



In re Estate of Joseph Githae Ngatia (Deceased) (Succession Cause 240 of 1990) [2024] KEHC 9250 (KLR) (16 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9250 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 240 OF 1990
SM MOHOCHI, J
JULY 16, 2024**

IN THE MATTER OF THE ESTATE OF JOSEPH GITHAE NGATIA (DECEASED)

BETWEEN

CHARLES WAMBUGU GICHURU APPLICANT

AND

MARTHA WANJIRA GITHAE EXECUTOR

RULING

1. Before this Court is an Application by way of Notice of Motion dated 30th January 2024 seeking an order of stay of execution of Ruling, Order and decree pending filing of an intended Appeal against the Ruling dated 26th January 2024.
2. This Application was on the 30th March 2024 certified as urgent and that the Applicant was to serve the Application upon the Respondent within 3 days with a priority hearing date being fixed at the registry.
3. On the 23rd April 2024 this court further directed that the Application was to be heard and determined by way of written submissions with requisite directions being issued. And a ruling date was scheduled for 18th June 2024.
4. The Respondent duly complied with the Courts directions by filing grounds of opposition dated 3rd April 2024 and written submissions dated 30th April 2024.
5. The Applicant's motion is brought pursuant to Order 51 Rules 1,2, 3 and 4 of the *Civil Procedure Rules* and is premised on the following three grounds;
 - i. That the Respondent intends to execute the ruling of the Court which the Applicant is aggrieved with.



- ii. That for the interest of justice that to be seen to be done, there is need for granting of the sought order; and
 - iii. That the sought orders are for preservation of the estate subject property that is the cause of the matters in court.
6. As at the time of preparation and delivery of this ruling the Applicant was yet to comply with the Court's direction and did not file any written submission and the court has to determine the Application against the bare notice of motion.

Applicant's Case

7. The Applicant in his sworn affidavit dated 26th January 2024 depones and avers that;
 - i. That, pursuant to the ruling of court and which left the some of the beneficiaries dissatisfied, they wish to file an appeal in the Court of Appeal but there are orders the Respondent wants to execute and which will adversely affect the distribution of the estate properties.
 - ii. That, the application that this Honourable court ruled out was for stay the transfer and registration of L.R. NO. 204/511 Sabugo scheme in the names of the Martha Wanjira Githae the administrator pursuant to the further Rectified Confirmation of Grant issued by this
 - iii. Honourable court of the 21st October, 2022 and further grant orders of injunction restraining any form of interference with the Estate property namely L.R. NO. 204/511 Sabugo Scheme for reasons that the applications for such further rectification of confirmation was done contrary to Section 76 of the Succession Act and withdraw trust granted to the Administrator for the heirs of the 1st Family and further direct for the distribution and registration of 6.5 Acres equally among the children of David Gichuru Githae who are all adults.
 - iv. That, for preservation of justice before the filing of the appeal, it is imperative that this Honourable court be pleased to grant a stay of execution of its orders for 45 days and which will be sufficient for the entry of appeal.
 - v. That, the sought stay will not negatively affect any of the beneficiaries or the estate properties as the same is in preservatory form.
 - vi. That he swore the affidavit pleading for urgency granting stay of execution of the Ruling and all the other consequential orders issued by this Honourable court pending appeal.

The Respondent's Case

8. In opposition the Respondent filed Grounds of Opposition dated 3rd April, 2024 on the grounds that the orders issued in the Ruling dated 26th January, 2024 are negative orders not capable of being stayed, the application has been overtaken by events as distribution of the estate is complete and that the application does not meet the threshold for grant of the orders sought as irreparable loss has not been demonstrated and that no security has been offered.
9. The Respondent also filed a Replying affidavit sworn by herself on 3rd April, 2024. She averred that no injunctive orders were issued against proceeding to distribute the estate. She stated that the distribution of the estate is complete and certificates of title issued as per the rectified Certificate of Confirmation of Grant dated 21st October, 2022. She asserts that had the Applicant taken time to conduct a search, he would have discovered that Nyandarua/Sabugo/511 has been subdivided



into three portions Nyandarua/Sabugo/9394, 9395 and 9396 with the 1st House being apportioned Nyandarua/Sabugo/9396.

10. She argued that the Applicant has not demonstrated any loss or damage as a result of the distribution and the portion in questioned never belonged to him and shall pass in his father's estate.
11. The Respondent through counsel filed written submissions on 3rd May, 2024 and submitted that the orders issue by the Court in its Ruling are negative orders and such orders are not capable of being stayed. She cited the cases of *Raymond N. Omboga vs. Austine Pyan Maranga* Kisii HCCA No 15 of 2010, *David Kipron Chingi & Another v Director of Public Prosecutions & 2 Others* [2016] eKLR, *Kaushik Pachamatia & 3 Others vs Prime Bank Limited & Another* [2020] eKLR and *Re Estate of Yusuf Kipkoris Chepkeitany (Deceased)* [2021] eKLR.
12. As regards substantial loss, it was argued that the Applicant stands to lose none, as the portion which the Applicant's father was entitled to is already registered in the name of the Applicant to hold in trust for the 1st House and that the Court simply upheld the wishes of the deceased. On the issue of security, it was submitted that failure to offer security renders the Application defective.

Analysis & Determination

13. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon.
14. 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.”
15. In *Visbram 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.”

16. 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.
17. In [Stephen Boro Gittha 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.
18. In [Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union](#) Civil Application No. Nai. 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.”
19. 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](#)...
20. 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.
 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.”
21. 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”
22. 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 26th January 2024, and the notice of appeal filed with the court on the 30th January 2024. There was no delay.
23. The Applicant does not contend that he will suffer substantial loss if the orders sought are not granted.
24. It is the duty of the applicant in an application for stay of execution to establish that he/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.”
25. 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.”

26. The Applicant in this matter has not offered any security in the event that the appeal fails. The condition of security has therefore not been met.
27. 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.
28. This Court Nonetheless grants the Applicant leave to Appeal and to make an application for stay before the Court of Appeal and a 45-day stay is accordingly granted in the interests of justice.
29. The upshot is that there is no merit in the Application Notice of Motion dated 30th January, 2024. The same is thereby dismissed with costs to the Respondent.
30. 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 16TH DAY OF JULY, 2024.

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S. MOHOCHI
JUDGE

