



**Muriuki v Maina (Civil Appeal E010 of 2022)
[2024] KEHC 10102 (KLR) (8 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10102 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E010 OF 2022
MA ODERO, J
AUGUST 8, 2024**

BETWEEN

PURITY NJOKI MURIUKI APPELLANT

AND

EUNICE WANJIRU MAINA RESPONDENT

RULING

1. Before this Court for determination is the Summons dated 8th June 2023 by which the Appellant/Applicant Purity Njoki Muriuki seeks the following orders:-
 - “1. Spent
 2. Spent
 3. That there be a stay of the orders of the court issued by Hon. M. Okuche in CM succession E149 OF 2021 on 5th May, 2023 pending the hearing and determination of the substantive appeal.
 4. That costs be in the cause.
2. The application was supported by the Affidavit of even date sworn by the Applicant.
3. The Respondent Eunice Wanjiru Maina opposed the application through her Replying Affidavit dated 3rd July, 2023. The matter was canvassed by way of written submissions. The applicant filed the written submissions dated 26th April 2024, whilst the Respondent relied upon her written submissions dated 30th April, 2024.



Background

4. This matter emanates from Nyeri Succession Cause No. E419 of 2021: Estate Of Charles Macharia Muragaru which cause was heard and determined in the Chief Magistrates Court.
5. The Deceased Charles Macharia (hereinafter ‘the Deceased’) passed away on 30th November 2020. Following his demise the widow Eunice Wanjiru Maina (the Respondent herein) applied for and obtained Grant of Letters of Administration Intestate which were issued to her on 5th July, 2021.
6. Thereafter the Respondent filed a Summons for confirmation of Grant dated 25th August, 2021. The Protestor (the Applicant herein) Purity Njoki Maina filed an Affidavit of Protest dated 8th September, 2021 alleging that she was also a wife to the Deceased and therefore was entitled to benefit from the estate.
7. The protest was heard interpartes and vide a judgment delivered on 25th July 2022, Hon M. Okuche Senior Principal Magistrate found that there was no evidence of a marriage between the Deceased and the Applicant and dismissed the protest.
8. Being aggrieved by the decision of the trial court the Applicant filed the Memorandum of Appeal dated 17th August 2022. Contemporaneously with the Appeal the Applicant filed this Notice of Motion seeking to stay the decision of the trial court pending hearing and determination of her Appeal.
9. The Applicant submits that if the order of stay is not granted then her appeal may be rendered nugatory as the estate may be distributed and she will be disinherited.
10. The Respondent on her part reiterates that the Applicant was not married to the Deceased. She insists that the Applicant does not in any case have an arguable appeal.

Analysis And Determination

11. I have carefully considered this application for stay, the reply filed thereto as well as the written submissions filed by the Respondent.
12. It is not the duty of this court to determine at this stage the merits or otherwise of the Intended Appeal. All the court is required to determine is whether the application for stay of execution is merited.
13. Order 42 Rule 6 which sets out the principles for stay of execution provides 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 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 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;-



- (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)

14. 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.
15. The impugned judgment which I note was not annexed to the application was delivered on 25th July, 2022. This application for stay is dated 8th June 2023 almost one (1) full year after the said judgment was delivered.
16. The application for stay was not filed in a timely manner. The Applicant has not given any explanation as to why it took her so long to file the application despite having filed the Memorandum of Appeal in August 2022. I find that there has been unreasonable and indeed unexplained delay in filing this application for stay.
17. Notwithstanding that delay I will proceed to consider the merits of this application. The Applicant submits that her appeal is likely to be rendered nugatory if the stay sought is not granted. It is not the duty of this court to determine the merits or otherwise of the intended appeal. All this court has to consider is whether in the circumstances of this case a stay ought to be granted.
18. I have perused the judgment delivered by the learned trial magistrate and I am not persuaded that the Appellant has an arguable appeal.
19. The Applicant submits that she is likely to suffer substantial loss if the stay is not granted as she will be disinherited.
20. The question of what constitutes substantial loss is one which has engaged the Kenyan courts over a long period of time.
21. In RWW -VS- eKW [2016] eKLR the court stated

“Demonstrating what substantial loss is likely to be suffered is the core to granting a stay order pending appeal”. [case law]
22. The Applicant claims that the substantial loss she is likely to suffer is that she may be disinherited. It is only a genuine beneficiary to an estate who can be disinherited. There is nothing to show that the Applicant is a genuine beneficiary. Indeed a competent court of law has declared that she is not a beneficiary to the estate.
23. At the present time the Applicant cannot lay claim to any part of the estate. In my view the Applicant has not demonstrated substantial loss to herself since she is not at the present time entitled to any share of the estate, nor indeed is she in possession of part of the estate. One cannot lose what one does not have.
24. Therefore I find no merit in the application for stay. The same is dismissed in its entirety. Each party to bear their own costs.

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



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MAUREEN A. ODERO

JUDGE

