



**In re Estate of Julius Marete Ibutu (Deceased) (Succession Cause 11 of 2018) [2023] KEHC 2537 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2537 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 11 OF 2018  
TW CHERERE, J  
MARCH 23, 2023**

**IN THE MATTER OF THE ESTATE OF JULIUS MARETE IBUTU (DECEASED)**

**BETWEEN**

**PRISCILLA NKIROTE MARETE ..... PETITIONER**

**AND**

**GLADYS KINAITORE MARETE ..... 1<sup>ST</sup> RESPONDENT**

**JANET MWARANIA MARETE ..... 2<sup>ND</sup> RESPONDENT**

**SALOME KANARION MARETE ..... 3<sup>RD</sup> RESPONDENT**

**ESTHER MAKENA MARETE ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. By ruling dated October 27, 2022, this court made the following orders:
  1. Applicants are lawful beneficiaries and dependants of the deceased
  2. Deceased's Will is a nullity on account of its discriminatory provisions
  3. Deceased's estate except one acre of Nyaki/Giaki/3993 bequeathed to a buyer one Kariuki Kware shall be administered and distributed as an intestate estate in accordance with section 40 of the Act
  4. The parties shall bear their own costs
  5. Mention on February 15, 2023 to confirm distribution
2. Applicant was aggrieved by the ruling and has filed Civil Appeal No 14 OF 2023 at the Court of Appeal and has by summons dated February 06, 2023 supported by applicant's affidavit sworn on even date



sought an order of stay of the orders dated October 27, 2022 pending the determination of the appeal which she avers will be rendered nugatory if the orders sought are not granted.

3. Respondents opposed the application on the basis of an affidavit sworn by the 2<sup>nd</sup> respondent on February 14, 2023. 2<sup>nd</sup> respondent avers that the stay order will delay the matter and will be prejudicial to the respondents and especially the 1<sup>st</sup> respondent who is over 80 years old and is sickly. They also argue that the stay is unwarranted since the estate is yet to be distributed.
4. I have considered the summons dated February 06, 2023 in the light of the affidavits on record.
5. Order 42 (6) of the Civil Procedure Rules provides that no order for stay of execution shall be made unless application has been made without unreasonable delay; substantial loss is demonstrated and security for the due performance of such decree or order is offered. (See Equity Bank Limited v Japhet Kubai Ikiamba & another [2021] eKLR and Julius Muturi Thumi v Josphat Ntongai with Solomon Gitundu as the Guardian [2021] eKLR).
6. The present application was filed on February 09, 2023 which is three months after the impugned ruling and the delay has not been explained.
7. I have considered whether applicant has demonstrated that she is likely to suffer substantial loss if stay of execution is not granted.
8. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. As to what is substantial loss, it was observed in James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, 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.”
9. A party seeking an order of stay pending appeal bears a specific burden regarding proof of substantial loss. In this case, other than that Applicant is aggrieved by this court’s ruling dated October 7, 2022, Applicant has not demonstrated that she is likely to suffer any loss substantial or otherwise.
10. In the absence of prove of substantial loss, it is unlikely that the appeal would be rendered nugatory especially considering that the estate the subject matter of this cause is yet to be distributed.
11. I take cognizance of the fact that the applicant has a right to appeal but the filing of an appeal perse does not entitle a party who has not demonstrated substantial loss to an order of stay.
12. From the foregoing, I find that the application dated February 06, 2023 lacks merit and it is dismissed with costs to the respondents.
13. Matter shall be mentioned on July 20, 2023 to confirm filing of application for distribution.

**DATED AT MERU THIS 23<sup>rd</sup> DAY OF March 2023**

**WAMAE T W CHERERE**



**JUDGE**

**Appearances**

**Court assistant - Mr Kinoti**

**For applicant - Ms Gikundi for Charles Kariuki & Kiome Advocates**

**For respondents - Ms Kaaria for Kariuki for Mithega & Advocates**

