



**Kinyua v Kinyua (Family Appeal E004 of 2021)
[2024] KEHC 10126 (KLR) (8 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
FAMILY APPEAL E004 OF 2021
MA ODERO, J
AUGUST 8, 2024**

BETWEEN

MARTIN MWAI KINYUA APPELLANT

AND

JULIET WANGECHI KINYUA RESPONDENT

RULING

1. Before this court for determination is the Amended Summons dated 21st August 2023 by which the Applicant Martin Mwai Kinyua seeks the following orders:-
 1. Spent.
 2. Spent.
 3. That the court be pleased to grant an interim stay of execution of the estate of the deceased herein in accordance with the order and judgement dated 26th January 2023 pending the filing of the intended appeal.
 4. That this honourable court be pleased to stay proceedings in Karatina Magistrate Court Land and Environment Case Number 22 of 2018 pending the hearing and determination of Court of Appeal Civil Appeal No. E115 of 2023.
 5. That this court be pleased to grant stay of execution of the estate of the deceased herein in accordance with the order and judgment dated 26th January 2023 pending the hearing and determination of Court of Appeal Civil Appeal No. E115 OF 2023.
 6. That costs be in the cause.
2. The Summons which was premised upon Rule 49, 63 and 73, Rule 40 (2) of the Probate and Administration Rules, Sections 71 (3) of the Law of Succession Act Order 42 Rule 6 Civil Procedure



Rules 2010, Sections 1(a), 2(a) and 3(a) of the Civil Procedure Act and all other enabling provisions of law was supported by the Affidavit of even date sworn by the Applicant.

3. The Respondent Juliet Wangeci Kinyua did not file any reply to the Summons. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 24th May 2024 whilst the Respondents despite being granted an opportunity to do so, did not file any submissions.

Background

4. This matter emanated from Karatina Succession Cause No. 50 of 2013 in which judgement was delivered on 4th February 2021. The Applicant being dissatisfied with the judgment of the lower court filed an appeal in the High Court being Succession Appeal No. E004 of 2021.
5. That appeal was duly heard and vide a judgment delivered on 26th January 2023 Hon. lady Justice Muchemi dismissed the appeal for lack of merit.
6. Still dissatisfied with the decision of the High Court the Appellant filed in the Court of Appeal Civil Appeal No. E115 of 2023. The Applicant now prays for a stay of execution of the estate of the Deceased pending the hearing and determination of the appeal.

Analysis and Determination

7. I have carefully considered the summons before this court as well as the submissions filed by the Applicant.
8. By prayer (4) of the Summons the Applicants seeks a stay of proceedings in Karatina Magistrate Land and Environment Case No. 22 of 2018 pending hearing and determination by the Court of Appeal of Civil Appeal No. E1159 of 2023.
9. The above is a prayer that cannot be granted by the High Court. Article 162(2) (b) of the Constitution of Kenya 2010 established the Environment and Land Court (ELC) with the exclusive mandate to hear and determine all matters relating to land. The ELC is a court with equal status as the High Court. Therefore in so far as they are hearing a land matter, the Magistrates courts can only be supervised by the ELC.
10. Accordingly the prayer seeking stay of land matter being handled by the magistrates court ought to be made in the Nyeri ELC. Accordingly I dismiss prayer No. 3 of this Summons.
11. By Prayer (5) of the Summons the Applicant is seeking to stay the estate of the Deceased pending the hearing and determination of this appeal.
12. Order 42 Rule 6 of the Civil Procedure Rules 2010 provide 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 appeal case of in so far as the court appeal from may for sufficient cause order stay of execution of such decree or order, and whether the application of such stay shall have been granted or refused by the court appeal 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 to appeal is preferred may apply to the appellate court to have such order set aside. 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.
- c.”

13. Therefore in order to merit the orders being sought the applicants must satisfy the court.
 - a. That the application for stay was filed without unreasonable delay.
 - b. That they stand to suffer substantial loss unless the stay order is granted.
 - c. That security for the performance of the decree or order has been given by the Applicants.
14. The impugned judgment which I note was not annexed to this application for stay was delivered on 26th January, 2023. This application for stay was made on 21st August, 2023 several months after delivery of the judgment. No reason has been given for that delay of seven (7) months. I find that there has been inordinate delay, in filing their application for stay.
15. The decision whether or not to grant an application for stay of execution lies squarely at the discretion of the court concerned. The court must consider each case on its own merits and the likely effect of granting or declining an application for stay. The court ought to act conscientiously not capriciously in determining an application for stay.
16. In *Global Tours & Travels Nairobi HC Winding up Cause No. 43 of 2000*, Hon, Justice Aaron Ringera (as he then was stated as follows:-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice..... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”
17. Similarly in *Butt -vs- Rent Restriction Tribunal [1979] eKLR*, the court set out the principles to be considered in determining whether or not to grant a stay as follows:-
 - (i) 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.
 - (ii) The general principal 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.



- (iii) 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.
 - (iv) The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
18. The Applicant submits that he is likely to suffer substantial loss if the stay sought is not granted. The pertinent issue in this Cause is the distribution of the parcel of land known as LR Iriani/Kairia/254 (hereinafter the 'suit land'). The Appellant claims that he currently resides on the suit land. That by the decision of the Magistrates court he has been disinherited therefrom. That in the absence of a stay the Appellant faces imminent risk of being evicted from the suit land thereby rendering his appeal nugatory. The question of what constitutes "substantial loss" is one which has engaged our courts over a long period and there exist a plethora of decisions on the issue. In RWW -VS- EKW [2019] eKLR follows
- “Demonstrating what substantial loss is likely to be suffered is the core to granting a stay order pending appeal”
19. In the case of Wangalwa & Another -vs- Agnes Naliaka Chesoto [2012] eKLR the court held as follows:-
- “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.”
20. The main purpose of a stay is to preserve the subject matter of the dispute whilst balancing the right of the Appellant to appeal with the right of the Respondent to enjoy the fruits of her judgment.
21. In RWW -VS- EKW [2019] eKLR the court observed as follows:-
- “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 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”
22. Whilst it is not duty of this court to determine the merits or otherwise of the intended appeal, I have perused the judgment delivered on 26th January, 2023. I note that the Appellant was allocated an alternative parcel of land which he has refused/declined to move to. There has been no notice seeking to evict the Applicant from the suit land thus his claim that he faces imminent eviction is doubtful.



23. The Appellant is not the sole beneficiary of this estate. The Deceased had several other children all of whom are entitled to inherit. The other beneficiaries have been waiting for over three (3) years to have their dispute settled and to enjoy the fruits of the judgment. To stay execution of the estate will prejudice all the other beneficiaries.
24. I am not satisfied that this application for stay has merit. Accordingly I dismiss in its entirety the Amended Summons dated 21st August 2023. This being a family matter each side will bear their own costs.

DATED IN NYERI THIS 8TH DAY OF AUGUST, 2024.

MAUREEN A. ODERO

JUDGE

