



REPUBLIC OF KENYA



In re Estate of Esther Wambura Karinga (Deceased) (Civil Appeal E082 of 2023) [2024] KEHC 3475 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3475 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E082 OF 2023
LM NJUGUNA, J
APRIL 11, 2024**

IN THE MATTER OF THE ESTATE OF ESTHER WAMBURA KARINGA (DECEASED)

EUNICE WAWIRA MWANGI.....1ST APPELLANT /APPLICANT

BANCY WAMBUI KINYUA.... 2ND APPELLANT /APPLICANT

JOSIA MURIITHI KARINGA....3RD APPELLANT /APPLICANT

VERSUS

DAVID WACHIRA MWIHAKI.....1ST RESPONDENT

CHARLES KANGANGI KATHUMBI.....2ND RESPONDENT

RULING

1. The applicant has filed a notice of motion dated 19th December 2023, through which the applicant seeks the following orders:
 - a. Spent;
 - b. Spent;
 - c. Spent;
 - d. That the honourable Court be pleased to stay execution of the confirmed grant issued on 19th May, 2023 in Siakago Principal Magistrate's Court Succession Cause No E007 of 2023, and any other order that may have been issued pursuant thereto pending hearing and determination of this application;
 - e. That the honourable court be pleased to stay execution of the confirmed grant issued on 19th May, 2023 in Siakago Principal Magistrate's Court Succession Cause No E007 of 2023, and any other order that may have been issued pursuant thereto pending hearing and determination of the appeal;
 - f. The costs of this application be provided for.



2. The application is supported by the grounds on its face and in the supporting affidavit thereof.
3. The appellants/applicants have filed a memorandum of appeal dated 19th December, 2023 challenging the decision of the trial court dismissing the summons for revocation of grant issued to the 1st respondent. It is their argument through this application that the respondents are strangers to the estate of the deceased but the trial magistrate distributed a portion of the estate to them. That after the judgment was delivered, the respondents have commenced subdivision of the property in the pendency of the appeal. That this execution should be stopped to enable the subject matter of the appeal to remain intact. It is their case that their appeal has high chances of success but if the respondents are left to execute, the appeal will be rendered nugatory. They urged the court to grant the stay order and if it so deems, on conditions which the applicants will meet.
4. The respondents filed a replying affidavit dated 30th January, 2024 wherein the 1st respondent deposed on behalf of both respondents. He stated that the applicants are fraudsters who should not claim any part of the estate of the deceased and that the supporting documents to their summons for revocation were fraudulently obtained. That the dismissed summons for revocation of grant was accompanied by birth certificates of the applicants which were procured 3 days before filing of the summons. That the said birth certificates are marred with glaring irregularities that could not be ignored by the trial court and that the appeal has no chances of success.
5. The court directed the parties to file their written submissions but only the respondents complied.
6. The respondents submitted jointly, stating that the land in dispute is property title number Mbeere/Mwachoro/1505 measuring 9 acres and that the applicants could not prove to the trial court that they were entitled to inherit a portion of it. Reliance was placed on the case of *Giella v Cassman Brown C. Ltd* (1973) EA 358 for their argument that there is no *prima facie* case arising from the appeal and that the applicants will not suffer any substantial loss if the orders are not granted.
7. They urged the Court to decide the case on a balance of convenience. They also placed reliance on the cases of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015) eKLR and *Rosemary Wairimu Munene (Ex parte Applicant) v Ibururu Dairy Farmers Co-operative Society Ltd* Judicial Review Application No 6 of 2004 and urged the Court to exercise its discretion in determining the matter according to Article 159 (2) of the *Constitution*. They further urged the court to award them costs and on this they relied on the 2nd Edition of the book '*Judicial Hints on Civil Procedure*' by Rtd. Kuloba J.
8. The issue for determination is whether the application meets the threshold for granting of stay of execution.
9. Stay of execution is provided for under Order 42 Rule 6 of the *Civil Procedure Rules* 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 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 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; 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. First, the application has been filed promptly and there is no delay whatsoever. The impugned ruling was delivered on 13th December, 2023 and the application herein was filed on 19th December, 2023, 3 days after the ruling. Secondly, it is the applicant’s case that they are also beneficiaries of the estate of the deceased, which estate was placed in the hands of the respondents, being alleged imposters. That the trial magistrate dismissed their summons for revocation of the grant issued to the 1st respondent, regardless of the principles laid down under section 76 of the *Law of Succession Act*.

12. They deposed that if the orders sought are denied, the respondents will proceed to subdivide the property and distribute it according to the impugned confirmed grant, thereby disinheriting the applicants who are alleged legitimate beneficiaries of the estate. In my view, part of the reason for granting orders for stay of execution is to preserve the subject matter for purposes of the appeal. The Court, in the case of *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”.



13. The appeal herein was filed promptly, within 3 days of the impugned ruling, a demonstration that the applicants are ready and willing to prosecute the same without any further delays. I have perused the memorandum of appeal and I think that it raises an arguable case. The provision in Order 42 Rule 6 (2) (b) of the *Civil Procedure Rules* on security for performance of the decree does not apply in this case because there is no money decree in place. 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.
14. I do take note that the orders of this court as granted in chambers on 19th December 2023, were extracted but with a clerical error in the drafting of order 2 on the decree issued on 20th December, 2023 before the Deputy Registrar. The decree is hereby set aside and the parties are at liberty to extract the orders afresh as given by the court in its proceedings if they wish to do so.
15. In the end, it is in the greater interest of justice that the application be allowed. Therefore, I find that the application has merit and prayer 4 is hereby allowed as prayed. Each party shall bear its own costs of the application.
16. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF APRIL, 2024.

L. NJUGUNA

JUDGE

.....for the Appellants/Applicants

.....for the Respondents

