



In re Estate of Simon Nduru Kariuki (Deceased) (Succession Cause 155 of 2017) [2024] KEHC 7521 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7521 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 155 OF 2017**

CM KARIUKI, J

JUNE 20, 2024

IN THE MATTER OF THE ESTATE OF SIMON NDURU KARIUKI (DECEASED)

BETWEEN

DAVID GITAHU NDURU PETITIONER

AND

JOEL WAWERU KARIUKI 1ST RESPONDENT

JANE W MATHENGE & 37 OTHERS & 37 OTHERS 2ND RESPONDENT

AND

JOHN GITHINJI NDURU INTENDED INTERESTED PARTY

RULING

1. By an application dated 13/10/2022, the Petitioner seeks relief;
 - a. That pending the hearing and determination of Nakuru Court of Appeal No. E072 of 2023, there will be a stay of execution of the Judgment delivered on 13/10/2022, and all consequential orders will be issued thereto.
 - b. That costs of this Application will be the costs of the cause.■
2. He avers that there is an application by the purchaser dated 3/2/2023 for the release of title for the parcel subject matter. Parties were directed to canvass serve via submissions, which the applicant/purchaser filed and the Petitioner filed.

Petitioner/ applicant submissions;

3. That the Applicant herein is the son of the deceased. That Judgment in the present case was delivered on 13th October 2022 to with this Honourable Court made orders to the extent that the Applicant/



Petitioner's entitlement is 6(50x 100ft) plots being the estate of the deceased, whereas the Protestor/ respondent entitlement share is 6(50x100ft) plots and 38(50x100ft) plots are the entitlement of the purchasers.

4. Aggrieved by the Judgement rendered thereto, the Applicants preferred an appeal against the entire Judgement. Against that background, the Applicant brought this Application seeking the above orders.
5. The Application was opposed via a Replying Affidavit sworn on 22nd June 2023 by Joel Waweru Kariuki, where he deponed that the Applicant did not deserve the orders sort.
6. In view thereof, set down the following issues for determination:
 - a. Whether the Applicant is entitled to the orders sought.
 - b. Who should bear the costs?
9. The Law of Succession is a self-sufficient act with its own rules. However, by dint of Rule 73 of the *Probate and Administration Rules*, the Court has been given inherent powers to make necessary orders to meet the end of justice. Despite Order 42 Rule 6 of the *Civil Procedure Rules* not being provided for under Rule 63 of the *Probate Administration Rules*, we submit that this Court has inherent powers to ensure the ends of justice are met. In view thereof, Order 42 Rule 6(1) & (2) of the *Civil Procedure Rules*. He contends that, executing the Judgement will pose a significant danger, as the issue in dispute is that the prosecutors/respondents will deal with the land as they deem fit once it is transmitted to them.
10. Thirty-five persons whose identity remains unknown stand to benefit from the execution as 35 plots shall be transferred to them. It is not in dispute that the impugned Judgment gave a go-ahead for the grant to be confirmed as per order (i) of the Judgement delivered on 13th October 2020. Reliance is made on the case of *In Re Estate of David Kiongera Kinyanjui (Deceased)* [2018] eKLR,
11. In view of the foregoing, the Court is to find that based on the eminent danger posed and taking into account the memorandum of appeal annexed as "DGNZ" which heavily disputes the Protestor/ Respondent's entitlement and that of the 35 buyers to the estate of the deceased, it might be impossible to reverse the process once the land is transmitted and probably sold or dealt in a manner that it will be impossible to reverse.
12. It should not be lost to this Honourable Court, that the appeal may take long to be heard and if stay is not granted and the appeal succeeds, the very essential core of the appeal will be defeated, thus rendering the appeal nugatory.
13. On this instant Application being made without unreasonable delay, we submit that the instant Application could not be allowed legally if leave to appeal was not obtained first.
14. Additionally, other issues arose before the Applicant could properly instruct us. Thus, we submit that the delay was not inordinate because of the developments before we instituted this Application.
15. On security, he submits that it is in the realm of court discretion and relies on the case of *Jamii Bora Bank Limited & another vs - Samuel Wambugu Ndirangu* [2022] eKLR., which held that: -

“...it is clear that the security issue is discretionary, and it is upon the Court to determine the same. Notably, in their submissions, the applicants stated they are willing to offer security if called upon by this Honourable Court to do so, ”



