



**In re Estate of Sawe Maina (Deceased) (Succession Cause
350 of 2015) [2023] KEHC 20620 (KLR) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 350 OF 2015
RN NYAKUNDI, J
JULY 21, 2023**

BETWEEN

ESTHER JEPKOSGEI TOO 1ST APPLICANT

SUSAN CHEPTEPKENY MAINA 2ND APPLICANT

AND

PAUL KIPKORIR MAINA 1ST RESPONDENT

GILBERT KIPLIMO MAINA 2ND RESPONDENT

ISAAC MAINA 3RD RESPONDENT

RULING

- 1 The applicant approached this court vide a Notice of Motion application dated May 5, 2023 seeking the following orders;
 1. Spent
 2. Spent
 3. That this honourable court be pleased to order stay of execution of the judgement given on April 19, 2023 pending the hearing and determination of the intended appeal.
 4. That the respondents be restrained from selling any portion of LR No 8518/5 (I R No 182905), pending the hearing of the appeal herein.
 5. That costs of this application be provided for.
- 2 The application is premised on the grounds set out therein and the contents of the affidavit sworn by Susan Cheptepkeny Maina.



3 The applicants' case is that she is one of the administrators and a beneficiary from the 2nd house. On April 19, 2023 the court delivered its judgement on respect of the estate of the deceased and being aggrieved by the said decision they have filed a Notice of Appeal. The judgement varied their decision on the mode of distribution and it is only fair that there be stay of execution pending the appeal to enable the parties be heard on appeal. She deposed that they stand to suffer irreparable loss and damage if the orders sought are not granted. Further, that the appeal will be rendered nugatory unless a stay of execution is granted.

4 There is no response on record for the respondents.

Analysis & Determination

5 Upon considering the application and affidavit in support of the same, the following issue arises for determination;

1. Whether the orders for stay of execution should be granted

Whether orders for stay of execution should be granted

6 The principles upon which the court may grant stay of execution pending appeal are well-settled. These are captured in Order 42 Rule 6 of the Civil Procedure Rules which requires an applicant seeking a stay of execution pending appeal to demonstrate that;

- (a) Substantial loss may result to the applicant unless the order was made;
- (b) The application was made without unreasonable delay; and**
- (c) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant

7 Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant.

8 It has to be noted that the purpose of stay of execution is to preserve the status quo pending the hearing of the appeal. In RWW vs. EKW [2019] eKLR, it was observed that:

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9 The present application seeks to restrain the selling of any portion of LR No 8518/5 pending the determination of the appeal. The said portion of land comprises a considerable part of the estate of the deceased. In order to protect the subject matter of the appeal, it is my considered view that it would be in the interest of justice to grant the orders sought. This being a succession cause, there is no requirement that there be security for performance of the decree.

10 In the premises, the application succeeds. Each party shall bear its own costs.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 21ST DAY JULY 2023

In the presence of



Mr Korir for the Respondent

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R. NYAKUNDI

JUDGE

