



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Erastus Sagala Lunyaga (Deceased) (Succession Cause  
12 of 2019) [2023] KEHC 22243 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22243 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
SUCCESSION CAUSE 12 OF 2019  
AC MRIMA, J  
SEPTEMBER 19, 2023**

**BETWEEN**

**WALTER MAJANGA NYABERA ..... 1<sup>ST</sup> PETITIONER**

**WILBERFORCE KUFWAFWA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**ARTHUR NASIALI SAGALA & 3 OTHERS ..... OBJECTOR**

**RULING**

1. This ruling is in respect of an application by way of a Notice of Motion dated August 15, 2022. The application was taken out by the Applicants who were the original Executors of the Will of the deceased.
2. The application sought the following orders: -
  1. That this application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance under the Vacation Rules.
  2. That this Honourable Court be pleased to order a stay of execution of the Judgment of Honourable Justice L Kimaru in Kitale High Court Succession Cause No 12 of 2019 delivered on July 25, 2022 pending the hearing and determination of this Application.
  3. That this Honourable Court be pleased to order a stay of execution of the Judgment of Honourable Justice L Kimaru in Kitale High court Succession Cause No 12 of 2019 delivered on July 25, 2022 pending the filing and final determination of an Appeal in the Court of Appeal at Eldoret.
  4. That costs of this application abide the outcome of the Appeal.



3. The application was supported by the grounds appearing on the body thereof and an affidavit sworn by Janet Kendi Ngoci, one of the beneficiaries of the estate on the even date and a Supplementary affidavit sworn by Walter Majanga Nyabera, the 1<sup>st</sup> Applicant, on December 2, 2022.
4. The Objectors opposed the application. George Mmbogo Sagala, the 3<sup>rd</sup> Objector swore a Replying Affidavit on October 24, 2022.
5. The application was premised on the judgment of this Court (Hon Kimaru, J (as he then was) delivered on July 25, 2022. In the impugned judgment, the Learned Judge invalidated the Deceased's Will.
6. Dissatisfied with the finding, the Applicants herein, who were the Executors of the Will, lodged a Notice of Appeal dated July 29, 2022 on the same date. The Applicants further filed a Memorandum of Appeal dated November 17, 2022.
7. On the directions of this Court, the application was to be disposed of by way written submissions. The Applicants duly complied. However, the Objectors opted to, and, relied on the Replying Affidavit.
8. This Court has, with care, perused the proceedings, the impugned judgment, the instant application, its response, the written submissions as well as the decisions referred to therein.
9. As the application sought a stay of execution of the judgment of this Court, the starting point is Order 42 Rule 6(2) of the [Civil Procedure Rules](#) which gives the conditions precedent to granting a stay of execution order. The provision states as follows: -
  - 'No order for stay of execution shall be made under sub rule (1) unless-
    - (a) 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
    - (b) 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.'
10. The conditions are that the Applicant must demonstrate that it will suffer substantial loss unless the order is made, the application is made without any unreasonable delay and the Applicant offers security for the due performance of the decree. (See the High Court in [Antoine Ndiaye vs. African Virtual University \[2015\] eKLR.](#))
11. The Court of Appeal in [Butt vs Rent Restriction Tribunal \[1979\] KLR](#) discussed what ought to be considered in determining whether to grant or refuse stay of execution. The Court stated that the power of the Court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no 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. Thirdly, a Judge should not refuse a stay if there are good grounds for granting it merely because, in his or her opinion, a better remedy may become available to the Applicant at the end of the proceedings. Finally, the Court in exercising its discretion on whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
12. A further exposition on the purpose of an application for stay was made in [RWW v EKW \[2019\] eKLR.](#)
13. By parity of reasoning from the circumstances of this case, this Court is of the very considered position that the application is merited. The main appeal is on the judgment of this Court. The judgment



nullified a Written Will and directed that the distribution of the estate be undertaken by way of intestate proceedings.

14. Some of the beneficiaries and the Executors of the Will were unhappy with the judgment. They promptly lodged a Notice of Appeal and further filed a Memorandum of Appeal. They also filed the instant application.
16. This is a succession matter. It revolves on the distribution of the estate of the deceased. This is, therefore, a matter where a lot of caution ought to be exercised. The intricacy involved is that, on one hand, if the judgment is executed and the appeal succeeds, then it will mean that all what this Court would have done would be reversed. On the other hand, if the judgment is executed and the appeal fails, nothing much will arise.
17. Given the size of the estate, the number of beneficiaries involved and the fact that there is pending litigation before the Court of Appeal, a lot of expenses are likely to be incurred if the judgment is executed. Likewise, a lot of expenses will have to be incurred once again in reversing the execution of the judgment in the event the appeal succeeds. That will be a serious liability on the estate and it amounts to substantial loss. In such circumstances, there is need for restraint.
18. The Court in [\*James Wangalwa & Another v Agnes Naliaka Cheseto \[2012\] eKLR\*](#) discussed substantial loss as follows: -

'No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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.'

19. It is, therefore, on the basis of the foregoing that this Court finds that the application merited.
20. Deriving from the above, the following final orders do hereby issue: -
  - a. There be a stay of execution of the judgment of this Court rendered on July 25, 2022 pending the hearing and determination of the appeal lodged before the Court of Appeal.
  - b. Costs of the application shall be in the main appeal.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**A. C. MRIMA**

**JUDGE**

