



REPUBLIC OF KENYA



**Kebenei & another v Chepchirchir & 3 others (Probate & Administration
125 of 2019) [2023] KEHC 22321 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22321 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PROBATE & ADMINISTRATION 125 OF 2019
RN NYAKUNDI, J
SEPTEMBER 21, 2023**

**IN THE MATTER OF THE ESTATE OF ALEXANDER MACHII KEBENEI
(DECEASED)**

BETWEEN

JOSEPHINE KIBITOK KEBENEI 1ST PETITIONER

SAMMY KIPRONO KEBENEI 2ND PETITIONER

AND

MARY CHEPCHIRCHIR 1ST OBJECTOR

IRENE CHEPKOECH KEBENEI 2ND OBJECTOR

MARGARET JERUTO KEBENEI 3RD OBJECTOR

MAUREEN JEPKORIR KEBENEI 4TH OBJECTOR

RULING

1. Before me for determination is the 1st objector/applicant notice of motion dated May 4, 2023 in which she seeks the following orders:-
 1. Spent.
 2. That there be stay of execution of ruling issued by this honourable court on the April 19, 2023; pending the hearing and determination of this application inter-parties.
 3. That orders of stay of execution of the said ruling pending the hearing and determination of the appeal filed herewith.
 4. That the costs of this application be in the cause.



2. The application is premised on the grounds therein and it is further supported by the affidavit sworn on May 4, 2023 by Mary Chepchirchir, the 1st objector/applicant herein.

The Applicant's Case

3. The applicant's case is that the court herein delivered its ruling on April 19, 2023 wherein the court distributed the assets of the deceased herein in favour of the petitioners. According to the applicant, the court herein granted the petitioners, the 2nd, 3rd and 4th objectors the lion share of the deceased assets, leaving out the objectors family.
4. Being dissatisfied with the said ruling, the applicant has appealed to the Court of Appeal by filing the Memorandum of Appeal. The applicant further deposed that she commenced the appeal process by filing a Notice of Appeal and has requested for typed proceedings.
5. The Applicant is apprehensive that the 1st and 2nd Petitioners will immediately proceed to implement and execute the said ruling.
6. In the end, the Applicant urged the court to stay orders against the ruling delivered on April 19, 2023 pending the hearing and determination of the appeal.

The Respondents' Case

7. The Application is unopposed. The 1st petitioner/respondent and the 2nd petitioner/respondent filed a joint affidavit in Response dated May 19, 2023.
8. The 1st and 2nd respondents' case is that on April 19, 2023, the court herein delivered its ruling distributing the estate of the deceased herein. According to the 1st and 2nd respondents' the beneficiaries of the deceased estate herein are dissatisfied with the ruling that was delivered by this court on the mode of distribution. The 1st and 2nd Respondents herein want that there be stay of execution orders against the ruling that was delivered on April 19, 2023. The 1st and 2nd Respondents' contend that the said distribution did not factor all the beneficiaries of the deceased herein.

Analysis and Determination

9. The principles upon which the court may grant stay of execution pending appeal are well-settled. These principles are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:
 - (1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except 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 –



- (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. In *Visbram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the [Civil Procedure Rules](#) is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. A court may also grant stay of execution orders where sufficient cause is shown. In *Antoine Ndiaye v African Virtual University* (2015) eKLR Gikonyo J opined that -

....stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules...

11. Grant of stay of execution pending appeal is a discretion of the court. In *Butt v Rent Restriction Tribunal* (1982) KLR the court gave guidance on how such discretion should be exercised and held that –

1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. 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 that appeal court reverse the judge’s discretion.
3. 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. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. 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 for costs as ordered will cause the order for stay of execution to lapse.”



12. It must also be noted that the purpose of stay of execution is to preserve the status quo pending the hearing of the appeal. In *RWW v 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.

13. With the foregoing principles in mind. The first consideration is whether the application was filed timeously. The ruling of this Court in this matter was delivered on the 19th of April, 2023 and the Notice of appeal filed on May 3, 2023. From a cursory perusal of the draft Memorandum of appeal on record, it is clear that the Applicant is aggrieved by the mode of distribution that was adopted by this Court. The Applicant has also since sought of typed proceedings in the matter herein as evidenced by Applicant's copy of letter dated May 2, 2023 addressed to the Deputy Registrar Eldoret seeking typed proceedings. I am satisfied that there has been no inordinate delay in bringing the instant appeal.

14. As to what substantial loss is, it was observed in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, that:

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.”

15. With regard to substantial loss likely to be suffered by the Applicant, the Applicant contends that she and her family stand to suffer immensely, if the mode of distribution herein is likely to be undertaken. The Respondents on the other hand are not opposed to the Applicant's averments and also want the distribution herein to be set aside as it did not factor all the beneficiaries of the deceased.
16. With regard to security, the decree herein is not a money decree and therefore there is no need for security for due performance.
17. Weighing all the relevant matters and considering the parties interests, I find that for purposes of preserving the appeal and avoiding it been rendered nugatory it is in the interest of justice that the Applicant's order of stay be issued as she may suffer substantial loss if the same is disallowed. In any case, the Respondents do not stand to be prejudiced if the stay orders are granted as they are in support of the appeal and intended stay.
18. In view of the foregoing, the application dated May 4, 2023 be and is hereby allowed as prayed pending the hearing of the intended Appeal. This being a family matter, each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21st DAY OF SEPTEMBER 2023.

R. NYAKUNDI



JUDGE

