



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**In re Estate of Mumenya Njogu (Deceased) (Probate & Administration
Appeal E015 of 2022) [2023] KEHC 18510 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18510 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
PROBATE & ADMINISTRATION APPEAL E015 OF 2022
FN MUCHEMI, J
JUNE 15, 2023
IN THE MATTER OF THE ESTATE OF MUMENYA NJOGU
(DECEASED)**

BETWEEN

PETER MAINA KANYUA APPLICANT

AND

ELIZABETH WAMUYU KABURU 1ST RESPONDENT

ESTHER WAMAITHA MUTHUO 2ND RESPONDENT

MAINA GITHINJI GATURUKU 3RD RESPONDENT

MARGARET MUTHOI KARURIA 4TH RESPONDENT

AGATHA WAMUYU GATUKU 5TH RESPONDENT

RULING

Brief facts

1. This application dated October 26, 2022 brought under rules 49 and 63 of the *Probate and Administration Rules* seeks for orders of stay of further proceedings in execution of the ruling and judgement dated October 18, 2022 and August 10, 2021 respectively in Karatina PM Succession Cause No 224 of 2016 and any other proceedings therein pending the hearing and determination of the intended appeal.
2. In opposition of the application, the respondents filed a replying affidavit sworn on January 10, 2023.



The Applicant's Case

3. The applicant deposes that judgement was delivered on August 10, 2021 whereas the court in Karatina PM Succession Cause No 224 of 2016 distributed the estate of the deceased equally amongst the beneficiaries. The applicant further states that he sought to have the judgment reviewed and set aside *vide* his application dated February 18, 2022 but the court on October 18, 2022 dismissed the application. Being aggrieved by the said ruling, the applicant states that he filed an appeal against the said ruling and is apprehensive that if the stay orders are not granted, the respondents who are in the process of executing and transferring land parcel number Iriaini/Kiaguthu/654 will render his appeal nugatory. He further states that the appeal has high chances of success and no prejudice shall be suffered by the respondents if they await the outcome of the appeal.

The Respondents' Case

4. It is the respondents' case that the application and the intended appeal lacks merit and that this is another attempt by the applicant to delay the distribution of the estate. That notwithstanding, transmission of the estate and in particular land parcel No Iriaini/Kiaguthu/654 has already been transmitted to the rightful beneficiaries of the estate including the 2nd respondent, who is the mother of the applicant. The respondents further state that what is remaining is sub division of the said parcel of land so that each beneficiary can acquire their respective parcels of land.
5. The respondents argue that the matter has been in litigation since 2008 and two courts have considered the matter and both held that the applicant can only inherit the estate of the deceased through his mother, who is the 2nd respondent. Moreover, the respondents state that save for the 3rd respondent, they are all at advanced ages and they will be highly prejudiced if they continue to be dragged in endless litigation. As such, they pray that the application be dismissed with costs.
6. The applicant filed a supplementary affidavit sworn on February 15, 2023 and states that under the *Law of Succession Act*, he is a dependant of the deceased as he lived with the deceased on the said property even after his mother got married, he was left behind with the deceased. He further states that before the deceased died he bequeathed his sons other properties ensuring that he got the land he currently resides in and which he is now in danger of being evicted from. The applicant further states that he has lived on the said land for the last three decades where he carries out his farming activities.

The Applicant's Submissions

7. The applicant relies on rule 73 of the Probate & Administration Rules, order 42 rule 6 of the *Civil Procedure Rules* and the cases of *Butt vs Rent Restriction Tribunal* (1982) KLR and *R.W.W v E.K.W* [2019] eKLR and submits that he has met the threshold for grant of stay of execution orders. He further relies on the case of *Machira t/a Machira & Co Advocates v East African Standard* (2002) KLR 63 and submits that he stands to suffer substantial loss if stay is not granted as the respondents shall sub divide the suit property and he shall lose his home and source of livelihood. He further argues that he has demonstrated that he has lived on the said parcel of land since birth and attached evidence in the form of photographs to his supplementary affidavit.
8. The applicant submits that there was no undue delay in filing the current application or the appeal. He further submits that no prejudice will be occasioned to the respondents that cannot be compensated by way of costs as they are currently not in occupation of the suit property.



