In re Estate of William Kimenjo Arap Mosonik (Deceased) (Succession Cause 587 of 2009) [2024] KEHC 9254 (KLR) (17 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9254 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

SUCCESSION CAUSE 587 OF 2009

SM MOHOCHI, J

JULY 17, 2024

IN THE MATTER OF THE ESTATE OF WILLIAM KIMENJO ARAP MOSONIK (DECEASED)

BETWEEN

CATHERINE CHEPNGETICH MOSONIK ..... 1ST APPLICANT

NANCY CHEPKORIR MOSONIK ..... 2ND APPLICANT

AND

LINNER CHEROTICH BIEGON ..... 1ST RESPONDENT

MENJO MOSONIC ..... 2ND RESPONDENT

AGNES CHEPKEMBOI MOSONIC ..... 3RD RESPONDENT

LOICE CHELANGAT MOSONIC ..... 4TH RESPONDENT

GERALD MOSONIK MENJO ..... 5TH RESPONDENT

JANET CHEPKIRUI MOSONIK ..... 6TH RESPONDENT

AND

EMMS INVESTMENT LTD ..... INTERESTED PARTY

RULING

1. Before this Court for determination is the Summons for Revocation of Grant dated 8th January, 2024 and filed on 23rd January, 2024, Notice of Motion Application dated 19th January, 2024 filed 23rd January, 2023 and the Notice of Preliminary Objection dated and filed on 1st February, 2024.

Summons for Revocation of Grant

2. Summons for Revocation of Grant dated 8th January, 2025 and filed on 23rd January, 2024 brought under Section 47 and 76 of the *Law of Succession Act* by the Applicants herein Catherine Chepngetich Mosonik and Nancy Chepkorir Mosonik seeking:

    i. Spent

    ii. This Honourable Court be pleased to issue conservatory Orders restraining the Respondents from alienating, transferring, selling and disposing the property/assets of the deceased's estate in any manner whatsoever pending the hearing and determination of this Summons;

    iii. This Court be pleased to issue an Order of injunction against the Respondents, their agents/ servants and/or employees restraining them from evicting or otherwise interfering with the Applicants' use of their portions of the estate pending the hearing and determination of this Summons

    iv. That pending the hearing and determination of this Application, the Respondents as administrators of the estate be ordered to provide a full detailed and accurate accounts of the administration of the deceased's estate from the time of death and to be subjected to independent accounting audit at the expense of the estate.

    v. That the Respondents as administrators of the estate be compelled to provide a full, detailed and accurate accounts of the administration of the deceased's estate from the time of death and to be subjected to independent accounting audit at the expense of the estate

    vi. That the Grant of Letters of Administration made to Linner Cherotich Biegon, Samson Kipkoech Menjo Mosonik, John Kibet Mosonik and Agnes Chepkemoi Mosonik and the subsequent Certificate of Confirmation of Grant issued on 30th August, 2012 and rectified on 23rd March, 2017 be revoked.

3. While the Applicants depone that, they are beneficiaries by dint of being daughters of the deceased they do not specify the house they come from, they are nonetheless subject to a bequest flowing from the Ruling dated 28th of November, 2023.

4. The Application was supported by the joint affidavit of the Applicants sworn on the same date where they deponed that, the administrators have failed to diligently administer the estate since the grant was issued on the following grounds:

    i. little progress has been made to ensure transmission of LR. No. 6885 Nakuru to the beneficiaries;

    ii. The surveyor one Mr. Maghas, of Toplands Limited was engaged by the family in February of 2013 to assist with the subdivision process of LR. No. 6885 Nakuru and has not completed the engagement citing new laws that had been passed by the county government that restricted amalgamations and subdivision.

    iii. The surveyor was not license at the time of the engagement and the lack of expertise may have contributed to the delays.

    iv. A resurvey was conducted on 7th July, 2022 and the findings were presented in a meeting at the chief's office on 13th July, 2022. The resurvey revealed some discrepancies that;

a. The subdivision prepared by Mr Maghas had an allocation of 12-meter road which was not typical for access roads in private land and contrary to the 9 meters proposed.

b. The acreage of the Nakuru property as indicated in the grant as 1850 acres was more than the total acreage included in the deed plan presented by Mr.Maghas being 1792 acres.

c. While the grant provided that 120 acres of Nakuru 6885 be distributed to Elisha Chesyna and Susan Kimosop the deed plan presented by Mr. Maghas indicated 100 acres would be given to the said beneficiaries.

