



**Nyagesiba & another v Arika & another (Civil Appeal
105 of 2022) [2023] KEHC 21101 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21101 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 105 OF 2022
PN GICHOHI, J
JULY 20, 2023**

BETWEEN

ANN KERUBO NYAGESIBA 1ST APPELLANT

EDDINAH HULDAH N OGEMBO 2ND APPELLANT

AND

MELLEN KWABOKA ARIKA 1ST RESPONDENT

PATRICK NYABUTO NYAGESIBA 2ND RESPONDENT

RULING

1. By a notice of motion dated January 5, 2023 and filed through the firm of A.N. Moruri advocates and under Order 42 Rule 6 (1) (2) and 7 of the [Civil Procedure Rules](#), section 3A of the Civil Procedure Act, Order 50 Rule 1 of the [Civil Procedure Rules](#) and article 159 of the [Constitution](#) of Kenya 2010, the applicants herein seek orders that:
 1. Spent
 2. Spent
 3. Pending hearing and determination of the application, there be an order for preservation of the remains of the deceased herein Elijah Nyagesiba (deceased) at Hema Hospital Mortuary.
 4. There be a stay of execution of judgment delivered on the 14th Day of December 2022 by Hon. P.K. Mutai in Civil Case No. 842 of 2022 pending hearing and determination of the appeal.
 5. Costs of the application to abide the Appeal.
2. The grounds on the face of the application are that the applicants have since lodged an appeal against the whole judgment and decree and that the appeal overwhelming chances of success in that it raises salient and pertinent issues of law and fact. That the Appeal will be reduced into a mere academic



exercise and rendered nugatory if the orders sought are not granted. Further, they state that they are ready and willing to abide by any reasonable condition that this court may set and further, they state that the Respondents will not suffer any prejudice if the orders sought are issued. In support is an affidavit sworn by Ann Kerubo Nyagesiba on 5th January 2023 mainly on the ground that the Respondents are planning the burial of the deceased at an unknown place as opposed to his matrimonial home and without involving the appellants and this is the subject of the appeal lodged by the appellants herein.

3. In reply, the Respondents filed grounds of opposition on 14th February 2023 through the firm of M/S Ochwangi & Company Advocates. These grounds are that:
 1. The Notice of Motion is mischievous, misconceived, incompetent and otherwise legally untenable.
 2. The appellants/ applicants have not satisfied the requisite conditions to warrant stay of execution.
 3. The instant Notice of Motion is barred and /or prohibited by Order 42 Rule 6(2) of the Civil Procedure Rules.
 4. The Respondents state that the 2nd Respondent had filed a counterclaim in the lower court and that the same was dismissed hence, she cannot partake the discretion of this court over the notice of motion herein.
 5. The instant Notice of Motion does not raise and /or capture any reasonable cause of action constitutes and or amounts to an abuse of due process of the court and is devoid of merits whatsoever.
4. Directions were given and parties filed submissions as a way of canvassing this application.

appellants/applicants Submissions

5. In submissions dated February 23, 2023, counsel for the appellant submits that the appellants are aggrieved by the judgment of the trial court in that it held that the 2nd appellant is not a wife of the deceased and further directed that the deceased be buried at the 1st Respondent's homestead which prompted them to lodge the appeal.
6. He restates the conditions of granting stay pending appeal as provided for under Order 42 Rule 6 of the Civil Procedure Rules and on the condition regarding substantial loss, counsel submits that this being a burial dispute, the matter concerns personal rights and status whose substance and standing consists customs, rights and practices that have nothing to do with pecuniary loss or recompense. As a consequence, counsel submits that the deceased's burial if allowed will not only deny substance to the instant appeal but also result in irreparable prejudice and damage and denial of access to justice to the appellants /applicants.
7. On the issue of whether the application has been brought without unreasonable delay, counsel submits that the judgment having been delivered on December 14, 2022, the applicants diligently and promptly filed the appeal on December 15, 2022 and the instant application on January 5, 2023.
8. On the issue as to whether condition for security is necessary, counsel submits that the applicants and the Respondents are equally grieving the deceased. Further, counsel submits that the applicants in seeking orders of stay are and not intending to gain some prejudicial or unconscionable financial benefit and that neither are the Respondents being denied some financial benefit that is due to them



as a matter of right. Counsel further submits that the applicants are defending their personal tie and affection to the deceased which transcend hard fast legal rights and duties.

9. Lastly , counsel submits that notwithstanding the foregoing, the applicants are ready and obligated under Order 42 to comply with the issue of security as the court may direct. he terms the application meritorious and urges the court to allow it.

Respondents' Submissions

10. In submissions dated March 6, 2023, counsel for the Respondents submits that one of the reasons the appellants have raised is that they have filed an appeal but they have not given any other different reason which can persuade this court to grant the orders of stay. Arguing that stay is not automatic, counsel submits that the appellants have failed to show that they have an arguable appeal.
11. While referring the lower court record, counsel submits that 2nd appellant/ applicant filed a defence and counterclaim and admitted that the deceased be buried at Nyaguta Sub Location , Kiogoro location within Kisii County. That the 2nd applicant admitted that the 1st respondent is the wife of the deceased. For those reasons, counsel for the respondents submit that the appeal before court is frivolous and devoid of merit and therefore an order of stay of execution cannot be granted.
12. Further , counsel submits that the applicants have failed to demonstrate the reasons why if stay is not granted, what substantial loss they are likely to suffer and besides, the applicants have not annexed decree for court to discern the contents.
13. Lastly , counsel submits that the application has failed to satisfy the conditions for stay and that it is barred and prohibited by the provisions of Order 42 Rule 6 (2) of the [Civil Procedure Rules](#). He urges the court to dismiss the application with costs to the Respondents.

