



REPUBLIC OF KENYA



In re Estate of Jeremiah Nyaga Kiura (Deceased) (Civil Appeal E080 of 2023) [2024] KEHC 2746 (KLR) (13 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2746 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E080 OF 2023
LM NJUGUNA, J
MARCH 13, 2024**

IN THE MATTER OF THE ESTATE OF JEREMIAH NYAGA KIURA (DECEASED)

RULING

1. The applicant has filed a notice of motion dated 13th December 2023, through which she seeks the following orders:
 - a. Spent;
 - b. Spent;
 - c. That pending hearing and determination of the appeal, there be stay of implementation of the confirmed grant issued on the 23rd September 2021 by the Honourable Court at Siakago in Succession Cause No. E028 of 2021 and all subsequent orders;
 - d. The costs of this application be in the cause.
2. The application is supported by the grounds on its face and in the supporting affidavit thereof.
3. The applicant is aggrieved by the decision of the trial court dismissing the summons for revocation of grant and consequently, she has appealed against the said decision. In the meantime, it is her prayer that this court grants stay of execution of the confirmed grant to prevent loss in the event that the estate will be distributed before the appeal is determined. That if the order is not granted, the appeal will be rendered nugatory.
4. The respondent filed a replying affidavit stating that the trial court rightly dismissed the summons for revocation and that the present application is only meant to delay her from enjoying the fruits of her ruling. That under section 50 of the *Law of Succession Act*, the applicant has a right to appeal but the appeal must be based on merit and the present one is not. That the applicant and her children could not prove that they were dependants of the deceased and that the required standard of proof was not met. That as the widow of the deceased, she has suffered for long, waiting for the succession proceedings to end so that she can enjoy the estate of the deceased. She urged the court to dismiss the application.



5. The application was canvassed by way of written submissions and both parties filed their written arguments.
6. In her submissions, the applicant relied on Order 42 Rule 6 of the *Civil Procedure Rules* and stated that the application satisfies the requirements for granting of the order for stay of execution. That she will suffer substantial loss if the orders are not granted and the respondent proceeds to distribute the estate in accordance with the confirmed grant. That her appeal has high chances of success and that she is ready to provide any form of security for performance that the court will deem just. She urged the court to order that *status quo* be maintained until after determination of the appeal.
7. The respondent, in her submissions, relied on Order 42 Rule 6 of the *Civil Procedure Rules* and the case of *Chris Munga N. Bichage v. Richard Nyagaka Tongi & 2 Others* (2013) eKLR. She argued that the applicant has failed to satisfy that she is deserving of the order sought. That the applicant will not suffer any loss since she does not reside on the property of the deceased and so its distribution will not affect her current status. That distribution of the estate according to the confirmed grant is execution of the order of the court and the same cannot be termed as substantial loss on the part of the applicant. Reliance was placed on the case of *James Wangalwa & Another v. Agnes Naliaka Cheseto* (2012) eKLR.
8. The issue for determination is whether the application meets the threshold for granting stay of execution.
9. Stay of execution is provided for under Order 42 Rule 6 of the *Civil Procedure Rules* which provides:
 - “(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 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.
10. Further, in the case of *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR, the court held that:

“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.””

11. The application was filed on 15th December 2023. The impugned judgment was delivered on 08th December 2023 and there is a memorandum of appeal dated 14th December 2023 on record. Both the memorandum of appeal and the application herein were filed promptly, shortly after the impugned judgment was delivered. It is trite that this relief is granted on discretion and it is meant to safeguard the subject matter of the appeal. The applicant has deposed that if the estate is distributed as per the confirmed grant, the appeal will be rendered nugatory.
12. Even though execution of the ruling may not suffice as substantial loss as was held in the case of *James Wangalwa & Another v. Agnes Naliaka Cheseto* (2012) eKLR, it is my view that there is an appeal properly filed on record and execution may extinguish its subject matter. The appeal should see the light of day and be determined while the subject matter remains intact. On the argument that security should be provided, I note that there is no money decree in place and so the same will not apply in this case and so the court will not impose any such condition. The application is seeking to stay distribution of the estate of the deceased and so the order is targeted at preserving the subject matter of the appeal.
13. I have considered the sentiments of both parties in the pleadings and submissions and the relevant laws and find that the application is meritorious. Prayer 3 is hereby allowed as prayed. There shall be no order as to costs.
14. However, I find that there is need for the appeal to be heard expeditiously. In the circumstances, I hereby order that the appeal be prosecuted within 90 days, failing which the same shall stand dismissed.
15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF MARCH, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant/Applicant

.....for the Respondent