d. There were portions of surveyed parcels on Nakuru 6885 which had not been indicated in the schedule of distribution in the Certificate of confirmation of grant

e. According to the deed plan, some beneficiaries' parcels were larger than what was distributed to them

f. The new law hindering the amalgamation and subdivision of land was non-existent

v. After deliberations, the family resolved to terminate the services of Mr. Maghas however, despite protests, the 3rd Administrator pushed for the surveyors return.

vi. 20 acres of the Nakuru property have been allocated to the Interested Party without evidence that the Interested Party had paid the balance of the Purchase price. Kshs. 350,000 has been collected by the 2nd Administrator in lieu of the balance remaining.

vii. That the Grant provided that 120 acres be allocated to Elisha Chesyna (deceased) and Susan Kimosop. They discovered that the deceased had sold only 70 acres as per the sale agreement annexed as CM15. They sought to find out why 50 acres has been allocated to Mr. Chesyna and Susan despite the terms of the agreement. Susan Kimosop did not give any evidence to support the extra 50 acres. The estate has however been sued following the decision in the meeting of 13th July, 2013 to hive off the 50acres.

viii. Nakuru Property had been leased off and the proceeds were to form part of the family kitty that was managed by the administrators. The proceeds would be utilized for estate expenses and the surplus distributed amongst the beneficiaries. The administrators have failed to render a proper account of the monies or convene a meeting to discuss the issues despite questions from family members.

ix. Only the 1st and 4th Administrators have expressed interest in pursuing compensation from KETRACO that utilized the property near the Menengai Crater to establish an easement.

x. The Kericho property had significant land rate arrears and the family decided to dispose it to offset the land rates and the balance given to the estate. During the conveyance the purchasers were unable to account for the money and the transaction stalled leading to the purchasers suing for specific performance. That from the email dated 11th May, 2023, the 2nd and 3rd Administrators were seemingly in cahoots with the purchasers

xi. The firm of Kae and Partners appeared to be taking instructions from the 2nd and 3rd Administrators to the exclusion of others

xii. The Kericho case attracted a Bill of costs from the firm of Kiplenge Kurgat to tax their costs in these proceedings

xiii. Kericho Tea Farm property has never been surveyed

xiv. During the allocation of the property at the Menengai Crater, Nancy, Linah, Catherine, Agnes, Janet and Geral received land at the crater's edge without a buffer zone and acreage was below what was stipulated in the Grant. The 2nd and 3rd Administrators were granted precise acreage as specified in the Grant and allocated land far from the edge.

xv. Payments have been made to advocates, surveyors and other services unilaterally by one or two administrators without first consulting the beneficiaries.

xvi. The estate stands undistributed for more than 6 years.

5. She also averred that the administrators failed to disclose to the court several properties that are part of the estate and they only discovered that the firm of Kiplenge Kurgat had been prior instructed to deal with more properties when it filed its Bill of Costs. Despite the administrators being questioned by Nancy Mosonic no explanation has been given. That the concealment was deliberate in an attempt to short change some beneficiaries.

6. Further that the 2nd Administrator wrote to the applicants informing them that they were in illegal occupation of a portion of the estate and gave them fourteen days to vacate. That based on the foregoing, the administrator ought to be removed and the summons revoked.

Notice of Preliminary Objection

7. Samson Kipkoech Menjo Mosonik and John Kibet Menjo Mosonik, the 2nd and 3rd Administrators respectively in opposing the Summons for Revocation of Grant file a Preliminary Objection dated 1st February, 2024 under Rule 73 of the Probate and Administration Rules, Section 7 of the *Civil Procedure Act* and Order 2 Rule 15, Order 51 Rule 14 (1) (b) of the Civil Procedure Rules on the following grounds:

i. The suit offends the provisions of Section 7 of the *Civil Procedure Act*

ii. The Application is res judicata as the substratum of the matters therein have been determined in the Summons dated 30th September, 2021 and Summons dated 28th February, 2023 in the ruling of 28th November, 2023.

iii. The issue of the Surveyor, the Interested Party and Elisha Chesyna and Susan Kimosop were addressed in paragraphs 9 to 40 of the Supporting Affidavit dated 8th January, 2024 and were also dealt with and determined in the Ruling of 28th November, 2023

iv. The Court has no jurisdiction to hear and determine the Application having rendered its verdict on the matters therein.

