



**In re Estate of Kiragu Ngigie (Deceased) (Succession Cause  
578 of 2004) [2023] KEHC 1848 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1848 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION CAUSE 578 OF 2004  
FN MUCHEMI, J  
MARCH 2, 2023  
IN THE MATTER OF THE ESTATE OF KIRAGU  
NGIGIE ALIAS KIRAGU NGEIGIE (DECEASED)**

**BETWEEN**

**ISAAC KWIHA NGIGIE ..... APPELLANT**

**AND**

**DIANA NYAMBURA KIRAGU ..... 1<sup>ST</sup> RESPONDENT**

**GRACE WANJIRU NGIGE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Brief Facts**

1. The application dated August 22, 2022 seeks for orders for stay of execution of the judgment delivered on November 12, 2018 in this case pending the hearing and determination of Civil Appeal No E46 of 2022.
2. The 1<sup>st</sup> respondent has filed a replying affidavit dated November 14, 2022 in opposition to the application.

**The Applicant's Case**

3. The applicant states that the judgment herein was delivered on November 12, 2018 and being aggrieved with the decision of the court lodged an appeal in the Court of Appeal being Civil Appeal No E046 of 2022. The applicant states that the respondent is in the process of executing the judgment and that he is apprehensive that if the orders sought are not granted, he stands to suffer irreparable loss and damage which cannot be compensated by way of damages.
4. The applicant avers that he has an arguable appeal with high chances of success.



### The 1<sup>st</sup> Respondent's Case

5. The 1<sup>st</sup> respondent states that she is a daughter to the deceased while the 2<sup>nd</sup> respondent is her deceased brother's widow. The applicant herein is the 2<sup>nd</sup> respondent's son. She further avers that the court distributed the estate in equal shares between herself and the 2<sup>nd</sup> respondent and thus the applicant is not entitled to a share of the deceased's estate.
6. The 1<sup>st</sup> respondent further contends that the application is only intended to deny her the fruits of her judgment as they have litigated the matter since 2004 whereas judgment was delivered on June 3, 2016. Moreover, the 1<sup>st</sup> respondent avers that the appeal has no chances of success.
7. The 1<sup>st</sup> respondent states that the applicant has not demonstrated what substantial loss he stands to suffer as she is in occupation of her portion of the estate. The 1<sup>st</sup> respondent further states that she is aged and in poor health and the applicant's intention is to frustrate her ensuring that she does not get a share of the estate during her lifetime.
8. Parties disposed of the application by way of written submissions.

### The Applicant's Submissions

9. The applicant submits that he is a grandson to the deceased who died on February 24, 1995. The applicant further gave a background of the case and stated that the deceased had two wives, Annah Gathoni Kiragu (deceased) and Elishiba Wangui Kiragu (Deceased). The applicant contends that the deceased distributed his parcels of land between his two families with the 1<sup>st</sup> respondent being given land parcel Chinga/Gikigie/1211 whereas the 2<sup>nd</sup> respondent through her husband was given Chinga/Gikigie/1215. The applicant states that the parcel that is in contention is land parcel Chinga/Gikigie/1218 which was bequeathed to Annah Gathoni Kiragu. The applicant submits that following the said bequest, the late Diana Gathoni Kiragu filed the current succession cause with a view of having the property registered in her name. Further, she was substituted as an administrator by the 1<sup>st</sup> respondent not as her heir but as an agent of the estate and the applicant contends that it was for the 1<sup>st</sup> respondent to see to it that the parcel got to the rightful owner. The applicant contends that Annah Gathoni Kiragu had by oral will bequeathed the land parcel to him as a gift. Thus, the applicant argues that the subject land parcel is subject to two wills, one by the deceased herein dated January 17, 1995 and the 2<sup>nd</sup> one by Annah Gathoni Kiragu as reduced to writing on August 30, 2003 and which have not been contested. Based on the foregoing, the applicant contends that his appeal has a high probability of success as the trial court only considered one will yet the 2<sup>nd</sup> will was never contested or declared inadmissible in court.
10. The applicant relies on the cases of *Andrew Kuria Njuguna vs Rose Kuria* Nairobi Civil Case No 224 of 2001 (unreported); *Machira t/a Machira & Co Advocates vs East African Standard* (2002) KLR 63; *Kenya Shell Limited vs Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982-1988) KAR 1018 and *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR and submits that he stands to suffer substantial loss as the 1<sup>st</sup> respondent has already sold her share of the inheritance and is pushing to have land parcel Chinga/Gikigie/1218 in order to replenish her share to his detriment as he is the justified legal owner.
11. The applicant states that he has filed the application timeously and he is apprehensive that if the 1<sup>st</sup> respondent proceeds with the execution, it would cause the appeal to be nugatory.



