



In re Estate of Wilson Raphael Kimani (Deceased) (Civil Appeal E113 of 2022) [2023] KEHC 1008 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1008 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E113 OF 2022
RB NGETICH, J
FEBRUARY 16, 2023**

BETWEEN

FRED WAWERU KIMANI APPLICANT

AND

DENNIS KIMANI KIBE RESPONDENT

RULING

1. This is a ruling on application dated June 6, 2022 seeking stay of execution of ruling in Kiambu Succession Cause No 181 of 2019 delivered on November 23, 2021 which revoked letters of administration issued on September 5, 2019.
2. The application is supported by the annexed affidavit of Fred Waweru the applicant herein. He disposes that he is the Attorney of Susan Kivila and David Kivila vide a power of Attorney donated to him. He averred that the two are the children of the deceased herein and they have been disinherited to the exclusion of the respondent; that the appeal has a high chance of success and the deceased's children will suffer irreparable loss as the suit properties are in the process of being wasted by the respondent.
3. In response, the respondent filed notice of preliminary objection on the grounds that the applicant has a similar application in Kiambu Succession Cause No 181 of 2019 which is pending ruling and the application herein is frivolous, vexatious and an abuse of the court process.
4. The application was canvassed by way of written submission.

Applicant's Submissions

5. The applicant in his submissions filed on August 26, 2022 submitted that he is aggrieved by the decision of the trial court which revoked the grant of letters of administration and wishes to appeal against the said decision of the trial court; and added that the respondent is in the process of wasting the properties in question.



6. Counsel submitted that the notice of preliminary objection does not raise pure points of law and the applicant seeks to maintain the status quo of the property, pending the determination of the appeal. Counsel urged the court to allow application in the interest of justice.

Respondent's Submissions

7. Counsel submitted that the notice of preliminary objection raises the issue of subjudice as orders in the instant application are pending determination in the trial court and urged this court to dismiss the application herein.
8. Counsel further submitted that the respondent is the registered proprietor of the properties in question thus the orders being sought are incapable of execution and there is nothing to stay in the present matter. He urged this court to dismiss the application as it fails to meet the threshold for granting stay orders.

Analysis And Determination

9. I have considered ground of the application, averments herein and submissions filed by parties and what I wish to consider is whether prerequisites for grant of stay of execution have been established.
10. The principles upon which the court may grant a stay of execution pending appeal are well-settled. Order 42 rule 6 of the [Civil Procedure Rules](#) requires an applicant seeking a stay of execution pending appeal to demonstrate the following: -
 - a. Substantial loss may result to the applicant unless the order was made;
 - b. The application was made without unreasonable delay; and
 - c. 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.
11. In [Antoine Ndiaye v African Virtual University](#) (2015) eKLR, the court stated as hereunder: -

“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...”
12. The grant or refusal to grant a stay of execution pending appeal is a discretionary remedy of the court. The purpose of stay of execution is to maintain *status quo*. The applicant contends that the respondent is in the process of alienating the suit property which will amount to disinheriting the donors who are the rightful beneficiaries of the deceased's estate. The applicant submitted that if stay orders are not issued, the donors will suffer prejudice.
13. From the record, the trial court revoked the letters of administration issued in respect of the estate of the deceased. The trial court has not entirely determined the matter and issued final orders; the applicant is required to move the trial court to fully adjudicate the matter.
14. From the foregoing, the application before the court is premature. I do agree with the counsel for the respondent that there are orders of stay issued by the trial court. There are no adverse orders issued against the applicant in the trial. The applicant has not demonstrated the substantial loss to be suffered if the orders are not granted.



Final Orders:

1. The application dated June 6, 2022 is hereby dismissed.
2. Costs to the respondent.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 16TH DAY OF FEBRUARY, 2023

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RACHEL NGETICH

JUDGE

In the presence of:

Martin – Court Assistant

Parties – Absent