Notice of Motion

8. The 4th Administratix/Applicant Agnes Chepkemoi Mosonik filed a Notice of Motion Application dated 19th January, 2024 brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 42, Rule 6 (1) and (2) and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders: -

i. Spent

ii. That this Honourable Court be pleased to stay the execution of the Ruling delivered on 28th November 2023 and the Order arising therefrom ex-parte in the first instance pending the hearing and determination of this application.

iii. That the Honourable Court be pleased to stay the execution of the Ruling delivered on 28th November, 2023 and the Order arising therefrom and pending the hearing and determination of the 4th Administratix/Applicant's appeal at the Court of Appeal.

iv. That the costs of this Application be provided for.

9. The grounds in support of the Application were on the face of it and the Supporting Affidavit of the 4th Administratix/Applicant sworn on the same date. She deponed that in its Ruling delivered on 28th November, 2023 the Court ordered that any aggrieved party had forty-five (45) days stay to appeal the decision. A Notice of Appeal dated 11th December, 2023 was lodged and typed proceeding were also requested.

10. That the forty-five (45) days stay of execution to appeal issued had almost lapsed and if stay of the said Ruling is not issued, then the appeal will be rendered nugatory and would occasion irreparable loss.

11. She further averred that, the Court has a duty to safeguard her right to appeal and the matter ought to be expeditiously dealt with to safeguard the appeal, and not render it nugatory. She was ready and willing to adhere to any conditions the Court will set as a precondition and that the application has been made without delay.

12. The 3rd Administrator John Kibet Menjo Mosonik in opposition swore a Replying Affidavit on 7th February, 2024 on behalf of the 2nd Administrator, Loise Chelangat Mosnik, Gerald Mosonik Menjo and Janet Chepkurui Mosonik. He deponed that the Applicants did not show the likelihood of the appeal being rendered nugatory if stay of proceedings is not granted and in the event the Appeal is successful, the Appellate Court has power to revoke any title issued to the Interested Party or any beneficiary returning property to the estate.

13. It was also his argument that the Applicants have not demonstrated that the estate will suffer irreparable harm. That it is in fact the estate that stands to suffer irreparable harm if stay is granted since the Interested Party may sue the estate for loss of use of property for 12 years. He further deposed that no security has been provided as a prerequisite for granting of such orders and as administrators they are privy to the financial status of the estate, the estate is incapable of providing security. According to him, it is fair that the application is dismissed and the Ruling of the Court be implemented. The 2nd and 3rd Administrators are ready to execute any necessary documents.

14. The Interested Party opposed the Application in the Replying Affidavit sworn on 12th February 2024 by Michael Rotich. He averred that whereas the 4th Administratix filed a Notice of Appeal on 11th December, 2023, there is no appeal that has been filed due to the absence of a Memorandum of Appeal and the absence of a case number. That Pursuant to the Ruling, the time to file the appeal had already lapsed. The Applicant has also not filed an application to file the appeal out of time No evidence has been shown that if the orders sought the appeal will be rendered nugatory.

15. He also propounded that the Ruling of 28th November, 2023 was to give effect to the Rectified Certificate of Confirmation of Grant. There's nothing for the court to stay since the Interested Party remains the rightful beneficiary of the 20 acres in LR 6885 Nakuru. The application is an attempt to make the Administratix not fulfil her duties to execute and distribute the estate. the orders will amount to curtailing the Interested Party's right to enjoy the outcome of the Ruling.

16. Further he stated that no irreparable harm befalling the estate has been demonstrated. That there has been unreasonable delay in filing the appeal, 57 days later, without explanation or justification. No security has been provided for the costs awarded to the Interested Party in the said Ruling. The

Applicant has not met the requirements envisaged under Order 42 Rule 6 and seeks the dismissal of the application

17. The Applicant in her supplementary Affidavit sworn on 18th March 2024 states that, the 3rd Administrator's Response offends the provisions of Section 5 of the Oaths and Statutory Declaration Act. The affidavit was sworn in Nairobi but executed in Nakuru. That the time between 21st December, and 13th January is excluded from computation by dint of Order 50 Rule 4 of the Civil Procedure rules negating any notion of laches. Appeals to the Court of Appeal are lodged by way of Notice of Appeal by dint of Rule 75 of the Court of Appeal Rules.