Purchasers/Respondents' Submissions

16. The Petitioner, dissatisfied with the decision, filed a notice of appeal and subsequently filed Nakuru Court of Appeal No. E072 of 2023. The respondents herein opposed same and further filed submissions in which they set 3 issues for determination in his submissions, namely,
 - a. The applicable law
 - b. Whether the Application meets the threshold for a stay of execution
 - c. Whether the Applicant is entitled to prayers sought and who should pay the costs of this Application
17. It was submitted that the Law of Succession Act and the probate and Administration Rules do not contemplate the issue of stay of execution. Rule 73 of the said Rules does not provide order 42, Rule 6 of civil procedure Rules, which are the orders that should be applied in succession matters. The Petitioner's Application, therefore, fails on this first ground.
18. If this Court exercises its discretion and entertains the Application by the Petitioner, then the Petitioner must meet the threshold of an application for stay. The purchasers have analyzed the threshold hereunder in detail. See the grounds for granting a stay of execution as set in law—order 42 rule 6 (1) and (2).
19. Therefore, the Petitioner must satisfy the three requirements for granting the stay of execution. These are:
 - i. The Application must be made without unreasonable delay.
 - ii. The Applicant must demonstrate that substantial loss may result if the order of stay of execution is not granted
 - iii. The Applicant must furnish security.
20. The Petitioner, in his Application, has not met this requirement. The Judgment was delivered on 13/10/2022, and the Application for a stay of execution was filed in June 2023, eight months after the delivery of the Judgment. The Applicant was well aware of the consequences that were likely to follow. The Petitioner has not provided a good reason to the Court regarding the inordinate delay in filing the Application.
21. The Court ought to note that when the cause came for mention on 3rd May 2023, the advocates for the Petitioner informed the Court that the matter had been concluded and that the file should be marked as dosed. One month later, the Petitioner filed this Application, which shows it was an afterthought.
22. The Petitioner was already satisfied with the decision of the Court, which is why he took all his time to file this Application. Reliance made on the cases of Jaber Mohsen Ali & another v Priscillah Boit, another [2014] eKLR., Charles Nyamwega v Asha Njeri Kimata & another [2017] eKLR, and submit that the purchasers submit that the Application was not made without unreasonable delay and hence does not meet the threshold for a stay of execution.
23. The Petitioner is misusing the Court's process to delay execution of the Judgment, an afterthought and a tactic to delay the purchasers from enjoying the fruits of the Judgment. It should be noted that many original purchasers who were victims of 1992 clashes have since passed away, awaiting justice in this cause. The remaining original /purchasers are old and would want justice for their lifetime. The purchasers would be significantly prejudiced if a stay were to be granted.



24. The Petitioner has not convinced the Court of the substantial loss that may result to him unless an order for a stay of execution is made in his favor. The Petitioner has not been in occupation and/or in possession of the 38 plots referred to in the Judgment as being entitlement of the purchasers. The Petitioner will, therefore, not suffer any loss.
25. In the event the appeal succeeds, the Court has the power to order the cancellation of any entries made in L.R. No. Nyandarua/Leshau/Mbuyu Block 2 (Karai)/152.
26. In the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* (2012) eKLR, the Court held that:

"The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail " (Underlining ours).
27. Reliance also made on the case of *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR, *Kenya Shell Limited v Benjamin Karuga Kibiru, another* [1986] eKLR, and *Sunsand Dunes Limited v Raiya Construction Limited* [2021] eKLR. The purchasers submit that the Petitioner has not satisfied this requirement for granting a stay of execution and that his Application should be disallowed.
28. Under Order 42 rule 6 aforesaid, the Petitioner is required to offer security for the due performance of the decree, and the Court is entitled to take into account that no such security has been offered in deciding an application for stay thereunder. In the present Application, the Applicant has not offered any security or the due performance of such order as may ultimately be binding on him. Reliance made on the case of *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 others* [2015] eKLR, *Gianfranco Manenthi another vs. Africa Merchant Assurance Company Ltd* (2019) eKLR, and *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR.
29. Thus, it is submitted that the Petitioner has not met this requirement, and his Application should be disallowed with costs.
30. This Application is a waste of judicial time. This Court has already rendered its decision. The Petitioner has already filed an Appeal against the decision of this Court. The intended interested party has approached the wrong Court with his Application. He is supposed to file this Application before the Court of Appeal at Nakuru, which can entertain his Application. Even if this Court were to allow his Application, the leading cause would have already been determined, and this Court cannot make orders in vain.
31. The purchasers, therefore, submit that the Application to be joined ought to be dismissed with costs as the intended interested party slept on his alleged rights.2017

Issues, Analysis and Determination

32. After going through materials before me, I find the issues are;
 - a. Does the Application meet the threshold for a stay of execution?
 - b. Whether the Applicant is entitled to prayers sought?
 - c. Moreover, who should pay the costs of this Application?