Determination

14. I have considered the application herein, the grounds of opposition and the submissions by parties and the authorities cited therein. I also have the lower court record for Chief Magistrates Court at Kisii Civil Suit No. 842 of 2022 and a perusal of the same shows that by a plaint dated October 27, 2022 filed through the firm of Bigogo Onderi & Co. Advocates, Mellen Kwaboka Arika and Patrick Nyabuto Nyagesiba (Plaintiffs) sued Ann Kerubo Nyagesiba (Defendant) and sought judgment against the Defendant for:
 - a. On order against the defendant, her sons and agents- restraining them from interring the body of Elijah Nyagesiba elsewhere other than his ancestral home at Nyaguta Sub location, Kiogoro Location within Kisii County and denying the plaintiffs unfettered rights to determine the burial site of their late husband and father respectively.
 - b. An injunction order against the management of Hema Mortuary – preventing them from releasing the body of the deceased one Elijaah Nyagesiba to the defendant alone for burial without the consent of the plaintiffs herein.
 - c. Costs of this suit be borne by the defendant.
15. Simultaneously, the plaintiffs filed a Notice of Motion under a certificate of urgency under Order 40 Rule 1 & 2 of the [Civil Procedure Rules](#) and sections 3, 3A, 63 (c) and (e) of the Civil Procedure Act seeking injunctive orders against the defendant pending hearing and determination of the application and further pending hearing and determination of the suit. The trial magistrate granted orders on October 28, 2022.



16. Edna Huldah Ogembo wa finally joined as an interested party and after hearing the parties, the trial magistrate delivered the Judgment on December 14, 2022 and a decree dated 1 December 3, 2022 was issued on December 15, 2022 in the following terms:
1. That the remains of the deceased to be interred in Nyaguta where they had established home with the 1st Wife and also ancestral home.
 2. That the 1st plaintiff, the defendant and the interested party and close relatives are directed to play a prominent role in planning and final interment of the deceased
 3. That all parties are at liberty to perform any customary rites which was not concluded before interment. This affects both the 1st plaintiff and the interested party and the family of the deceased.
 4. That each party bear his own costs.
17. That prompted the appeal filed by appellants herein. Despite the lengthy submissions by the appellants, their application for stay of execution of that judgment pending appeal is premised under Order 42 of the *Civil Procedure Rules* and therefore that is the provision application herein regardless of their argument that this is a burial dispute.
18. On merit, the applicants have to satisfy the conditions for granting stay of execution pending appeal under Order 42 Rule 6 (2) of the *Civil Procedure rules* that:
- i. The application must be brought without unreasonable delay.
 - ii. The applicant must demonstrate that they will suffer substantial loss unless the order sought is granted.
 - iii. 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.
19. There is no doubt that the applicants have satisfied the first condition. They have filed this application without delay. In regard to the second condition that the applicants must demonstrate that they will suffer substantial loss unless the order sought is granted counsel relies on the case of *Rosemary Nyambura Mburu v Lilian Waithera Mburu & another* [2020] eKLR where C. Meoli J had this to say:
- The applicant was essentially laying a stake in the affairs of the deceased by asserting her alleged status as a spouse. It is true, that as a consequence of the dismissal of the suit, the deceased was buried without the participation desired by the applicant. Nothing can change that, not even her success on appeal.
- That notwithstanding, the determination that the applicant was not a wife of the deceased also affects any future involvement by her in the administration of the estate of the deceased. There can be no denying that if the Respondents finalise the anticipated succession proceedings to the inclusions of the applicant, she would suffer substantial loss that is incomparable to the question of costs.”
20. These findings were made in completely different circumstances from the circumstances herein and as can be discerned from the judgment in this case and the decree issued therefrom. Submissions by counsel for the applicants pegged on the above decision are that :
1. The 2nd applicant is trying to forestall substantial loss by filing this application in that the lower court has determined the relationship between the applicant and the deceased.



2. This means the said issue cannot be revisited in succession proceedings in the lower court as provided for by the *Law of Succession Act*.
3. That in the outcome of the appeal before this Court might have some impact on the future administration of the estate of the deceased.
21. This line of argument is not supported by evidence herein. There is no declaration in the judgment or the decree that the Interested Party Edinah Huldah Ogembo (2nd appellant) is not a wife of the deceased as they claim in this application.
22. The parties including the 2nd Respondent were granted rights of participation in the burial. There is no demonstration by the 2nd appellant herein and by extension the 1st appellant that they will suffer any substantial loss , emotional or otherwise if the orders of stay are not granted.
23. On issue of security for costs, the appellants have not offered any and in any event, each party had been ordered to bear his own costs. Further, the cornerstone of an application for stay of execution is the issue as to whether the applicants suffer substantial loss . They have totally failed on this ground.
24. The issue as to 2nd appellant's status in the succession proceedings whenever they will be filed, cannot in the circumstances herein be a matter for consideration by this court. The applicants appear determined to delay execution of the decree for undisclosed reasons and motive. Their arguments in this application do not also favour them on the issue as to whether they have arguable appeal. Ultimately, there is no justification whatsoever to stay execution.
25. In the upshot , this application lacks merit. The same is now dismissed and the costs will abide the appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 20TH DAY OF JULY 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for appellant

Mr. Momanyi for Mr. Ochwangi for Respondent

Kevin Isindu, Court Assistant