18. That if the Appeal succeeds the estate will suffer loss in the event that subdivision of LR NO. 6885 proceeds in form of costs and the financial implication reverting. back to the original title. On the issue of security, the Ruling of 29th November, does not involve money but intimated she was ready to abide by the conditions set by Court.

19. Both Applications and the Notice of Preliminary Objection were canvassed by way of written submissions.

Applicant's Submissions

20. The Applicant's Catherine Chepngetich Mosonik and Nancy Chepkorir Mosonik in their submission dated 8th April, 2024, submitted that, the Summons for revocation of Grant is not res-judicata as claimed and that the Court ought to look at the decision claimed to have settled the issues in question, the entire pleadings of the previous case and the pleadings in the instate case. See: Thiong'o (Suing & sued in her capacity as the administrator of the estate of the late Dedan Thiong'o Kingagi (Deceased) .

21. They also relied on the case of Bernand Ndegwa v James Nderitu Githae & 2 others [2010] eKLR which summarized the test for res judicata that is; the matter in issue is identical in both suits; the parties in the suit are the same; sameness of the title/claim; concurrent jurisdiction and finality of the previous decision.

22. They conceded that although the matter is between similar parties that is the innate nature of succession causes. The Ruling of 28th November determined different issues. The instant application seeks revocation and rendering of accounts. By dint of Section 76 of the *Law of succession Act*, the Applicants are within their right to move the court for revocation of grant. Counsel relied on the case of Thing'o (supra) to submit that for this action to be deemed res judicata, the Ruling should have conclusively determined the rights of the parties being sought in the subsequent suit and that no summons for revocation had ever been filed by any party prior.

23. Further that the Preliminary Objection does not meet the threshold set out in the celebrated case of Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696. Res judicata is not on a pure point of law and an objection on the grounds of res judicata cannot be successfully prosecuted through a Preliminary Objection as was reiterated in George Kamau Kimani & 4 Others v County Government of Trans-Nzoia and another [2014] eKLR and Githengi v Mwangi (Environment & Land Miscellaneous Case E012 of [KEELC [2023] 19017 (KLR) (24 July, 2023).

24. As for the Summons, it was submitted that there are conflicts amongst the Administrators making it impossible for any decision to be made regarding disposition of the estate. the Courts' attention was drawn to its Ruling of 28th November, 2023 where it made observations that the 1st and 4th Administrators were uncooperative, unconcerned and demonstrated no intention to implement any of their duties. It was argued that the 2nd and 3rd Administrators have imposed decisions contrary to

schedule of distribution as well as seized control of the estate funds without rendering accounts of estate funds.

The 2nd & 3rd Administrators Submissions

25. The 2nd & 3rd Administrators filed submissions in opposition of the Notice of Motion on 8th February, 2024 and in opposing the Summons and in Support of the Preliminary Objection on 23rd February, 2024.

26. It was submitted that according to the Mukhisa Biscuit case (supra), a Preliminary Objection is a pure point of law that may dispose of a suit in the first instance. It is their position that the issues raised regarding the surveyor and the Interested Party are res judicata and offend the provisions of Section 7 of the *Civil Procedure Act*. The issues according to them were raised in the Supporting Affidavit dated 8th January, 2023 and addressed in the Ruling of the Court of 28th November, 2023. The Court therefore, became functus officio and lacks jurisdiction to grant the order for revocation sought.

27. Reliance was placed in re Estate of Nchogu Sagana (Deceased) [2021] eKLR and in re Estate of Jonathan Wanjohi Karithi (Deceased) [2020] eKLR, Andrew Mwangi Kabugngo v Robisnson Gichobi Richard & Another [2017] eKLR where the Courts addressed the implications of Section 7 and the doctrine of res-judicata. It was their contention that any attempt to raise the issues now is an abuse of the Court process.

28. As regards the 4th Administratix's Notice of Motion Application dated 19th January, 2024, it was their submission that the Application is intended to cause further delays. That the Applicant has not shown the substantial loss likely to be suffered and has just stated that the appeal will be rendered nugatory occasioning irreparable loss to the estate. In reliance they cited the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR the Court held that the fact that the process of execution has been put in motion or likely to be put in motion does not amount to substantial loss.