The Respondents' Submissions

9. The respondents submit that the applicant was the protestor in the trial suit Karatina PM Succession Cause No 224 of 2016 where he argued that as a grandchild of the deceased, he was being supported by the deceased and during the lifetime of the deceased, the deceased allocated him two acres out of land parcel number Iriaini/Kiaguthu/654. The trial court heard the matter and made its determination on August 10, 2021 distributing the said property equally amongst the daughters of the deceased. The respondents further submit that the trial court took into account that the High Court had earlier on dismissed the applicant's protests and directed that the applicant should inherit through his mother, the 2nd respondent.
10. Being aggrieved with the decision of the court, the applicant sought to have the judgment reviewed and set aside through his application dated February 21, 2022 which was dismissed. The respondents argue that although the applicant brought an application for review, essentially he was appealing against the said judgment dated August 10, 2021. The trial court in its ruling dated October 18, 2022, dismissed the application to which the applicant has sought a review. The respondents argue that the impugned ruling is by its nature a negative order that is incapable of execution. They rely on the decision of *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others* (2021) eKLR to support their contentions.
11. Additionally, proceeding on the assumption that the applicant meant stay of execution of the judgment dated August 10, 2021, he has not satisfied the conditions for grant of stay of execution pending appeal as enshrined in order 42 rule 6 of the *Civil Procedure Rules*. The respondents argue that the applicant has not demonstrated what substantial loss he stands to suffer if the orders are not granted. The respondents further argue that in arriving at its decision, the trial court adhered to the law as stipulated in order 45 of the *Civil Procedure Rules* on review and therefore given the law and the set of facts of the case, it is highly unlikely that this honourable court shall depart from the holding of the trial court. Accordingly, the respondents submit that the applicant shall not suffer any substantial loss if the law was upheld.
12. The respondents further argue that litigation in the matter began in 2008 and the applicant is frustrating its completion as currently, three courts have had a chance to deal with the matter and the applicant has been advancing similar reasons throughout the cause, despite the courts dismissing his claim and holding that he can only inherit the estate of the deceased through his mother, the 2nd respondent.
13. The respondents submit that having failed to demonstrate substantial loss, the court ought not to consider the other conditions for the grant of orders of stay pending appeal.

The Law

Whether the applicant has met the prerequisite for grant of stay of execution pending appeal.

14. Having perused the application and the submissions of the parties, although the applicant stated in his application that he is seeking orders of stay of proceedings, essentially, the main issue for determination is whether he has met the prerequisite for grant of stay of execution pending appeal.
15. 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.
16. These principles were enunciated in *Butt v 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.
17. 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 v 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.
18. This matter was filed in the High Court Nyeri and on April 7, 2008. The court dismissed the applicant's protest and held that his claim to the estate could only be channeled through his mother, the 2nd respondent herein. By a ruling dated June 11, 2010, this court revoked the grant issued on the premises that the petitioners had not disclosed all the beneficiaries. The court thereafter referred the cause back to the magistrate's court in Karatina for determination. The matter was heard and the court on August 10, 2021 distributed the estate equally amongst the daughters of the deceased. The applicant being aggrieved with the said decision filed an application for review and setting aside dated February 18, 2022 which was dismissed on October 18, 2022. The applicant herein has appealed against the ruling dated October 18, 2022, and seeks for stay of the judgement and ruling of the Karatina court.
19. The ruling dated October 18, 2022 dismissed the application dated February 18, 2022 and in essence the impugned ruling was a negative order which the respondent says it is incapable of execution. This court proceeds to examine this argument in view of decided cases and the law. This principle was



enunciated by the Court of Appeal in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR where the court held as follows:-

An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.

20. Similarly in *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 others* [2016] eKLR the Court of Appeal expounded on stay of execution stating:-

In *Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah* [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:-

The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on December 18, 2006. The order of December 18, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.

The same reasoning was applied in the case of *Raymond M. Omboga v Austine Pyan Maranga* (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the court had to say on the matter:-

The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

21. I am of the considered view that the order dismissing the applicant's application for review was negative. Indeed none of the parties was ordered to do anything or restrained from doing any act. As such, the order remains negative and incapable of being stayed.
22. This being the position that the order cannot be stayed, it would be an exercise in futility to delve into the merits of the application. In view of order 42 rule 6 of the *Civil Procedure Rules*.
23. I find the application incompetent and I hereby strike it out with no order as to costs.
24. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 15TH DAY OF JUNE, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 15th day of June 2023.

