



REPUBLIC OF KENYA



**Mauta v M'mauta (Civil Appeal E029 of 2022)
[2023] KEHC 3203 (KLR) (14 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3203 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E029 OF 2022
EM MURIITHI, J
APRIL 14, 2023**

BETWEEN

AMOS KAINI MAUTA APPELLANT

AND

GEOFFREY NTOKAUWA M'MAUTA RESPONDENT

RULING

1. Before the court is a Notice of Motion under certificate of urgency dated February 24, 2022, brought under Sections 1A, 1B, 3A of the [Civil Procedure Act](#), Order 9 Rule 10 and Order 42 Rule 6 of the [Civil Procedure Rules](#), where the applicant seeks that:
 1. Spent
 2. This Honorable Court be pleased to grant leave to the firm of Meenye & Kirima Advocates to come on record for the Appellant/Applicant in the place of Bebo & Mose & Co Advocates.
 3. Spent
 4. This Honorable Court be pleased to issue an order of stay of execution of the judgment delivered on February 17, 2022 pending the determination of the Appellant's/Applicant's Appeal.
 5. There be such other or further orders as may be necessary and appropriate to meet the ends of justice.
 6. The costs of and incidental to this Application be provided for.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Amos Kaini Mauta, the Applicant herein, sworn on even date. He avers that he



is a son of the late M'Mauta M'Ibwathu and a beneficiary of his estate. After the trial court delivered its ruling on February 17, 2022, he instructed his advocates to appeal against the entire decision. The Respondent is in the process of disposing the suitland in question which will render him and other beneficiaries homeless and destitute. His advocates have already filed a memorandum of appeal and he seeks stay of execution pending appeal in order to preserve the subject matter in dispute so that his appeal is not rendered nugatory. He believes that unless stay is granted, they will suffer irreparable loss of their ancestral land as restitution may not be feasible in case the respondent develops it or transfers it to third parties. He urges the court to render substantive justice and allow the application as the Respondent will not suffer any prejudice, as he is not in occupation or possession of the land.

3. The Respondent has opposed the application vide his replying affidavit sworn on March 18, 2022. He avers that after the confirmation of the grant, all the beneficiaries took their respective shares and obtained title deeds save for Thomas Kithia M'Mauta who passed on before the grant could be fully implemented. He avers that the Applicant is not actually a beneficiary of the estate but a trespasser and intermeddler, and therefore his application ought to be dismissed with costs. In fact, the Applicant was bequeathed his land by the deceased before his death and thus he was not entitled to a share in the residue estate.

Submissions

4. The Applicant urges that he promptly filed the subject application thus he has proven his willingness to prosecute the subject appeal timely, and cites *Antione Ndiaye v African Virtual University (2015) eKLR*, *John Gachanja Mundia v Francis Muriira Alias Francis Muthika & Another (2016) eKLR*, *RWW v EKW (2019) eKLR* and *Re Estate of Solomon Mungura Mathbia (Deceased) (2021) eKLR*. He urges that since this is a family matter, there is no need for security for the due performance of the decree.
5. The Respondent urges that the instant application and the appeal itself are riddled with misinformation and non-disclosure of material facts and are thus a waste of the court's valuable time by a greedy beneficiary who wants to benefit from his deceased brother's portion of land. He urges that he was only holding parcel No Amwathi/Maua/821 in trust for the children of his deceased brother, and once they attained the age of majority, he proceeded to seek rectification of the certificate of confirmation of grant, and Maua Miscellaneous cause E138 of 2021 was meant to facilitate the opening of a skeleton file in Maua CM succession cause No 36 of 2002. He urges the court to dismiss the application with costs.

Analysis and Determination

6. The issue for determination is whether stay of execution shall be granted.

Stay of Execution

7. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of Order 42 Rule 6 of the Civil Procedure Rules, as follows: -

' 6.

- (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 appealed from may order but, the court appealed 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 the appeal is preferred may apply to the appellate court to have such order set aside.

- (2) 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.'

8. As a general rule, where there is no positive order capable of being executed, a stay of execution ought not to be issued. I respectfully agree with [*Titus Kiema v North Eastern Welfare Society \[2016\] eKLR*](#) the Court (PJ Otieno J) said:

' I appreciate the order to be a negative one authorizing no action nor placing any obligation upon the Appellant to be performed. In that event, therefore, one would pose the question: what execution is threatened and that needs to be stayed? I have been unable to see any such threat. The question of executable order is in my view tied to the question of substantial loss. An Applicant need to approach the Court and demonstrate in a word akin to the following: 'This is the order against me. It commands me to do a, b & c within this time and if I fail to do so as I await the outcome of this appeal, I stand the peril of the consequences which I need to be saved from facing so that my appeal does not turn out to have been an academic sojourn. This to me is the obligation on every applicant in an application for stay of execution pending appeal. I have demonstrated above that there is no order of the trial court compelling or expecting an action or obligation upon the Applicant to merit an order for stay pending appeal and I hold that the application does not lie and cannot succeed.'

9. The Court of Appeal in [*AG v James Hoseah Gitau Mwaru \[2014\] eKLR*](#) observed that in order for a Court to exercise its discretion to grant stay, it must ask itself the question whether there is anything capable of being stayed in the ruling or decision sought to be impugned.
10. In the instant case, the Applicant seeks stay of execution of the trial court's ruling dismissing his summons for the revocation of the grant. The Applicant has deposed that the Respondent is neither in occupation or possession of the suit land.
11. This court finds that the Applicant has failed to prove that he will suffer substantial loss if the orders sought are not granted, even though the application was brought without unreasonable delay.



Leave to come on record

12. The provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates after judgment has been entered to be effected, there must be an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. In order not to impede the Applicant's right to be represented by an Advocate of his choice, this court hereby grants the leave sought.

ORDERS

13. For the reasons set out above, the court grants leave to the firm of Meenye & Kirima Advocates to come on record for the Appellant/Applicant in place of Bebo & Mose & Co Advocates.
14. The other reliefs sought in the Applicant's application dated February 24, 2022 are declined.
15. Order accordingly.

DATED AND DELIVERED ON THIS 14TH DAY OF APRIL, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Meenye & Kirima Advocates for the Appellant.

M/S Frank Gitonga Associates Advocates for Respondent.