29. That no security has been provided or shown how the estate was going to provide security. They submitted that the importance of Security as a prerequisite for grant of stay of execution was stated in James Wangalwa & Another v Agnes Naliaka Cheseto (supra)

30. It was their contention further that the Applicant has not established an arguable appeal as she failed to file a draft/memorandum of appeal to assist the Court in determining it. Reliance was place in the pronouncement in Bendict Ojou Juma & 10 others vs A.J. Pereira & Sons Ltd [2016] eKLR the Court

> " .....the memorandum of appeal serves to establish if the re is an arguable appeal.....there is no way of assessing if there is an arguable appeal without the Court having the benefit of a draft Memorandum of Appeal..."

4th Administrator's Submissions

31. In the submissions dated 18th March, 2024, the 4th Administrator relied on the decision in In Re estate of Bernice Wairimu Ngara (Deceased) [2021] eKLR to submit that, she has proved to the required standards that execution will subject the estate substantial loss as to the costs appurtenant to the subdivisions of the estate and the issuance or reregistration of titles in the event the appeal succeeds.

32. It was also her argument that, since the Court dismissed the Application dated 28th February, 2023 and partially allowed the application dated 30th September, 2021, the subsequent orders emanating from the Ruling of 28th November 2023 would precipitate the sub-division of the entire estate rendering the appeal nugatory.

33. As regards undue delay, the 4th Administratix submits that by didn't of Order 50 Rule 4 of the Civil Procedure Rules on computation of time, the application was filed timeously.

34. Pertaining security, the 4th Administratix submits that she did not intimate to provide security for costs as the impugned ruling is not related to a money decree. Her contention is that she was willing to abide by any conditions set by court. To buttress this argument, she relied on the decision in Re estate of Bernice Wairimu Ngara (Deceased) (supra) to submit that the Court would be exercising its discretion in making any orders and directions necessary to allow the stay of execution outside of money as security.

35. Finally, it was submitted that the 2nd and 3rd Respondent's Replying Affidavit dated 7th February, 2024 should be struck off as it contravenes the provisions of Section 5 of the *Oaths and Statutory Declarations Act* for not being properly commissioned. To buttress this argument, she relied on the pronouncement in Mary Gathoni & Another v Frida Ariri Otolo & Another (2020) eKLR and sought the Application be considered un opposed at least from the 2nd and 3rd Administrators.

Analysis and Determination

36. This Court is obliged to consider an Application dated 8th January 2024 for revocation of grant and the one dated 19th January 2024 for stay of proceedings pending Appeal and a Notice of Preliminary Objection dated 1st February 2024. Having directed that All Applications shall be considered concurrently with the Notice of Preliminary Objection coming up firsts in consideration.

37. In the Celebrated 'locus classicus' John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR, the Supreme Court held that;

> " The doctrine of res judicata allowed a litigant only one bite at the cherry. It prevented a litigant or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It served the cause of order and efficacy in the adjudication process. It ensured that litigation came to an end and prevented a multiplicity of suits"

38. The Flurry of motions was as a result of this court's ruling dated 28th November 2023 where this court held that;

> " the attempt at Disputing the interested party(es) right 20-Acre piece of land to be excisional from LR 6885, I respectfully find this to be an attempt at reviewing and setting-aside a confirmed Grant outside the parameters permissible in law.
>
> This court finds the same challenge, to be res-judicata, having been dealt with twice from 2012 to 2017 both periods where the Respondents were all along administrators and they had executed requisite consents when moving the court, the issue of Proof of payment of the consideration by the interested party was never raised until six years later, I find this to be mysterious and not in good faith".

39. Having considered the Notice of Preliminary Objection, the application, responses, rival submissions and the supporting authorities I concur with the 2nd and 3rd Respondents that the Summons for Revocation of Grant dated 8th January, 2024, filed on 23rd January, 2024 brought under Section 47 and 76 of the *Law of Succession Act* by Catherine Chepngetich Mosonik and Nancy Chepkorir Mosonik is res judicata as the substratum of the matters therein have been determined in the Summons dated 30th September, 2021 and Summons dated 28th February, 2023 in the ruling of 28th November, 2023.

40. This Court equally recalls that, the 1st and 4th Respondents and the 2nd and 3rd Respondents are administrators not working collectively and as has been in the past the two factions remain apparent in this motion the 1st Respondent has been in active in these proceedings while as is customary the 4th Respondent had her Application against the 2nd and 3rd Respondent while her daughters are the Catherine Chepngetich Mosonik and Nancy Chepkorir Mosonik Applicants.

