



REPUBLIC OF KENYA



**In re Estate of Naomi Wanjiru Chege (Deceased) (Succession Cause
2602 of 2014) [2023] KEHC 18700 (KLR) (Family) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18700 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2602 OF 2014
PM NYAUNDI, J
MAY 19, 2023**

BETWEEN

**ELIZABETH WANJIKU CHEGE 1ST APPLICANT
HELLEN NJERI CHEGE 2ND APPLICANT
SIMON KIMANI CHEGE 3RD APPLICANT
PETER CHEGE (DECEASED 4TH APPLICANT
MOSES ITUMA 5TH APPLICANT**

AND

TONY KAMAU WANJIRU RESPONDENT

RULING

1. The Application dated February 23, 2023 is presented by the Respondent herein under Section 73 of the [Law of Succession Act](#), seeking the following orders;
 - a. THAT the Honourable Court be pleased to stay further proceedings in this matter pending the hearing and determination of Nairobi Court of Appeal Civil Appeal No E 896 of 2022
 - b. THAT costs of this Application to abide the outcome of the pending Appeal.
2. The Application is supported by the Affidavit of the Applicant, Tony Kamau Wanjiru sworn on the February 23, 2023 and his further affidavit sworn on March 3, 2023.
3. The Application is opposed by Affidavit of Simon Kimani Chege sworn on March 2, 2023 and Affidavit of Moses Ituma sworn on March 15, 2023. The matter proceeded for hearing by Oral submissions on May 10, 2023.



4. The Respondent submits that he has an arguable appeal and that unless stay is granted his appeal will be rendered nugatory.
5. The Respondents contend that the Application is not merited and submit that the same has been filed to further delay the matter. And that the matter has been in abeyance since 2014 and they have not been able to access the benefits due them from the estate.
6. The Respondents aver that if the Court is inclined to such as deposit of the rent of Plot No 60 Huruma Fire Victims Estate in a joint account. The Applicant is opposed to depositing the money in a joint account.

Analysis And Determination

7. Having considered the pleadings and rival submissions by the parties, I derive the following issue for determination

a. Whether the Applicant has met the threshold for the grant of the stay of proceedings pending appeal.

8. In arriving at my decision, I am guided by the decision in *Butt V Rent Restriction Tribunal (1982) KLR 417* the Court of Appeal held that

- ' 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. 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 that appeal court reverse the judge's discretion.
3. 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. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. 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 for costs as ordered will cause the order for stay of execution to lapse.'

9. Further the Court of Appeal in [*RWW vs EKW \(2019\) eKLR*](#) addressed itself on this as hereunder: -

- ' Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.'



10. I observe that the Application is erroneously presented under Section 73 of the Law of Succession Act, guided by the principles of Article 159 (d) of the Constitution of Kenya and Section 47 of the Law of Succession Act. I will proceed to consider the Application on its merits.
11. The Memorandum of Appeal was not availed and I am therefore unable to gauge whether or not the Appeal raises triable issues. The Applicant has in his further Affidavit demonstrated that the matter is proceeding before the Court of Appeal. The Applicant avers that he will suffer substantial prejudice if proceedings are not stayed.
12. I am also mindful of the interests of the Respondents, who are keen to have their interest safeguarded and be assured of easy access to the amount awarded in the event the appeal fails.
13. The Court is duty bound to examine how it can ensure that the interests of the Applicants are protected in the circumstances of this case. The Respondents aver that as beneficiaries of the estate they are prejudiced as the Applicant has sole access to the rental income collected from Plot No 60 Huruma Fire Victims Estate.
14. In exercise of my discretion, I therefore grant stay of proceedings on the following conditions:
 - a. THAT the rent collected from Plot No 60 Huruma Fire Victims Estate be deposited in a joint interest earning account held in the joint names of the Advocates for the Applicants and within 14 days from the date of this ruling.
 - b. The matter be mentioned on June 14, 2023 to confirm compliance.
15. Each party to bear their own costs.

It is so ordered

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 19TH DAY OF MAY, 2023.

P M NYAUNDI

HIGH COURT JUDGE

In the presence of

..... **Advocate for Applicant**

..... **Respondent**

Karani Court Assistant

