



Wambaire (Sued as the Legal Representative of Stanley Migwi Njoroge - Deceased) v Witeithie Self Help Group (Suing Through its Officials) Julius Mwangi, James Muriuki Njarui & Paul Muchira) (Civil Appeal 68 of 2022) [2024] KEHC 16858 (KLR) (6 May 2024) (Ruling)

Neutral citation: [2024] KEHC 16858 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 68 OF 2022
RM MWONGO, J
MAY 6, 2024**

BETWEEN

ESTHER WAMBAIRE (SUED AS THE LEGAL REPRESENTATIVE OF STANLEY MIGWI NJOROGE - DECEASED) APPELLANT

AND

WITEITHIE SELF HELP GROUP (SUING THROUGH ITS OFFICIALS) JULIUS MWANGI JAMES MURIUKI NJARUI PAUL MUCHIRA) RESPONDENT

RULING

1. In this application, the applicant seeks that:
 1. This court be pleased to order a stay of execution of the judgment and decree made on 20.7.2022 in Kerugoya CMCC No. 137 of 2016 pending the hearing and determination of this application; and in particular, order the stay of the orders of the lower court dated 21/6/2023 allowing sale of deceased's property Kabare/Nyangati/2296.
 2. That this honourable court be pleased to order a stay of execution of the judgment and decree made on 20.7.2022 and all consequential orders in Kerugoya CMCC No.137 of 2016 pending the hearing and determination of this appeal.
 3. That costs of this application be provided for.
2. The application is premised on the following grounds:
3. The brief background in the matter is that in the Lower Court, the applicant was sued as the legal representative of Stanley Migwi Njoroge (deceased). It was alleged that the deceased had been a long serving member and chairman of Witeithie Self Help Group and that he owed the Group KShs.1,118,600. The suit against the deceased's legal representative.



4. Following application in the Lower Court, the plaintiffs obtained an order on 21st June 2023 allowing them to execute against the deceased's legal representatives. It is that ruling for execution that is challenged here.
5. The applicant in her supporting affidavit confirms that grant ad litem was obtained whereby she was substituted for her deceased husband for purpose of the suit. On her part she asserts that she objected to the grant ad litem and the subsequent judgment and ruling of the Lower Court upholding the claim and allowing execution. Accordingly, she filed an appeal and seeks stay of execution against the deceased's property Kabare/Nyangati/2296 pending the appeal.
6. The applicant's argument is essentially that the Ad Litem grant does not empower her to deal with creditors or liabilities to the estate.
7. The respondent's position, set out in their replying affidavit and submissions is that, in essence in judgment in the Lower Court was made in their behalf and execution orders granted; that no stay was obtained in the Lower Court hence their application for execution which was allowed; that the judgment was delivered on 20th July 2022, and the application for stay filed on 3rd July 2023 without any explanation for the delay whatsoever.
8. The respondent relies on the case of County Government of Mombasa v Kooba Kenya Limited [2019] eKLR, in which the court dismissed the application for extension of time for lodging Notice of Appeal filed one day out of time without any reasonable cause.
9. The only issue for determination is whether stay of execution pending hearing and determination of appeal should be granted.

Whether stay of execution should be granted

10. The law in stay of execution is under pinned by Order 42 Rule 6(2), the Civil Procedure Rules. The threshold that should be met for court to grant stay of execution stated as follows.

“No order for stay of execution shall be made under sub rule (1) unless-

- i. 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
- ii. Such security as the court orders for the due performance of such decree or order may ultimately be binding on him has been given by the applicant.

Substantial loss

11. The applicant argues that the respondents intend to sell the property in the name of a deceased person which in the realm of the law of succession under succession cause. The decretal sum is a debt to the deceased's estate and allowing the sale of the property at this juncture offends the law under Section 86 of the [Law of Succession Act](#).
12. The respondent submitted that the applicant herein was procedurally substituted in place of her deceased husband in the civil suit and execution is thus against her as the deceased's legal representative absolving all his liabilities in such capacity.
13. These arguments are, of course, the subject of the appeal where at the appellate court will evaluate the judgement and or the rulings of the trial court.



13. The two opposing arguments as to the loss by either party; that the applicant will improperly lose the estate's property; and the respondent's will lose the fruit of their judgment, are in tension. It is that tension that this court must balance.

On whether this application has been filed expeditiously

14. The applicant submits that the judgment appealed herein was delivered on 20.7. 2022. The Memorandum of Appeal was filed on 19.8. 2022. This application for stay of execution was made on 26.6.2023. The appellant contends that there was no delay as the respondents had filed the application for execution of decree in the lower court which was determined vide ruling delivered on 21.6.2023 which prompted this current application.

The delay on the part of the applicant is reasonable.

15. The court notes that an appeal was timeously filed on 19.8.2022 after the judgment was delivered giving notice of intention to challenge the Lower Court's position. That the application for stay was filed months later was a mere reaction to the application for execution.

On the issue of security

16. With regard to security, the applicant herein has not indicated in her supporting affidavit that she is ready to abide by any conditions set by the court in order to stay the execution and allow the hearing and determination of this appeal. On the other part the respondents submit that it is not guaranteed that the appeal herein will be successful, and if it doesn't the respondents will have been denied their fruits arising out of the judgment in their favour in vain. They also assert that the judgment is for a liquidated amount.
17. The issue of security is discretionary and it is upon the court to determine the same. In *Jamii Bora Bank Limited & another v Samuel Wambugu Ndirangu Civil Appeal E030 of 2021* under paragraph 23, the case of Gianfranco Manenthi & Another vs Africa merchant Assurance Co.Ltd [2019]eKLR was quoted and the court stated;

“Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine.”

Disposition

18. It upon the court to balance the interests of both the applicant and the respondents. In the case like this the court can order the applicant to furnish the court with reasonable deposit of security to ensure that the judgment is not a mere pyrrhic victory.
19. Accordingly, I would, and do hereby do allow, the application for stay of execution on the following conditions:
- a) That the applicant shall deposit 50% of the decretal sum into court within forty-five (45) days from the date hereof.
 - b) In the event of failure to comply then execution may proceed forthwith.
 - c) There is liberty to apply.



20. The respondent is at liberty to effect a caution on the property proclaimed, viz LR Kabare/ Nyangati/2296 for the balance of the decretal sum not secured by the deposit ordered herein.
21. Orders accordingly.

DATED AT KERUGOYA THIS 6TH DAY OF MAY 2024

R. MWONGO

JUDGE

Delivered in the presence of:

Miriti for Appellant/Applicant

Mwagiru - holding brief for Kagio for Respondent

Court Assistant, Murage

