



REPUBLIC OF KENYA



**In re Estate of Josphat Githutha Mutua alias Josphat Githutha
alias Josphat Githutha Mutua Kungu (Deceased) (Succession Cause
18 of 2016) [2023] KEHC 22832 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22832 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 18 OF 2016**

A MSHILA, J

SEPTEMBER 22, 2023

**IN THE MATTER OF THE ESTATE OF JOSPHAT GITHUTHA MUTUA ALIAS
JOSPHAT GITHUTHA ALIAS JOSPHAT GITHUTHA MUTUA KUNGU (DECEASED)**

MAGDALENE NYAMBURA CHEGE.....3RD ADMINISTRATOR/1ST APPLICANT

MARGARET NJOKI GITHUTHA.....OBJECTOR/2ND APPLICANT

VERSUS

KIMAMA GITHUTHA KUNGU.....1ST ADMINISTRATOR/RESPONDENT

RULING

1. Before court is an application by way of Notice of Motion dated May 24, 2023 and brought under Order 42 Rule 6 of the *Civil Procedure Rules*, sections 1A, 1B and 3A of the *Civil Procedure Act*. The Applicants sought for orders:-
 - a. Spent
 - b. Spent
 - c. That the honourable court be pleased to stay the execution of Grant confirmed in this case on the March 24, 2022 pending the hearing and determination of the appeal preferred against the ruling of the Honourable Court delivered on the 19th May, 2023.
2. The application is premised on the grounds that the Applicants are dissatisfied with the ruling of the court delivered on 19/5/2023 and have preferred an appeal that has high chances of success at the Court of Appeal as such the court should grant the orders sought.
3. The application is supported by the affidavit of Magdalene Nyambura Chege sworn on May 24, 2023 as one of the administrators of the estate of deceased herein and with the authority of the beneficiaries from the 2nd house. She stated that they are dissatisfied by the decision of the court delivered on 19/5/2023 which decision they have appealed at the Court of Appeal. The said appeal is said to be



arguable as the Judgment of Hon. Kasango disinherited a widow as such its execution should be stayed. The Respondent was said to have disposed his share as such the appeal could be rendered nugatory. In the circumstances, there is need for stay of execution of the confirmed Grant.

4. Kimama Githutha Kungu filed his replying affidavit sworn on June 19, 2023, in opposition to the applicants' application. He deposed that litigation must come to an end as the ruling dated 24/3/2022 has already taken effect. He deposed that the applicants have not demonstrated that the appeal is arguable as such the court should not grant the orders sought. The appeal was said to be nugatory as most of the property are not in the names of the deceased. The 2nd family prayer for stay was said to be a ploy to delay justice while the 2nd family is enjoying the proceeds of the whole estate. The aim of the court was said to be the expeditious disposal of cases as such the court was urged to dismiss the application herein.
5. The application was heard by way of written submission.

Applicants' Submissions

6. The applicants submit that they have exhibited a Notice of Appeal as such they are serious on appealing against the decision of the court as they also sought leave to appeal. The applicants aver that if stay is not granted the members of the 2nd house face eviction as their houses have been allocated to the 1st house. The respondent having stated that the appeal has become nugatory as some assets have been transferred hence the urgency in staying the execution of the distribution pending the appeal. In regard to security, it was submitted that the incapacity to transfer or dispose of the estate is itself security for due performance of any decree that will ultimately be binding upon them.

Respondent's Submissions

7. The respondent submitted that the application for stay was filed 14 months after the delivery of the judgment. The applicants have not explained the cause of the delay as such the delay was said to be inordinate and unreasonable. The grounds of appeal do not raise weighty issues as such the same should be disallowed. No security has been offered in the event the appeal does not succeed. Lastly, it was submitted that the appeal herein will contravene with the expeditious disposal of cases.

Issues for Determination

8. Having considered the applicants' application, the replying affidavit and the submissions, the main issue framed for determination is whether an order for stay pending appeal should be granted.

Analysis

9. Order 42 Rule 6 of the [*Civil Procedure Rules*](#) states as follows:

“(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 subrule (1) unless—
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; and
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.
- (3) ...
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that court notice of appeal has been given.
- (5) ...
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

10. In the case of *Antoine Ndiaye v African Virtual University* (2015) eKLR an applicant seeking for an order of stay of execution of a decree or order pending appeal is obliged to satisfy the following conditions:-
 - i. that substantial loss may result to the Applicant unless the order is made;
 - ii. that the application has been made without unreasonable delay, and;
 - iii. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
11. The applicants claim that the respondent is already transferring parcels of land allocated to him in the confirmed grant of 24/3/2022 as such the appeal will be rendered nugatory. That the application was filed without unreasonable delay and that the Applicants will suffer substantial loss as they face being evicted from their houses. The Respondent contends that the instant application is a ploy to further delay execution of the judgment of the court. That the delay was said to be inordinate and that the same has not been explained and that the intended appeal does not raise weighty issues. In any case, the applicants have not offered any security.
12. In regard to whether the application was filed without undue delay, the ruling which the applicants are aggrieved by was delivered on 19/5/2023 while the instant application was filed on 25/5/2023 as such the same was filed timeously. A Notice of Appeal dated May 22, 2023 was also filed before this court.
13. The Applicants contend that they will suffer substantial loss if the orders sought are not granted as the respondent is already transferring his share of the estate and that the applicants face eviction from their houses if the confirmed Grant is anything to go by.
14. The purpose of the order for stay is to preserve the estate to avoid an appeal being rendered nugatory. This court is satisfied that the Applicants have demonstrated that they will suffer substantial loss in the event the appeal succeeds as the assets of the deceased the subject matter in this cause will have been transferred as the same is already taking place a fact which was not controverted by the respondent.



15. The applicants offer the estate as the security given that the stay if granted will mean that both parties cannot deal with the said estate. the fact that the applicants have offered to give security as much as it is in the form of the estate is in good faith.
16. In the case of *Arun C.Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates* (2014) eKLR the court held that:
- “The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”
17. Therefore, this court is satisfied that the application seeking an order for stay pending appeal as sought by the applicants is merited.

Findings and Determinations

18. In light of the forgoing this court makes the following findings and determinations;
- i. The Application for an order of stay of execution pending appeal of Grant confirmed in this case on the March 24, 2022 pending the hearing and determination of the appeal preferred against the ruling of the honourable court delivered on the May 19, 2023 is found to have merit and it is hereby allowed and granted to the applicants;
 - j. Stay is conditional to the Applicants depositing into court the sum of Kshs.100,000/- within fourteen (14) days hereof to be retained thereat as security pending determination of the appeal;
 - ii. Mention on 16/10/2023 before the Deputy Registrar for compliance. In default orders for stay shall stand discharged
 - iii. The applicants to bear the costs of this application.

Orders Accordingly.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 22ND DAY OF SEPTEMBER, 2023

A.MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Masore – for Applicants

Respondent – present in person