41. In this instance the two Applicants in the Summons for Revocation of Grant dated 8th January, 2024 are belated Applicants who have all along been represented by the 4th Administrator and are not with bonafide as was in the case of Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) [2022] eKLR Odunga J held that;

> " However, it is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of res judicata inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation 6 to section 7 of the *Civil Procedure Act*, where persons litigate bona fide in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating".

42. This Court upholds the Notice of Preliminary Objection dated 1st February, 2024 by the 2nd and 3rd Respondents finding that, the Summons for Revocation of Grant dated 8th January, 2025, by Catherine Chepngetich Mosonik and Nancy Chepkorir Mosonik is res judicata and the Application is accordingly struck out.

43. This Court shall not condemn the Applicants Catherine Chepngetich Mosonik and Nancy Chepkorir Mosonik to costs and that parties shall bear their own costs.

44. This Court nonetheless and in the interests of justice, grants the Applicants Catherine Chepngetich Mosonik and Nancy Chepkorir Mosonik leave to Appeal and to make an application for stay before the Court of Appeal and a 45-day order of stay is accordingly granted.

45. With regards to the Notice of Motion Application dated 19th January, 2024, while it has not met the threshold for grant of orders, it is equally noteworthy that she alleges that unless stay is rendered then the Appeal shall be rendered nugatory, this court disagrees that she seeks to Appeal against a ruling and that she has an opportunity to obtain stay orders from the Court of Appeal from whence they may determine the Arguarbility of the Appeal.

46. Order 42 rule 6(1) and (2) of the Civil Procedure Rules provides 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 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."

47. In Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay 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*, the Court is no longer limited to the foregoing provisions. 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. According to Section 1A (2) of the *Civil Procedure Act*:

> " 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."

48. Under Section 1B some of the aims of the said objective 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.

49. In *Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009*, Nyamu, JA on 20/11/09 held inter alia that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way.

50. In *Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union Civil Application No. Nairobi. 85 of 2010* Judge Nyamu held that:

> " where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case."

51. A stay of execution should only be granted where sufficient cause is shown. In Antoine Ndiaye v African Virtual University (2015) eKLR Gikonyo J opined that -

....stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules...

52. Grant of stay of execution pending appeal is a discretion of the court. In Butt v Rent Restriction Tribunal (1982) KLR the court gave guidance on how such discretion should be exercised and held that –

> " 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
>
> 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
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> 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
>
> 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
>
> 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

53. The purpose of stay of execution is to preserve the status quo pending the hearing of the appeal. In RWW vs. EKW [2019] eKLR, it was observed that:

> " 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".

54. The above are the principles to bear in mind in determining the application. The first consideration is whether the application was filed timeously. The Ruling of the High Court in this matter was delivered on the 28th November 2023, and the notice of appeal filed with the court on the 13th December 2023 while the instant Application was filed on the 19th January 2024. There was no delay.

55. The 4th Administratix/Applicant Agnes Chepkemoi Mosonik does not contend that he will suffer substantial loss if the orders sought are not granted.

56. It is the duty of the 4th Administratix/Applicant Agnes Chepkemoi Mosonik in her Notice of Motion Application dated 19th January, 2024 for stay of execution to establish that she will suffer substantial loss if the orders sought are not granted. In Machira t/a Machira & Co. Advocates v East African

Standard (No 2) (2002) KLR 63 the Court of appeal considered as to what amounts to substantial loss and held that –

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

57. The other consideration is security. In the case of Arun C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates (2014) eKLR the court held that:

> " The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose."

58. The 4th Administratix/Applicant Agnes Chepkemoi Mosonik in this matter has not offered any security in the event that, the appeal fails. The condition of security has therefore not been met.

59. This Court is unable to discern the arguability of the Appeal from only the Notice of Appeal and as such any interlocutory relief properly ought to be argued before the said Court.

60. The upshot is that there is no merit in the Notice of Motion Application dated 19th January, 2024 by the 4th Administratix/Applicant Agnes Chepkemoi Mosonik. The same is hereby dismissed with costs to the 2nd and 3rd Respondents.

61. This Court nonetheless and in the interests of justice, grants the 4th Administratix/Applicant Agnes Chepkemoi Mosonik leave to Appeal and to make an application for stay before the Court of Appeal and a 45-day order of stay is accordingly granted.

62. This Court shall mention the matter in 45-days' time for further directions.

It is So Ordered.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 17TH DAY OF JULY, 2024.

S. MOHOCHI

JUDGE