectives are;
- “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
30. Therefore, an Applicant seeking stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that 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. See [Antoine Ndiaye v African Virtual University](#) [2015] eKLR.
31. I note from the contentions of both parties that there is a Judgement of Court which has not been stayed. Consequently, Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides that:
- “(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 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”.

32. Similarly, the court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

33. The 1<sup>st</sup> and 2<sup>nd</sup> Petitioners have urged the court to stay execution pending Appeal on the ground that the Appeal stands to be rendered nugatory.

34. The Application was filed 1<sup>st</sup> August 2022 when the impugned Judgement was delivered on 29<sup>th</sup> July 2021. This is clearly 12 months later and raises the implication on substantial loss and timeous filing of the Application.

35. The Applicant has not made attempt to justify the delay of one year in lodging this Application. It would appear that the Application is a mere afterthought. There is a judgment of court and there is no order staying execution thereof. I am unable to allow the Appeal to operate as stay of execution in the circumstances of this case. The triumphant party is entitled to the fruits of the Judgement. In the case of *Wachira Karani v Bildad Wachira* [2016] eKLR, the Supreme Court stated that:-

... while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it.

36. In the premises, having found that stay of execution cannot issue, I now establish whether the Protestor’s Application dated 2<sup>nd</sup> August 2022 is merited.

37. In this case, I note the Petitioners annexed a cover page for the Record of Appeal lodged at the Court of Appeal at Kisumu under Civil Appeal No. E156 of 2022. I hear the Applicant for the Protestors to



assert that there is no Memorandum of Appeal to assist this court discern the merit of the Appeal. I differ. It is not upon this court to establish the chances of success of an Appeal to the Court of Appeal. That is the concern of the Court of Appeal where the Appeal lies. It is also not anticipated under Order 42 of the *Civil Procure Rules* that the High Court should delve into whether the Appeal is arguable. It is none of the business of this court.

38. I note that the main prayers in the Application dated 2<sup>nd</sup> August 2022 are in the nature of the enforcement of the Judgement of this Court and the consequential Confirmed Grant. The Applicant seeks that the Petitioners sign the transfer documents. The consequences of an administrator's failure to sign completion documents were well elaborated in Kerugoya Succession Cause No. 36 of 2013, *Re Estate of Wilfred Munene Ngumi (deceased)* [2020] eKLR where the court stated:

“Section 83(g) of the *Act* mandates administrators of an estate to, within six months of confirmation of grant or longer period as the court may allow, complete the administration of the estate, and to produce to the court a full and accurate account of the complete administration.

This undertaking cannot be done unless the necessary documents are executed by the parties...”

39. I am also alive to the existence of the Judgement of Court. It is valid and wanting implementation as there is no stay order in place. There is no doubt that the Petitioners are acrimonious and highly likely not to cooperate with the Protestor. Even these proceedings are evidence. The court in *Re Estate of Wilfred Munene Ngumi (deceased)* (*supra*) while allowing the application for the Deputy Registrar of the court to execute completion documents thus held as follows:

“...It is evident from the Applicant's affidavit in support of the application and oral arguments by her Advocate, Mr. Kahiga, that the Respondents have refused to sign the necessary documents to facilitate execution of the court's judgment/decree. To prevent abuse of the court process, by the above legal provisions, this court has inherent powers to prevent such abuse. I therefore find and hold that the petitioner's summons dated 23/9/2019 and filed on 25/9/2019 to be merited...”

40. I am unable to find any valid reason in the objection by the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners that the appeal will be rendered nugatory. On the other hand, I find no reason for the stalemate in executing the Judgement.
41. In the case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410. The Court of Appeal set principles that have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the *Shell case* are especially pertinent. These are that:

- “1. ....
2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.



4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”

42. I find no basis to stay execution herein, or deny the Protestor’s wish to execute the Judgement of Court from which no stay of execution exists.

### **Determination**

43. In the circumstances I make the following orders: -

- a. The Application dated 1<sup>st</sup> August 2022 lacks merit and is accordingly dismissed.
- b. The Application dated 3<sup>rd</sup> March 2022 is allowed in the following terms:
  - i. An Order is hereby issued directing Dinah Bosibori Okemwa, Mary Kerubo Okemwa and Kepha Marita Okemwa, the Joint Administrators with the Applicant herein for the estate of the late Johnson Okemwa Nyakundi to execute and/or sign all the relevant instruments required for the Administration of the Estate of Deceased herein inter alia relevant forms such as L.R 39, L.R 42 and the Mutation Forms necessary for the Transfer of the parcels of land forming part of the Estate of the Deceased to the beneficiaries per the confirmed Certificate of Grant dated 29<sup>th</sup> July 2019 within 14 days.
  - ii. In default to comply with (i) above, the Deputy Registrar of this Court to execute the Transfer and incidental instruments to facilitate the completion of Administration.
- c. There shall be no Order as to Costs.

**DELIVERED, DATED AND AT MOMBASA ON THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Onchwangi & Co. Advocates for the Petitioners

Ochoki & Co. Advocates for the Protestor for the 1<sup>st</sup> Respondent

Court Assistant - Brian