33. The grounds for granting a stay of execution are well settled in law. Order 42 rule 6 (1) and (2) of the Civil Procedure Rules provide as follows: -

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 seems just, and any person aggrieved by 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. ”

34. It is, therefore, clear that the Petitioner must satisfy the three requirements for granting the stay of execution. These are:

- i. The Application must be made without unreasonable delay.
- ii. The Applicant must demonstrate that substantial loss may result if an order of stay of execution is not granted
- iii. The Applicant must furnish security.

35. It is submitted that the Petitioner, in his Application, has not met this requirement. The Judgment was delivered on 13/10/2022, and the Application for a stay of execution was filed in June 2023, eight months after the delivery of the Judgment. The Applicant was well aware of the consequences that were likely to follow. The Petitioner has not provided a good reason to the Court regarding the inordinate delay in filing the Application.

36. The Court ought to note that when the cause came for mention on 3rd May 2023, the advocates for the Petitioner informed the Court that the matter had been concluded and that the file should be marked as dosed. One month later, the Petitioner filed this Application, which shows it was an afterthought. The Petitioner was already satisfied with the decision of the Court, which is why he took all his time to file this Application.

37. In the case of Jaber Mohsen Ali & another v Priscillah Boit, another [2014] eKLR. The Court held that: -

“The question arises whether this Application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after Judgment could be an unreasonable delay depending on the Judgment of the Court and any order given after that.”



38. The Court further held that: -

“In my opinion, an application for stay coming after the stated days for compliance with the Judgment will constitute unreasonable delay unless a good explanation is offered, giving reasons why the Application has come after the period given for compliance. This is because there is a reason why the Court considers a certain number of days reasonable for compliance with the Judgment, and continued non-compliance after the given duration constitutes a violation of the Judgment of the Court... The Court does not condone illegality. The reason that there ought not to be an unreasonable delay for one to be entitled to stay pending appeal was not placed there in vain. It is incumbent upon a litigant to move with speed. 14. In this case, the defendant has not stated why he did not apply for a stay within the 30-day timeframe given to him to vacate. I believe the defendant has applied for a stay of execution pending appeal after unreasonable delay. That element of unreasonable delay tilts the scales in favor of the plaintiffs in so far as possession of the premises is concerned. The defendant must, therefore, cede possession of the suit land to the plaintiffs for the duration of the appeal. ”

39. In the case of *Charles Nyamwega v Asha Njeri Kimata & another* [2017] eKLR, the Court held that: -

“After that, the Applicant took three and a half months to be the instant Applicant. This delay has not been explained, and it is after warrants of arrest were issued and court bailiffs visited the Applicant on 22nd September 2017 that he moved to Court to seek the instant orders. I, therefore, find that there was a delay in filing this Application.”

40. The purchasers submit that the Application was not made without unreasonable delay and hence does not meet the threshold for a stay of execution: The Petitioner is misusing the Court’s process to delay execution of the Judgment, an afterthought and a tactic to delay the purchasers from enjoying the fruits of the Judgment.

41. It should be noted that many original purchasers who were victims of 1992 clashes have since passed away, awaiting justice in this cause. The remaining original purchasers are old and would want justice for their lifetime. The purchasers would be significantly prejudiced if a stay were to be granted.

42. The Petitioner has not convinced the Court of the substantial loss that may result to him unless an order for a stay of execution is made in his favor. The Petitioner has not been in occupation and/or in possession of the 38 plots referred to in the Judgment as being entitlement of the purchasers. The Petitioner will, therefore, not suffer any loss.

43. In the event the appeal succeeds, the Court has the power to order the cancellation of any entries made in L.R. No. Nyandarua/Leshau/Mbuyu Block 2 (Karai)/152. The Court thus finds that even without going to other grounds, the delay of 8 months is excusable as no valid ground has been advanced. Thus, the Court makes the following orders;

i. The Application is dismissed with costs to the respondents

RULING, DATED AND SIGNED AT NYANDARUA THIS 20TH DAY OF JUNE 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

.....
CHARLES KARIUKI



JUDGE