## **The 1<sup>st</sup> Respondent's Submissions**

12. The 1<sup>st</sup> respondent relies on order 42 rule 6 of the [Civil Procedure Rules](#) and submits that the applicant has not demonstrated what substantial loss he stands to suffer if the orders sought are not granted. The 1<sup>st</sup> respondent refers to the judgment delivered on June 3, 2016 which indicates that the deceased was survived by herself and a son Alexander Ngigie who died during the pendency of the succession cause and was substituted by his wife, the 2<sup>nd</sup> respondent. The deceased's estate comprising of land parcel number Chinga/Gikigie/1218 was distributed in equal shares between the two respondents in accordance with section 38 of the [Law of Succession Act](#).
13. The 1<sup>st</sup> respondent further submits that the applicant seeks for stay of execution of the ruling delivered on November 12, 2018. The said ruling dismissed the application dated 24/3/2017 whereby the applicant sought to have the grant dated 3/6/2016 revoked. The 1<sup>st</sup> respondent argues that a reading of the ruling indicates that the applicant's interest is the portion of land given to his mother the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent has indicated that she is willing to transfer the said parcel to the applicant. The 1<sup>st</sup> respondent states that she is in occupation of her own portion of the suit land and thus no substantial loss can be suffered by the applicant if her portion is excised and registered in her name.
14. The 1<sup>st</sup> respondent contends that she is a daughter to the deceased and is therefore entitled to inheritance of her later father's estate. Further, there is no reason why her rights should not be enforced merely because the applicant believes that he has an entitlement. The 1<sup>st</sup> respondent deposes that the applicant has not sought stay for execution of the judgment delivered on June 3, 2016.
15. The 1<sup>st</sup> respondent argues that the ruling was delivered on November 12, 2018, which was a duration of four (4) years to the time of filing this application. The applicant has not explained the reasons for the delay in filing this application. As such, the 1<sup>st</sup> respondent states that the delay is inordinate and inexplicable.
16. It is further submitted that the appeal is wanting in merit as the estate was distributed equally amongst the beneficiaries in accordance with the [Law of Succession Act](#).

## **Whether the Applicant has Met the Prerequisite for Grant of Stay of Execution Pending Appeal.**

17. Section 47 of the [Law of Succession Act](#) gives the court jurisdiction to entertain any application such as the present one which seeks to preserve the *status quo* pending the appeal. Order 42 rule 6(2) of the [Civil Procedure Rules](#) lays down the conditions which a party must establish in order for this court to order stay of execution. These conditions are:-
  - a. Substantial loss may result to him/her unless the order is made;
  - b. That the application has been made without unreasonable delay; and
  - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.



18. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

- "1. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
2. Secondly, 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 the appeal court reverse the judge's discretion.
3. Thirdly, 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. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse."

19. On the issue of substantial loss, the case of *Re Estate of Wanga Ole Oiyie* [2022] eKLR Gikonyo J relied on the case of *James Wangalwa & another vs Agnes Naliaka Cheseto* [2012] eKLR where the court held:-

"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 applicant states that he stands to suffer substantial loss as the 1<sup>st</sup> respondent has already sold her inheritance and she seeks to replenish her share by acquiring land parcel Chinga/Gikigie/1218 to the detriment of the applicant. The 1<sup>st</sup> respondent has argued that the applicant has not demonstrated how he stands to suffer substantial loss and the fact that execution is underway is not sufficient to demonstrate loss. The 1<sup>st</sup> respondent has further argued that she is a rightful beneficiary of the deceased estate and is in occupation of the portion in the estate that was bequeathed to her and as such the applicant does not stand to suffer substantial loss.

21. The execution of the grant is a lawful process and it is not sufficient for the applicant to claim that substantial loss will ensue for the mere fact that transmission to the beneficiaries will take place. Additionally, although the applicant contends that the appeal shall be rendered nugatory if the orders sought are not granted, he has not demonstrated how this will happen. The 1<sup>st</sup> respondent is the daughter of the deceased and was entitled to a share in the estate. The applicant is a grandson and his mother who is the 2<sup>nd</sup> respondent was given her share. The respondents are more closely related to the deceased and as such this renders the appeal one with limited chances of success.



22. It is noted that the applicant has not sought for stay orders against judgement dated 3<sup>rd</sup> June 201 where the court distributed the estate of the deceased to the respondents. He seeks stay of the ruling delivered on November 12, 2018 which dismissed his application for revocation. It is trite law that stay of execution cannot be granted in respect of negative orders. In my view, there are no orders to be stayed.
23. The instant application was filed on August 25, 2022 and the ruling was delivered on November 12, 2018. This is a duration of over 4 years since judgment was delivered. Furthermore, the applicant has not explained the reasons for his delay in filing the instant application. As such, it is my considered view that the delay is inordinate and inexcusable.
24. On the issue of security, it is trite law that security is discretionary and it is upon the court to determine the same. Notably, the applicant has not offered any terms of security to warrant the application for stay. In balancing the rights and interests of the parties, it is my considered view that the scale tilts in favour of the 1<sup>st</sup> respondent who is the rightful heir of the deceased's estate. This succession cause was lodged in 2004 and judgement was rendered in June 2016, which was over 10 years of litigation with the 1<sup>st</sup> respondent not enjoying the fruits of her judgement. This application is not brought in good faith but to delay the execution of the grant further in an appeal that does not have chances of success. The deceased's estate was distributed equally between the respondents who were the rightful heirs of the deceased's estate.
25. Proof of substantial loss is the key to granting orders for stay pending appeal. The applicant has failed to demonstrate such loss and is guilty of delay in filing this application. The delay of four (4) years is in my view inordinate and not acceptable.
26. I am of the considered view that the applicant has failed to meet the requirements of order 42 rule 6 and his application must fail.
27. I find no merit in this application and I hereby dismiss it with costs to the respondents.
28. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 2<sup>ND</sup> DAY OF MARCH, 2023.**

**F. MUCHEMI**

**JUDGE**

**RULING DELIVERED THROUGH VIDEOLINK THIS 2<sup>ND</sup> DAY OF MARCH, 2023**

